

EB-5 VISA REGULATION AND CONTROVERSY: HOW AN IMMIGRATION-SECURITIES HYBRID VISA HAS BEEN USED TO FUND REAL ESTATE VENTURES

Rachel Behar[†]

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[†] Rachel Behar is the Editor-in-Chief of the *International Comparative, Policy & Ethics Law Review* and J.D. Candidate at the Benjamin N. Cardozo School of Law, Class of 2019. Thank you to my ICPELR colleagues for your hard work and diligence in editing this Note along with the other publications in Volume II. Sincere gratitude to Andrea Kramer for her advice and assistance with this note.

I. INTRODUCTION

With an ultra-expensive market, safety and predictability make New York City (“NYC”) a premier destination for international real estate investors. Global investors seek out NYC with the hope of making money from one of the most renowned real estate markets in the world.

When the economy tanked in 2008, NYC real estate developers had difficulty obtaining financing to continue ongoing projects across Manhattan. As a result, NYC developers flocked to one of the least expensive financing sources at that time – the EB-5 investment visa. The EB-5 program has made significant contributions to the United States economy since 2008, creating over \$22.6 billion in revenues.¹ The EB-5 visa allows foreign investors to obtain a U.S. visa if they invest \$1 million, or \$500,000 to a “targeted employment area” or a “TEA.”² To qualify as a TEA, an area must either be rural or have an unemployment rate that is 150% of the national unemployment rate.³ Regardless of the project’s investment requirement, the project must still create ten jobs.

The U.S. Citizenship and Immigration Services (USCIS) administers and generally regulates the EB-5 visa.⁴ The Securities Exchange Commission (SEC) also plays a role in its regulation because EB-5 investments qualify as securities.⁵ The SEC ensures that EB-5 investments comply with federal securities laws and anti-fraud provisions. The Federal Bureau of Investigation (FBI) and U.S. Immigrations and Customs Enforcement (ICE) are partnered with USCIS to identify vulnerabilities in the EB-5 program.⁶ The EB-5 visa was designed to create jobs and raise capital for projects that would help stimulate the U.S. economy.⁷

¹ *EB-5 Industry Analytics*, INVEST IN THE USA (IIUSA), <https://share.geckoboard.com/dashboards/F7C1F0339D47813D> (last visited Feb. 4, 2018).

² *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/eb-5> (last visited Nov. 1, 2017).

³ Kelly Phillips Erb, *The EB-5 Visa: United States Citizenship For Sale?*, FORBES (May 10, 2017, 8:59 AM), <https://www.forbes.com/sites/kellyphillipserb/2017/05/10/the-eb-5-visa-united-states-citizenship-for-sale/#47cc8fc42cb9>.

⁴ *EB-5 Immigrant Investor Program*, *supra* note 2.

⁵ Erica Orden, *SEC Looks Into Kushner Cos. Over Use of EB-5 Program for Immigrant Investors*, WALL ST. J. (Jan. 6, 2018, 7:03 AM), <https://www.wsj.com/articles/sec-looks-into-kushner-cos-use-of-eb-5-program-for-immigrant-investors-1515240181>.

⁶ *Citizenship for Sale: Oversight of the EB-5 Investor Visa Program: Hearing Before the S. Comm. on the Judiciary*, 155th Cong. (2018) [hereinafter *EB-5 Investor Visa Program Hearing*] (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

⁷ *EB-5 Immigrant Investor Program*, *supra* note 2.

Without a formal definition for “area,” and no uniform method to designate an area as a TEA, some areas most in need of development are not receiving it.⁸ Criticisms of the EB-5 visa often concern unethical TEA designations, with gerrymandering as a common designation practice.⁹ In 2016, over twenty census tracts in Manhattan were designated as TEAs,¹⁰ and many of those received EB-5 projects at a discounted rate. Critics express the concern that if the cap of EB-5 visas are met for projects in big cities, communities that are most in need are left behind. How did a program designed to benefit poor and rural communities end up being used to build office buildings, condominiums, and hotels in NYC? This question is what some members of Congress have been asking.¹¹

While immigration issues are at the forefront of American politics today, there is seldom a broad, general perspective taken to explore our national immigration policies. The EB-5 program is riddled with fraud and abuse among the actors involved. Congress must reassess our national immigration policies as a whole, and address all of the inadequacies and unethical practices – from the EB-5 program to border control, and everything in between.

Critical issues affect the regulation of EB-5 visas because there are few ways to determine that the information investors, principals, and regional centers submit to USCIS, is accurate and verifiable. USCIS Director L. Francis Cissna (Director Cissna) acknowledged that USCIS is aware of the concerns that the EB-5 program only benefits a few major metropolitan areas, and that the EB-5 investments are not following the congressional intent by providing economic support to high

⁸ See Kriston Capps, *When Harlem Unemployment Pays for Midtown Luxury*, CITYLAB (Jan. 31, 2017), <https://www.citylab.com/equity/2017/01/how-to-fix-the-broken-eb5-cash-for-visas-immigration-program-trump/511265> [hereinafter Capps, *When Harlem Unemployment Pays for Midtown Luxury*] (“How in the world did a program designed to draw badly needed economic development to disinvested neighborhoods wind up paying for skyscrapers in Manhattan’s glitziest new haunt?”).

⁹ See Norman Oder, *How Jersey City Unemployment Was Gerrymandered to Help Kushner Pitch Investor Visas*, CITY & STATE: NEW YORK (May 24, 2017), <http://cityandstateny.com/articles/opinion/jersey-city-unemployment-gerrymandering-jared-kushner-investor-visas.html>.

¹⁰ See 2017 TEA Annual Map: Targeted Employment Areas for the EB-5 Immigrant Investment Program, IMPACT DATASOURCE, <http://impactdatasource.maps.arcgis.com/apps/webappviewer/index.html?id=691f6ead1ec24e25ac71a6e64c5840d3> (last visited Jan. 28, 2018).

¹¹ See Kriston Capps, *Inside EB-5, the Cash-for-Visas Program Luxury Developers Love*, CITYLAB (May 9, 2017), <https://www.citylab.com/equity/2017/05/kushner-companies-real-estate-and-eb-5-cash-for-visas-reform/525792/> [hereinafter Capps, *Inside EB-5*] (“Some members of Congress would like to reform EB-5 to bring the program back in line with its all-but-forgotten original intent—to direct foreign investment toward struggling communities—or scrap it altogether.”).

unemployment and rural areas.¹² Director Cissna further recognized that reforms are necessary to circumvent fraud, abuse and mismanagement. To further regulate the EB-5 to ensure its efficacy, USCIS must be granted power by Congress.¹³

This note explores the EB-5 visa, how it is regulated and administered, and its operations in New York City. This note recommends changes to how this visa is regulated and describes the actions necessary to effectuate these changes. This note explores why USCIS should continue making changes to how the EB-5 program is administered, and why it is important for USCIS to finalize and execute regulations. If USCIS fails to effectuate these policies and regulations, this note also explains why Congress should make legislative changes to compensate for whatever USCIS cannot do. If neither USCIS nor Congress can make changes in the program, states should individually take action to ensure a more ethical TEA designation process. Finally, this note argues that if the EB-5 visa should continuously be administered, it must be done so with its original intent in mind, and violations of this should be vigorously challenged.

II. THE EB-5 VISA AND ITS REGULATION

A. The Visa, Explained

The EB-5 Program is administered by the U.S. Citizenship and Immigration Services (USCIS).¹⁴ This program was created by Congress in 1990 to “stimulate the U.S. economy through job creation and capital investment by foreign investors.”¹⁵ Section 203 of the Immigration and Nationality Act created the EB-5 program,¹⁶ with the applicable rules located at 8 C.F.R. §§ 204.6 and 216.6.¹⁷ The program allows

¹² *EB-5 Investor Visa Program Hearing*, *supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

¹³ Konrad Putzier, *The EB-5 Program Has a Growing Problem. A New Fund Seeks to Tackle It*, THE REAL DEAL (Jul. 27, 2017, 8:50 AM), <https://therealdeal.com/2017/07/27/the-eb-5-program-has-a-growing-problem-a-new-fund-seeks-to-tackle-it> (“Mona Shah, an attorney specializing in the EB-5 program explained, “right now there’s no adequate guidance, no oversight, and we’re taking about millions of dollars . . . it’s very worrying.”).

¹⁴ *EB-5 Immigrant Investor Program*, *supra* note 2.

¹⁵ *Id.*

¹⁶ 8 U.S.C. § 1153 (2012).

¹⁷ 8 C.F.R. §§ 204.6, 216.6 (2018). For more information on the EB-5 Program, *see* U.S. CITIZENSHIP & IMMIGR. SERVS., EB-5 IMMIGRANT INVESTOR PILOT PROGRAM (2011), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%2>

entrepreneurs, along with their spouses and unmarried children under twenty-one, to apply for a green card if they make a qualifying investment in a commercial enterprise in the United States, and plan to create or preserve ten full-time jobs for qualified United States' workers.¹⁸ A green card allows entrepreneurs to remain in the United States indefinitely.¹⁹ Thus, the EB-5 visa has three key elements: (1) capital investment; (2) job creation; and (3) the business receiving the investment must qualify for the EB-5 program.²⁰

Investors must file an I-526 with USCIS to begin the process of obtaining an EB-5 visa.²¹ Once USCIS approves this application, the investor is put in line behind thousands of other petitioners to wait for their EB-5 visa. Once the I-526 is approved, which takes typically two years, the investor can submit a visa application.²² The time it takes from filing their I-526 petition until receiving their EB-5 visa varies from country-to-country.²³ Recent estimates indicate about fifteen years for Chinese investors, and five years for Indian investors.²⁴

Only ten thousand EB-5 visas may be given out per year.²⁵ Three thousand are reserved for TEA investors, and another three thousand are reserved for regional center investors.²⁶ USCIS imposes a limit on the number of visas that may be issued per year to citizens of any country. These limits are calculated each year and they depend on the number of family-sponsored and employment-based visas available.²⁷ "No more than 7 percent of the visas may be issued to natives of any one independent country in a fiscal year; no more than 2 percent may [be] issued to any one dependency of any independent country."²⁸

0National%20Immigration%20&%20Consular%20Conference%20Presentations/EB-5_Immigrant_Investor_Pilot_Program.pdf [hereinafter U.S. CITIZENSHIP & IMMIGR. SERVS.].

18 *EB-5 Immigrant Investor Program*, *supra* note 2.

19 Erb, *supra* note 3.

20 *EB-5 Visa Requirements*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb-5-visa-requirements> (last visited Nov. 1, 2017).

21 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. G.4 (2018), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter4.html>.

22 *FY17 Per-Country I-526 Data, SEC Action (Registration)*, LUCID PROFESSIONAL WRITING: EB-5 BLOG, <https://blog.lucidtext.com/category/eb-5-statistics/> (last visited, Oct. 20, 2018).

23 *See id.*

24 *See id.*

25 *See EB-5 Visas Per Country Limit*, CITIZENSHIP BY INVESTMENT (June 23, 2018), <http://citizenshipbyinvestment.ch/index.php/2018/06/23/eb-5-visas-per-country-limit>.

26 *See id.*; *see also* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610.

27 *See EB-5 Visas Per Country Limit*, *supra* note 22.

28 *Id.*

1. Capital Investment

Generally, the minimum qualifying capital investment for the EB-5 visa is \$1 million USD.²⁹ “Capital means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.”³⁰ The investment does not have to be in a real estate development project, although it has become a very popular form of EB-5 investment.³¹

The EB-5 applicant must prove that his or her capital was obtained through lawful means.³² To make this showing, the investor must submit: (1) foreign business registration records; (2) tax returns; (3) “evidence identifying any other sources of capital”; or (4) “certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.”³³ The applicant must also prove that his or her committed capital investment was either received by the American enterprise, or received into escrow.³⁴ “[M]ore than showing mere receipt of these funds into the escrow account, the USCIS requires records showing the PATH of the capital from the immigrant’s personal bank accounts to the escrow account.”³⁵ In *Matter of Izummi*, USCIS established that a petitioner must submit more than bank letters or statements documenting the deposit of

²⁹ *About the EB-5 Classification*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa-classification> (last updated Mar. 27, 2018) [hereinafter *About the EB-5 Classification*].

³⁰ *Id.*

³¹ *Real Estate Development and the EB-5 Program*, EB5 AFFILIATE NETWORK, <http://eb5affiliatenetwork.com/real-estate-development-eb-5-program> (last visited Feb. 4, 2018).

³² 8 C.F.R. § 204.6 (2016).

³³ *Id.*; see also U.S. CITIZENSHIP AND IMMIGRATION SERVICES, POLICY MEMORANDUM NO. PM-602-0083, EB-5 ADJUDICATIONS POLICY 4 (2013).

³⁴ See *Documenting the Lawful Source of Funds*, ASHCROFT SULLIVAN ECONOMIC DEVELOPMENT CENTERS, <http://aseb5.com/documenting-the-lawful-source-of-funds> (last visited Jan. 31, 2018).

³⁵ See *id.*

funds.³⁶ Third-party money exchangers have prompted USCIS to inquire further in these cases to the origin and path of funds.³⁷

2. Targeted Employment Area – The \$1 Million Capital Investment Exception

There is an exception to the \$1 million capital requirement if the investment is made in a targeted employment area (“TEA”), in which case, the investment minimum is \$500,000 USD.³⁸ The project must be in either a rural area, or an area with high unemployment.³⁹ Several criteria must be met for an area to be designated as rural, or a high unemployment area. An area is rural if it is not within a metropolitan statistical area as labeled by the U.S. Office of Management and Budget.⁴⁰ In addition, the area must not be on the outskirts of a town or city with a population of twenty thousand residents or more, with the population determined through the U.S. Census.⁴¹ To be designated as a high unemployment area, the project location must have an unemployment rate of at least 150% of the U.S. national average.⁴² Furthermore, it must be in an area that has a population of twenty thousand residents or more.⁴³ Project locations may be designated as rural or high unemployment areas if they abide by these guidelines at the time of the EB-5 investment.⁴⁴

Investors have the burden to provide sufficient evidence to support the I-526 application that they submit to USCIS.⁴⁵ If a project location has already been designated as a TEA by the local government, the investor need only submit a letter from the government body including that

³⁶ See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm. 1998); see also Joseph Barnett, Bernard Wolfsdorf & Vivian Zhu, *Five Things to Know about EB-5 Source and Path Issues Relating to Third Party Money Exchangers*, WOLFSDORF ROSENTHAL LLP (Mar. 30, 2017), <https://wolfsdorf.com/blog/five-things-know-eb-5-source-path-issues-relating-third-party-money-exchangers> [hereinafter Barnett, Wolfsdorf, & Zhu] (“In these cases, because the EB-5 investor’s money never left Mainland China, USCIS is questioning whether the funds received by the NCE [new U.S. commercial enterprise] from the third party money actually belonged to the EB-5 investor and whether the use of a third party money exchanger violates any local law.”).

³⁷ See Barnett, Wolfsdorf, & Zhu, *supra* note 37.

³⁸ See Erb, *supra* note 3.

³⁹ *Id.*

⁴⁰ *Targeted Employment Area*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/targeted-employment-area> (last visited Nov. 1, 2017).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Supra* note 22.

information.⁴⁶ If not, the investor must gather the evidence and submit it to USCIS, demonstrating that the area in which he or she is investing has a high enough unemployment rate to so qualify.⁴⁷ Investors can acquire the proper documentation in several ways, including: (1) obtaining published technical bulletins from the U.S. Bureau of Labor Statistic's Local Area Unemployment Statistics; and (2) obtaining "a letter from a state government body to provide rural area or high unemployment area evidence."⁴⁸

In 2016, about 91.41% of EB-5 visas were issued for TEA projects.⁴⁹ Clearly, investors would rather pay 50% less for a qualifying project.⁵⁰ In fact, ninety-seven percent of all EB-5 visas issued in 2017 were to TEA projects.⁵¹ Four percent of these visas were for direct investors and their family members, and the other 93.1% were for regional center investors and their families.⁵²

3. The Entities of an EB-5 Capital Raise

Three entities are involved when EB-5 capital is raised for a project.⁵³ There is the regional center, the job creating entity (JCE) and the new commercial enterprise (NCE).⁵⁴ The principals of these entities can be the same, or distinct.⁵⁵ "An EB-5 Regional Center is an organization designated by USCIS that sponsors capital investment projects for investment by EB-5 investors . . . [t]he major advantage for regional center designation is that the regional center can take advantage of *indirect* job creation."⁵⁶

46 *Targeted Employment Area (TEA)*, EB5 AFFILIATE NETWORK, <http://eb5affiliatenetwork.com/targeted-employment-area> (last visited Sept. 27, 2018).

47 *Id.*

48 *Targeted Employment Area*, *supra* note 41.

49 *EB-5 Industry Analytics*, *supra* note 1.

50 *See, e.g.*, Eliot Brown, *How a U.S. Visa-for-Cash Plan Funds Luxury Apartment Buildings*, WALL ST. J. (Sept. 9, 2015, 10:38 PM), <https://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>.

51 *FY2017 EB-5 Visas by Country*, LUCID PROFESSIONAL WRITING (Jan. 23, 2018), <https://blog.lucidtext.com/category/eb-5-statistics>.

52 *Id.*

53 Jeff Champion, *EB-5 Capital At a Glance*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/path-to-eb5-capital> (last visited Feb. 3, 2018). This only pertains to those investments that are not direct – i.e., investments made through a regional center project.

54 *Id.*

55 *Id.*

56 Kate Kalmykov & James Cormie, *EB-5 Regional Center*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb-5-regional-center> (last visited Feb. 6, 2018); *see also*

Congress launched the regional center pilot program on October 6, 1992.⁵⁷ Although the requirements for obtaining an EB-5 visa through a pilot program are generally the same as the basic EB-5 program, there are a few key differences.⁵⁸ The pilot program provides that investors are providing their investments to a “regional center,” an economic unit that has associated investment projects.⁵⁹ Regional centers in turn have less restrictive job creation requirements, based upon the creation of “direct” and “indirect” jobs.⁶⁰

Regional centers have opened in major U.S. cities, either directly funded, or are being managed by real estate developers. As of June 4, 2018, there were 903 regional centers across the United States.⁶¹ Regional centers can legally operate in multiple states.⁶² Thus, a regional center can be registered in one state, and engage in projects in another state. Aside from all the regional centers that are based in the state of New York, there are regional centers in nearby states that operate in New York, including the states of Connecticut, New Jersey and Pennsylvania.⁶³

The U.S. Immigration Fund (USIF) is such a regional center that funds many NYC developers of luxury condos.⁶⁴ Related Companies, a major NYC developer, has a regional center in New York.⁶⁵ USIF and Related are among the top spenders for EB-5 lobbying.⁶⁶ “Related reportedly spent \$1.4 million lobbying for the program between 2015 and 2016 and USIF reportedly spent nearly \$1 million on lobbying over the last four years.”⁶⁷

The NCE issues the securities, and once the capital is received, it is brought to the JCE in the form of a loan.⁶⁸ “The loan to the JCE is,

About the EB-5 Classification, supra note 30 (“Indirect jobs are those held outside of the new commercial enterprise but that are created as a result of the new commercial enterprise.”).

⁵⁷ See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 18, at 7.

⁵⁸ See *id.*

⁵⁹ *Id.* at 8 (“A *Regional Center* is not merely a defined geographic area but rather is a business entity that coordinates foreign investment within that area in compliance with the EB-5 statutory, regulatory and precedent decision framework.”).

⁶⁰ *Id.* at 9.

⁶¹ See *EB-5 Investor Visa Program Hearing, supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ Will Parker, *Government Releases Crucial EB-5 Data – But Beware, It Could Be Full of Flaws*, THE REAL DEAL (Jun. 21, 2017, 3:00 PM), <https://therealdeal.com/2017/06/21/uscis-releases-crucial-eb-5-data-but-beware-it-could-be-full-of-flaws>.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ *Campion, supra* note 54.

normally, for a period of five (5) years. After five (5) years (and assuming no loan extensions), the loan is paid off, the JCE issues a liquidating distribution to each of the investors, and the process is complete.”⁶⁹ To issue the securities, however, the NCE must produce:

- A *Matter of Ho* compliant business plan,
- Proof of regional center designation (including scope),
- A TEA letter (if applicable),
- Economic analysis, and
- Offering documents (these include private placement memorandum, articles of entity formation, partnership agreement, subscription agreement, loan agreement between the NCE and JCE, collateral agreement for the loan and other documents).⁷⁰

The JCE must produce a variety of documents, including:

- A deed to the property (if it is a real estate transaction),
- Market analysis,
- Bank loan commitment,
- As-built appraisal,
- Proof of developer capital,
- Proof of any other capital or lending instruments utilized,
- Developer track record, and
- Method of loan repayment (refinance, sale, or other method).⁷¹

Necessary documents are not limited to the ones listed, and these documents may change depending on the circumstances.⁷²

4. The “At Risk” Requirement, and the Risky Nature of the EB-5

The investors’ money must be at risk, or involved in the U.S. project, until the investor has received his or her green card and spent two years living in the U.S.⁷³ An alien investor must demonstrate in a petition that: (1) “the required funds were placed ‘at risk’ throughout the period of the petitioner’s residence in the United States”⁷⁴; and (2) “the required amount of capital was made available to the business or businesses most

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY ALERT NO. PA-2017-01, JOB CREATION AND CAPITAL AT RISK REQUIREMENTS FOR ADJUDICATION OF FORM I-526 AND FORM I-829 (2017).

⁷⁴ U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MEMORANDUM NO. PM-602-0083, EB-5 ADJUDICATIONS POLICY 25 (2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5_Adjudications_PM_Approved_as_final_5-30-13.pdf.pdf.

closely responsible for creating the employment”⁷⁵; (3) “this ‘at risk’ investment was ‘sustained throughout’ the period of the applicant’s residence in the United States”⁷⁶; and (4) “the investor created (or maintained, if applicable), or can be expected to create within a reasonable period of time, the requisite number of jobs.”⁷⁷ Furthermore, “[f]or the capital to be ‘at risk’ there must be a risk of loss and a chance for gain.”⁷⁸

Aside from the requirement that investors keep their capital “at risk” there is also a precarious nature to EB-5 investments. Long wait times put all parties at risk. Investors might not be able to obtain visas, and real estate developers may lose the cheap funding source.⁷⁹ Investors and developers both have a lot at stake. The developers cannot move forward on their projects until they receive the requisite funding. If a project is financed wholly or primarily by EB-5 investments, the project needs to be halted if it cannot receive the funds. Rather than waiting for the EB-5 funds to come in, developers might seek more expensive financing. For example, EB-5 financing used for hotels has increased in popularity over the years.⁸⁰ Typically, EB-5 investments have an interest rate of 1% to 6%.⁸¹ While that may seem like a wide margin, average commercial real estate loans for building a hotel or motel investment project may carry an interest rate from 5.5% to 11.3%.⁸² Thus, developers’ reliance on the EB-5 investors’ financing can be cost effective.

Investors also have a lot at stake. Not only are they placing their capital in jeopardy for the two-year period, they run the risk of getting no return on their investment and no green card. “The EB-5 program is fraught with risk as an investment strategy, prone to fraudsters, and gives

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

⁷⁹ See Jeanne Calderon & Gary Friedland, *What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data*, 54 (NYU Stern Center for Real Estate and Finance Research) (Dec. 23, 2015) (Working Draft), http://www.stern.nyu.edu/sites/default/files/assets/documents/What-TEA-Projects-Might-Look-Like-under-EB5-2.0-Alternatives-with-Maps-and-Data_0.pdf (last updated Jan. 25, 2016) (“Regional centers and developers will need to address the mounting visa backlog, whether or not Congress incorporates visa reserves into the reform legislation.”).

⁸⁰ Ali Brodie, *EB-5 Financing for Hotels Growing in Popularity*, EB5 INVESTORS (Oct. 3, 2013), <http://www.eb5investors.com/blog/eb5-financing-for-hotels-growing-in-popularity>.

⁸¹ *Evaluating EB-5 Capital for Real Estate Projects*, EB5 AFFILIATE NETWORK, <http://eb5affiliate.network.com/evaluating-eb-5-capital-for-real-estate-projects> (last visited Feb. 3, 2018).

⁸² *Average Commercial Real Estate Loans for 2018*, VALUE PENGUIN, <https://www.valuepenguin.com/average-commercial-real-estate-loan-rates> (last visited Feb. 3, 2018).

the hopeful immigrant-investor little recourse if anything goes wrong.”⁸³ There is no guarantee to investors that they will actually receive a green card.⁸⁴ Furthermore, there is no guarantee that a project will be successful.⁸⁵ Other investment risks include being defrauded; using a bad regional center; hiring an attorney that does not do his or her full due diligence; and the lack of recourse for a failed EB-5 project.⁸⁶

5. Job Creation Requirement

On June 17, 2009, USCIS released a policy memorandum allowing more construction jobs to count for the job creation requirement, if the project was planned to last at least two years.⁸⁷ “USCIS, however, now interprets 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 when the petitioner’s I-829 is filed, may now count as permanent jobs.”⁸⁸ USCIS defines direct jobs as “actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital,” and indirect jobs as “those jobs shown to have been created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.”⁸⁹ Full-time employment is defined as “employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.”⁹⁰ “Full-time” employment requirement has been interpreted by USCIS to exclude jobs that are

83 Eric Sustad, *US Immigration with EB-5 Visa Program – Risks and Critical Steps to Avoid Falling Victim*, EXIGER DILIGENCE (May 24, 2017), <https://www.exiger.com/content/us-immigration-eb-5-visa-program---risks-and-critical-steps-avoid-falling-victim>; see also Anne Galloway, *Defrauded Jay Peak Investors Unable to Get Green Cards*, STOWE REPORTER (Aug. 18, 2016), http://www.stowetoday.com/stowe_reporter/news/state_news/defrauded-jay-peak-investors-unable-to-get-green-cards/article_8e5d5c0a-6560-11e6-a86b-7be99f78aa68.html (“In 2016, 700 EB-5 investors in the bankrupt Jay Peak Report in Vermont lost their chances at green cards, in what was characterized as a Ponzi scheme.”).

84 See Sustad, *supra* note 84.

85 *Id.* (“A green card is not guaranteed after an EB-5 investment, and a project that fails may result in loss of investment funds, and no green card.”).

86 *Id.*

87 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MEMORANDUM NO. HQDOMO 70/6.1.8 AD09-04, EB-5 ALIEN ENTREPRENEURS – JOB CREATION AND FULL-TIME POSITIONS 5 (2009).

88 *Id.*

89 U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 18, at 9.

90 Immigration and Nationality Act 203, 8 U.S.C. § 1153(b)(5)(D) (2012).

intermittent, temporary, seasonal or transient in nature, making it harder for projects to meet the job creation requirement.⁹¹

6. The EB-5 and Real Estate Development

Following the financial crisis in 2009, many banks shut off credit for construction projects.⁹² “Since the collapse of the traditional financing markets in 2008, many commercial real estate developers cannot find financing to fill their capital stacks, particularly mezzanine financing.”⁹³ An inability to obtain mezzanine funding resulted in real estate developers turning to the EB-5 visa whereby the threshold of meeting application requirements became less stringent in the aftermath of the financial crisis. Although lenders have returned to real estate, developers remain attracted to the EB-5 program because of its low costs.⁹⁴ “Because the foreign investors seek a green card, they have been willing to accept very low interest rates on money they lend, typically for four or five years.”⁹⁵ EB-5 investments carry significantly lower interest rates than traditional modes of financing.⁹⁶ “But as the program’s popularity has soared in recent years, the bulk of immigrant investment is going to projects that are located, like the \$20 billion Hudson Yards, in prosperous urban neighborhoods.”⁹⁷ Real estate developers are capitalizing on the cheap financing option that the EB-5 visa offers.

⁹¹ See e.g., *Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025 (E.D. Cal. 2001); U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 18.

⁹² Brown, *supra* note 51.

⁹³ Robert J. Ahrenholz, Robert B. Keim & Mariza E. McKee, *Raising EB-5 Capital: Key Securities Laws Considerations and a Compliance Roadmap*, KUTAK ROCK LLP 1 (2014), <http://www.kutakrock.com/files/Publication/8a8b4dd5-d052-4d86-ba7c-72a4b41b1605/Presentation/PublicationAttachment/1f3c76f5-97c4-4bdd-b76a-7435abcc4485/Raising%20EB-5%20Capital.pdf>. “Mezzanine financing” is defined as “a hybrid of debt and equity financing that gives the lender the rights to convert to an ownership or equity interest in the company in case of default, after venture capital companies and other senior lenders are paid.” *Mezzanine Financing*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/mezzaninefinancing.asp> (last visited, Jan. 23, 2018).

⁹⁴ Brown, *supra* note 51.

⁹⁵ *Id.*

⁹⁶ *Evaluating EB-5 Capital for Real Estate Projects*, *supra* note 82; *Average Commercial Real Estate Loans for 2018*, *supra* note 83.

⁹⁷ Brown, *supra* note 51.

B. Securities Regulation of the EB-5

Although the EB-5 program is administered by USCIS,⁹⁸ EB-5 investments are securities offerings, so they are also regulated by the SEC.⁹⁹ EB-5 offerings are private placements or unregistered offerings.¹⁰⁰ “Even though the EB-5 program is designed to provide a path for immigrant investors to obtain a visa, EB-5 financing involves the offer and sale of securities and must be analyzed like any other securities offering.”¹⁰¹

Before the 1992 pilot program, EB-5 investments were directly managed by the investor, so that federal securities laws weren't relevant.¹⁰² With the establishment of regional centers, multiple investors' funds were pooled into these regional centers, which are commercial enterprises.¹⁰³ Despite exemptions from registration as limited partnerships or limited liability companies, EB-5 investments are subject to U.S. securities laws, including anti-fraud provisions.¹⁰⁴

Securities laws are intended to protect investor interests, and the U.S. financial system at large. “Securities laws ensure the disclosure of material information so that investors can make informed decisions.”¹⁰⁵ The securities laws that apply to EB-5 offerings are The Securities Act of 1933¹⁰⁶ (“Securities Act”), The Securities Exchange Act of 1934¹⁰⁷ (“SEA”), The Investment Company Act of 1940¹⁰⁸ (“ICA”), and The Investment Advisers Act¹⁰⁹ (“IAA”).¹¹⁰ Under the Securities Act, exemptions from registration for EB-5 offerings are available under Regulation

⁹⁸ *EB-5 Immigrant Investor Program*, *supra* note 2.

⁹⁹ Orden, *supra* note 5.

¹⁰⁰ Yi Song, *SEC Guidelines on EB-5 Offerings*, LEXISNEXIS LEGAL NEWSROOM BANKING & FIN. (Sep. 29, 2014, 2:00 PM), <https://www.lexisnexis.com/legalnewsroom/banking/b/venture-capital/archive/2014/09/29/sec-guidelines-on-eb-5-offerings.aspx>.

¹⁰¹ Ahrenholz, Keim & McKee, *supra* note 94, at 1-2

¹⁰² *The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter *EB-5 Regional Center Program Hearing*] (statement of Stephen L. Cohen, Assoc. Director, Division of Enforcement, U.S. Securities and Exchange Commission).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Hermoine Krumm, *The Ins & Outs of EB5 Admin Fees with Osvaldo 'Ozzie' Torres*, MONA SHAH & ASSOCIATES GLOBAL (Dec. 5, 2017, 4:08 PM), <http://mshahlaw.com/ins-outs-eb5-admin-fees-osvaldo-ozzie-torres>.

¹⁰⁶ 15 U.S.C. §§ 77a–77z-3 (2012).

¹⁰⁷ 15 U.S.C. §§ 78a–78kk (2012).

¹⁰⁸ 15 U.S.C. §§ 80a-1–80a-64 (2012).

¹⁰⁹ 15 U.S.C. §§ 80b-1–80b-21 (2012).

¹¹⁰ Ahrenholz, Keim & McKee, *supra* note 94, at 2, 5.

S or Regulation D.¹¹¹ “[T]his registration process is extremely involved and burdensome. . . [i]n fact, complying with some SEC securities regulations can take so long that it can prevent investors from fulfilling all EB-5 requirements within the USCIS mandated timeframes.”¹¹²

1. The Securities Act of 1933

The Securities Act requires companies that offer or sell securities to register those offerings with the SEC, unless an exemption from registration is available.¹¹³ “Accredited investors” of private placements under Regulation D, however, are exempt from many of the laws and regulations designed to protect investors.¹¹⁴ Rule 501(a) sets out categories of “accredited investors,” including: (1) “[a]ny director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer”; (2) “[a]ny natural person whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1,000,000”; (3) “[a]ny natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person’s spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year”; or (4) “[a]ny trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person.”¹¹⁵ “The [new commercial enterprise] is the issuer of securities and is the entity into which the investors invest.”¹¹⁶

Regulation S provides an exemption for offers and sales of securities to non-U.S. persons, as defined under the Securities Act.¹¹⁷ “Regulation S is meant to assist US and foreign companies with raising capital overseas quickly and inexpensively without complying with the registration requirements under Section 5 of the Securities Act.”¹¹⁸ Category 3 of Rule 903 of Regulation S often applies to EB-5 offerings, because equity securities¹¹⁹ must be issued in these offerings, and the issuer is usually a

¹¹¹ *See id.* at 2.

¹¹² *EB-5 and Securities*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb5-SEC-accredited-investor-issues> (last visited Feb. 3, 2018).

¹¹³ *See Song, supra* note 101.

¹¹⁴ *See Ahrenholz, Keim & McKee, supra* note 94 at 2.

¹¹⁵ 17 C.F.R. § 230.501(a) (2018). ¹¹⁶Campion, *supra* note 54.

¹¹⁶ Campion, *supra* note 54.

¹¹⁷ Ahrenholz, Keim & McKee, *supra* note 94, at 2.

¹¹⁸ *Id.*

¹¹⁹ *See Security*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/security.asp> (last visited Sept. 26, 2018) (“An equity security represents ownership interest held by shareholders in an

newly formed entity.¹²⁰ This rule contains restrictions and conditions for compliance, including the rule that “securities sold should not be transferred to a US person or for the account or benefit of a US person for a period of one year in the case of equity securities (which is required for an EB-5 investment).”¹²¹

Regulation D also contains restrictions on general solicitation and general advertising.¹²² “The SEC seeks to enforce such regulations to protect EB-5 applicants from fraudulent or misleading information.”¹²³ For a private placement exemption to be valid under Rule 506(b), the non-U.S. investor must be accredited, and neither the issuer of the securities, or any person acting on behalf of the issuer, may offer or sell securities in the offering through general soliciting or general advertising.¹²⁴ This requirement prohibits: “seminars or meetings whose attendees were invited by general solicitation or general advertising”; “publications in newspapers, magazines or similar media”; and television, radio, or internet broadcasts.¹²⁵ Further, “the SEC has recently made efforts to prevent misrepresentations by developers marketing projects to potential EB-5 investors. Developers are forbidden from intentional false statements, reckless material misrepresentation, and omission of material information, meaning any marketing materials must not be misleading to investors.”¹²⁶

2. The Investment Company Act

The ICA is often implicated due to the nature of EB-5 investments. This is because EB-5 offerings are typically made after new issuing entities, such as regional centers, are formed.¹²⁷ These newly formed entities use the EB-5 proceeds to invest in or to make loans to other entities that

entity a company, partnership or trust, realized in the form of shares of capital stock, which includes shares of both common and preferred stock.”).

¹²⁰ Ahrenholz, Keim & McKee, *supra* note 94, at 2.

¹²¹ *Id.* at 2.

¹²² *See id.* at 3.

¹²³ *EB-5 and Securities*, *supra* note 113.

¹²⁴ Ahrenholz, Keim & McKee, *supra* note 94, at 3.

¹²⁵ *See id.*; *see also EB-5 and Securities*, *supra* note 113 (“More targeted solicitation may also be made if there is prior knowledge that the prospective EB-5 applicants are, in fact, accredited investors.”).

¹²⁶ *Real Estate Development and the EB-5 Program*, *supra* note 32 (“Nonetheless, misinformation remains a problem, especially in the Chinese market.”).

¹²⁷ *See* Ahrenholz, Keim & McKee, *supra* note 94, at 4. ¹²⁸*See id.* ¹²⁹*Id.* ¹³⁰Investment Company Act of 1940, 18 U.S.C. §§ 80a-1–80a-64 (2012).

own the EB-5 project.¹²⁸ These other entities usually are real estate developers. “Either of these scenarios raises questions of whether the issuing entities are investment companies within the meaning of the Investment Company Act because the majority of the assets they end up holding, such as mortgage notes and debt or equity securities, constitute securities under the securities laws.”¹²⁹

A series of registration exemptions under the ICA¹³⁰ can apply for private investment companies.¹³¹ Companies often rely on these exemptions “when there is no easier way to avoid becoming an inadvertent investment company and therefore subject to the onerous requirements of the Investment Company Act.”¹³² “Transactions that violate the [ICA] are void and unenforceable under Section 47 of the Act.”¹³³ “If an issuer must register as an investment company, it has to comply with a variety of substantive requirements”¹³⁴

3. The Investment Advisers Act

The IAA often relates to EB-5 entities that may provide advice to investors. The IAA defines an investment adviser as

[A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.¹³⁵

The compensation requirement has been “broadly construed.”¹³⁶ In general, “if a person is receiving special compensation for providing investment advice, the person likely is an investment adviser and must register with the SEC (or applicable state securities authority) unless an exemption is available.”¹³⁷

128 *See id.* 129*Id.* 130Investment Company Act of 1940, 18 U.S.C. §§ 80a-1–80a-64 (2012).

129 *Id.* 130Investment Company Act of 1940, 18 U.S.C. §§ 80a-1–80a-64 (2012).

130 Investment Company Act of 1940, 18 U.S.C. §§ 80a-1–80a-64 (2012).

131 *See* Ahrenholz, Keim & McKee, *supra* note 94, at 4.

132 *Id.*

133 *Id.*

134 *Id.*

135 15 U.S.C. § 80b-2(a)(11) (2012).

136 Robert E. Plaze, *Regulation of Investment Advisers by the U.S. Securities and Exchange Commission*, PROSKAUER 2 (March 2017), <https://www.proskauer.com/uploads/regulation-of-investment-advisers-by-the-us-sec>.

137 Genna Garver, *Are You An Investment Adviser?*, EB-5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb-5-investment> (last visited Jan. 16, 2018).

Classification as an investment adviser often hinges on the actions of the potential adviser, and whether such actions rise to the degree of true investment. Without an available exemption, a person deemed to be an investment advisor must register with the SEC or the person's home state.¹³⁸ "In order for advisors to receive compensation for helping EB-5 applicants, they must be registered with a broker-dealer, and the investments must be made in accordance with Financial Industry Regulatory Authority regulations."¹³⁹

4. Broker and Broker-Dealer Registration: Migration Agents

Migration agents may be subject to U.S. securities laws. "Many EB-5 offerings depend on the fundraisers who locate and introduce eligible investors to projects."¹⁴⁰ These migration agents may be brokers that are subject to regulation under broker-dealer laws of the SEC and the Financial Industry Regulatory Authority ("FINRA").¹⁴¹ Section 3(4) of the SEA defines "broker" broadly as "any person engaged in the business of effecting transactions in securities for the account of others."¹⁴² A dealer acts as a principal, while a broker typically acts as an agent.¹⁴³ Brokers are required to register with the SEC and the states in which they conduct business, and they are required to become members of FINRA.¹⁴⁴

Although most EB-5 capital has been raised without the assistance of registered broker-dealers, "recent enforcement trends are setting the stage for increasing involvement of licensed broker-dealers in the EB-5 industry."¹⁴⁵ Investors from China, in particular, have been defrauded by

¹³⁸ *See id.*

¹³⁹ Danielle Andrus, *FINRA, SEC Targeting EB-5 Immigrant Investor Program*, THINKADVISOR (April 5, 2016, 2:40 PM), <http://www.thinkadvisor.com/2016/04/05/finra-sec-targeting-eb-5-immigrant-investor-progra>.

¹⁴⁰ John Tishler, *EB-5 Broker-Dealer*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb-5-broker-dealer> (last visited Jan. 31, 2018).

¹⁴¹ *See id.*; *see also EB-5 Regional Center Program Hearing*, *supra* note 103 (statement of Stephen L. Cohen, Assoc. Director, Division of Enforcement, U.S. Securities and Exchange Commission) ("FINRA is an independent, not-for-profit self-regulatory organization that provides regulatory oversight for the securities industry, in particular with respect to the brokers and dealers that make up FINRA's membership."); Campion, *supra* note 54 ("Most investors invest through means of a migration broker.").

¹⁴² 15 U.S.C. § 78c(a)(4)(A) (2012); *see also Broker-Dealer Registration*, U.S. SEC. & EXCHANGE COMM'N, <https://www.sec.gov/fast-answers/answersbdregishtm.html> (last updated Jan. 14, 2013) [hereinafter *Broker-Dealer Registration*].

¹⁴³ *See Broker-Dealer Registration*, *supra* note 143.

¹⁴⁴ *See Tishler*, *supra* note 141.

¹⁴⁵ *Id.*

migration brokers.¹⁴⁶ “Typically, migration brokers work on behalf of Regional Centers to market to EB-5 investors, while immigration consultants assist Regional Centers to connect with migration brokers.”¹⁴⁷ Investors that engage in negotiations with a broker outside of the U.S. might not be protected by U.S. securities laws. “SEC regulation of broker-dealer relationships may not be enforced if the negotiations take place overseas outside of US jurisdiction.”¹⁴⁸

The SEC has continuously worked with FINRA to identify brokers.¹⁴⁹ FINRA has released rules and guidance with respect to the investor suitability as well as due diligence obligations for broker-dealers in EB-5 offerings.¹⁵⁰ In a letter dated August 26, 2013, FINRA provided interpretive guidance on FINRA Rule 2111 pertaining to suitability, for EB-5 securities transactions.¹⁵¹ “EB-5 Program securities transactions that involve pooled investments sold through private placements raise many of the same concerns as those associated with sales of any private-placement securities.”¹⁵² Suitability requirements are as equally applicable to EB-5 investments as they are to other securities transactions.

It is important to note that investment advisors and brokers are not the same thing.¹⁵³ “Broker-dealers and investment advisers are regulated extensively, but the regulatory regimes differ, and broker-dealers and investment advisers are subject to different standards under federal law when providing investment advice about securities.”¹⁵⁴ Investment

¹⁴⁶ See Sustad, *supra* note 84 (“High net-worth individuals, particularly from China, are frequently targeted by firms and individuals billing themselves as ‘migration brokers’ and ‘immigration consultants.’”).

¹⁴⁷ *Id.*

¹⁴⁸ *EB-5 and Securities*, *supra* note 113.

¹⁴⁹ See *EB-5 Regional Center Program Hearing*, *supra* note 103 (statement of Stephen L. Cohen, Assoc. Director, Division of Enforcement, U.S. Securities and Exchange Commission).

¹⁵⁰ See *Suitability*, FIN. INDUS. REG. AUTH., <http://www.finra.org/industry/suitability> (last visited Feb. 3, 2018) (“FINRA Rule 2111 requires that a firm or associated person have a reasonable basis to believe a recommended transaction or investment strategy involving a security or securities is suitable for the customer. This is based on the information obtained through reasonable diligence of the firm or associated person to ascertain the customer’s investment profile.”).

¹⁵¹ See James S. Wrona, *Interpretive Letter to Brian Sweeney, Trustmont Financial Group, Inc.*, FIN. INDUS. REG. AUTH. (Aug. 26, 2013), <http://www.finra.org/industry/interpretive-letters/august-26-2013-1200am>.

¹⁵² *Id.*

¹⁵³ See generally U.S. SEC. & EXCH. COMM’N, *STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS* summ. at iii (2011), <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

¹⁵⁴ *Id.* summ. at i.

advisers are fiduciaries regulated by the SEC.¹⁵⁵ Broker-dealers are regulated by the SEC and FINRA.¹⁵⁶

The SEC has full jurisdiction over violations of federal securities laws and looks to specific investments arising out of the EB-5 program to determine if there was a violation.¹⁵⁷ The SEC has increasingly received more tips and complaints regarding EB-5 investments, including claims of fraud and unregistered broker-dealer activity.¹⁵⁸ The EB-5 program, while slightly different from other fraud actions, is generally “no different than the many other offering fraud cases” under the purview of the SEC Enforcement Division.¹⁵⁹ The SEC regulates securities to protect investors; it is for this reason there are sophistication requirements—so unsophisticated investors are not taken advantage of.¹⁶⁰

III. ISSUES WITH THE EB-5 AND PROPOSED CHANGES

In January 2017, right before President Trump was sworn into office, the Department of Homeland Security (DHS) proposed similar rules to preserve the original intent of the EB-5 program.¹⁶¹ One of the proposed rules called for federal regulation of TEA designation by USCIS.¹⁶² The proposed rule also suggested an increase in the minimum investment amount for TEAs to \$1.35 million from \$500,000.¹⁶³ During that time, Congress also heard from former DHS Secretary Jeh Johnson, who described TEA gerrymandering and suggested changes that Congress could make to allow USCIS to do a better job in administering the Visa.¹⁶⁴

In 2017, there were five federal bills, and thirty-seven state bills, seeking either to amend or repeal the EB-5 provision of the Immigration

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See EB-5 Regional Center Program Hearing, supra* note 103 (statement of Stephen L. Cohen, Assoc. Director, Division of Enforcement, U.S. Securities and Exchange Commission). This jurisdiction is subject to the exception of broker-dealer negotiations that occur outside of the jurisdiction of the United States.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See Investor Bulletin: Private Placements Under Regulation D*, U.S. SEC. & EXCH. COMM'N (Sept. 24, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_privateplacements.html (“[T]he non-accredited investors in the offering must be financially sophisticated or, in other words, have sufficient knowledge and experience in financial and business matters to evaluate the investment.”).

¹⁶¹ EB-5 Immigrant Investor Program Modernization, 82 Fed. Reg. 4738 (proposed Jan. 13, 2017) (to be codified at 8 C.F.R. pts. 206, 216).

¹⁶² *Id.* at 4739.

¹⁶³ *Id.*

¹⁶⁴ 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016) (statement of Sen. Leahy).

and Nationality Act (“INA”). Director Cissna described USCIS’s recent efforts and proposed changes to the EB-5 program in June 2018.¹⁶⁵ He highlighted the program’s inadequacies, and changes that need to be made to ensure the administration of the program is aligned with Congress’ original intent in its creation.¹⁶⁶ The Senate is currently reviewing these policies with this push from USCIS to reform the program. The current administration of the EB-5 program has proven to be ineffective in carrying out the program’s original intent.

It is my recommendation that USCIS should continue to implement policies that are aligned with the intent of the EB-5 program. Additionally, USCIS should pursue regulations that will supplement these policies. Congress should authorize USCIS to cover the key areas that USCIS currently cannot regulate. If these thorough changes cannot be made quickly, this note recommends that states create policies and enact legislation to ensure the ethical administration of the EB-5 program within their state.

A. TEA Designation: Issues and Reforms

TEAs are nationally regulated by USCIS, but states certify an area as a TEA.¹⁶⁷ This certification approval process varies state-by-state.¹⁶⁸ “Different states define TEAs in various ways, setting different standards for how many Census tracts can be gerrymandered into a larger area of economic impact . . . [s]ome states statutorily cap the number of tracts, while others leave the formula open to the discretion of relevant state authorities.”¹⁶⁹ Some states are known to have easier certification processes than others.

New York, for example, has one of the simplest processes for obtaining certification, because it does not require a TEA analysis or letters of support from the local government in the area of the project.¹⁷⁰ Furthermore, applicants need not substantiate the need for TEA designation for the area of their project. Empire State Development, the economic development agency for the state of New York, defines TEAs within the

¹⁶⁵ See *EB-5 Investor Visa Program Hearing*, *supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

¹⁶⁶ See *id.*

¹⁶⁷ See *New York EB-5 Targeted Employment Area Certifications*, EB-5 DAILY (Mar. 18, 2016), <http://www.eb5daily.com/new-york-eb-5-targeted-employment-area-tea-certifications>.

¹⁶⁸ See *id.*

¹⁶⁹ Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 8.

¹⁷⁰ See *New York EB-5 Targeted Employment Area Certifications*, *supra* note 168.

state¹⁷¹ Some critics argue that, “unlike California, there’s no limit to the number of Census tracts that can be gerrymandered to justify EB-5 funding for a project.”¹⁷² The New York Department of Labor assesses “the site location to determine qualification” and “look[s] at subarea unemployment data at the census tract level and census block group level” without “any restrictions on the resulting shape of the targeted employment area.”¹⁷³ Thus, New York does not take a particularly stringent view when determining whether to designate an area as a TEA.

Critics argue that the requirement for a high unemployment area or a rural area are “often ignored and easily manipulated.”¹⁷⁴ The EB-5 Program has come under legislative scrutiny because urban developers take advantage of TEA rules to reduce the EB-5 investment amount in cities with high real estate values.¹⁷⁵ With gerrymandering, a poor area can be aggregated with a wealthier area, to be designated as a TEA.¹⁷⁶ “As a result, some developers have been receiving a customized TEA in cities that appear to have low unemployment such as NYC, but after nearby census tracts with higher unemployment are included, have an unemployment rate that is greater than 150% of the national average.”¹⁷⁷ For example, as of February 2018, census tracts 232 and 234 in Harlem have unemployment rates of 14.1% and 14.8%, respectively.¹⁷⁸ This note questions whether areas with unemployment rates as high as this are receiving any TEA projects.¹⁷⁹

One of the most contested issues with the EB-5 visa is based on allegations that some TEA designations are based on N.Y.C. gerrymandering.¹⁸⁰ “[G]errymandering makes a mockery of the philosophy behind the Targeted Employment Areas: to direct jobs to those who need them.”¹⁸¹

171 See *Immigration Act of 1990/EB5 Visa Program/Targeted Employment Area*, N.Y. STATE DEP'T LAB, https://www.labor.ny.gov/stats/immigration_act.shtm (last visited October 13, 2018).

172 Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 8.

173 *New York EB-5 Targeted Employment Area Certifications*, *supra* note 168.

174 Erb, *supra* note 3.

175 *The EB-5 Program – EB-5 Immigration and Investor Visas in NYC*, HAUSEIT (Aug. 18, 2017), <https://www.hauseit.com/the-eb-5-program-nyc>.

176 Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 8. However, if the map is gerrymandered to include poorer Census tracts, then the average unemployment rate over the whole area could be high enough to qualify even Hudson Yards. *See id.*

177 *The EB-5 Program – EB-5 Immigration and Investor Visas in NYC*, *supra* note 176

178 See *NYC Census Fact Finder*, NYC DEP'T OF PLANNING, <http://maps.nyc.gov/census> (last visited Feb. 4, 2018).

179 *See id.*

180 See *Gerrymander*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gerrymander> (last visited Nov. 12, 2017) (defining “gerrymander” (verb) as “[t]o divide or arrange (an area) into political units to give special advantages to one group”); Oder, *supra* note 9.

181 Oder, *supra* note 10.

Michael Gibson, the managing director of USAAdvisors.org, explained to the *Wall Street Journal* that “[a]t least 80% of EB-5 money is going to projects that [would not] qualify as being in [TEAs] ‘without some form of gerrymandering.’”¹⁸² Senator Leahy remarked in 2016 that “[c]urrently 90 percent of EB-5 capital goes to areas that rely on gerrymandering to qualify as distressed.”¹⁸³ Ninety percent is no small number; in fact, it is alarming.

One of the largest EB-5 projects in Manhattan is Hudson Yards, a new development in the West Chelsea neighborhood. It may be the most significant U.S. real-estate undertaking thus far, totaling \$25 billion.¹⁸⁴ Furthermore, the project may be the sole greatest beneficiary of the EB-5 program.¹⁸⁵ The project is set to bring a whopping 55,752 direct jobs to the area, along with a \$19 billion annual contribution to NYC’s gross domestic product.¹⁸⁶ Despite the outstanding forecasted job creation of Hudson Yards, maps show that the area was gerrymandered to qualify as a TEA.¹⁸⁷ “That’s how unemployment in Harlem helped pay for Hudson Yards: The map used to qualify the \$25 billion Hudson Yards development as a TEA winds north through Central Park and picks up half a dozen housing projects.”¹⁸⁸

“As it stands, the EB-5 looks like a form of reverse-Robin Hooding: Developers in wealthy districts tap unemployment in poorer ones in order to unlock foreign capital intended for distressed areas. Wealthy aliens get visas, developers get cash, and cities get luxe towers that only the global elite can afford.”¹⁸⁹ One would wonder if this is what the EB-5 program was designed to accomplish. As noted by Senator Leahy, the EB-5 program is “[f]ar from being a tool for economic development and job creation” and “serves as a corporate subsidy for wealthy developers, allowing them to save tens of millions of dollars on financing.”¹⁹⁰ He further asserted, “it is no wonder these developers fight so hard against reforms that would restore incentives to invest in rural and poor urban areas.”¹⁹¹

182 Brown, *supra* note 51; 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).

183 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).

184 See Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 8.

185 See *id.*

186 See *New Report Details Substantial Economic Impact of Hudson Yards Development*, HUDSON YARDS (May 2, 2016), <http://www.hudsonyardsnewyork.com/press-releases/new-report-details-substantial-economic-impact-of-hudson-yards-development> (“It will also contribute nearly \$500 million annually in City taxes.”).

187 See Capps, *Inside EB-5* *supra* note 11.

188 *Id.*

189 Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 8.

190 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).

191 *Id.*

Critics have highlighted that developers' lobbying efforts reflect their need for this cheap source of financing.

Congress created the EB-5 visa as an incentive to create direct investment to underserved areas.¹⁹² Instead of serving the underserved, EB-5 funds are going to neighborhoods that could receive funding otherwise. "Increasingly, the money appears to be flowing to the flashiest projects, which the investors often see as safest, EB-5 professionals say."¹⁹³ As Jeanne Calderon and Gary Friedland explained, the original argument for the EB-5 was a "but for" argument, to spur projects that would not otherwise have happened.¹⁹⁴

"A primary concern is that the use of EB-5 financing for high-price condo and office towers sops up the program's capacity and leaves poorer communities out in the cold."¹⁹⁵ Moreover, there may only be ten thousand visas given out annually under the EB-5 program.¹⁹⁶ Thus, many of these visas are used up at the beginning of the year for projects that do not benefit the communities that they are supposed to. The program cannot possibly serve the communities it was designed to help when all of the financing is benefiting wealthy communities.

Jeanne Calderon and Gary Friedland suggest alternative TEA definitions, along with approaches to take to NYC census tracts to avoid gerrymandering.¹⁹⁷ They advocate for following the California methodology, which imposes limits on the aggregation of census tracts.¹⁹⁸ Under this approach, many recent Manhattan developments in TEA areas would not have qualified as TEAs.¹⁹⁹ Some critics of the EB-5 program have argued that California's method for calculating TEAs is "more transparent than most."²⁰⁰ California's standard ensures that distressed communities are actually included in TEAs. "So long as the TEA bundles enough distressed communities to achieve, in aggregate, the necessary unemployment target—150 percent of the national unemployment rate—then it doesn't matter if the project will be built in, say, Beverly Hills."²⁰¹ Implementation of any method, whether it be California's or some other,

192 *See id.*

193 Brown, *supra* note 51

194 *See* Calderon & Friedland, *supra* note 84.

195 Brown, *supra* note 51.

196 *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 18.

197 *See* Calderon & Friedland, *supra* note 84

198 *See id.*

199 *See id.* at 48.

200 Capps, *When Harlem Unemployment Pays for Midtown Luxury* *supra* note 9.

201 *Id.*

could mitigate the kind of gerrymandering that has occurred in New York City.

Why are projects going to West Chelsea and not Harlem? As a whole, the NYC unemployment rate was 4.7% as of November 2017.²⁰² Given that the November 2017 national average in was 4.1%,²⁰³ the rate in NYC clearly is not 150% of the national average.²⁰⁴ There are underserved areas in and around NYC that could use new developments. But, where are these areas? What types of projects would most benefit these communities? What types of projects will create jobs that will provide true economic stimulation to the area? These are important questions that policymakers should be asking.

A bill was introduced in the New Jersey Assembly on January 9, 2018 by Nicholas Chiaravalloti to require the New Jersey Department of Labor and Workforce Development to implement a regulation establishing standards for TEA designation that require a TEA be located entirely within a single ZIP code.²⁰⁵ The justification for this rule is as follows:

In the past, many areas designated as areas of high unemployment have not reflected any geographical or political boundaries. Instead, the areas are a series of census tracts with high unemployment strung together, often chosen to avoid neighboring areas with low unemployment. As a result, investors can receive visas for investments in projects located in relatively affluent areas, based on the unemployment rates of census tracts that are contiguous, but not located near the project site. This bill attempts to correct this problem by requiring the entire area of high unemployment to be located in the same ZIP Code.²⁰⁶

On the U.S. Senate floor in 2016 Senator Leahy said, “I am not suggesting affluent areas should never qualify for EB-5 financing. I am merely suggesting that they should not qualify for the unique incentives that Congress intended for underserved communities that have more trouble attracting capital.”²⁰⁷ The TEA exception was created to incentivize investment in underserved communities.²⁰⁸ There are persuasive

²⁰² See *Labor Statistics for the New York City Region*, N.Y.S. DEP'T OF LABOR, <https://www.labor.ny.gov/stats/nyc> (last visited Feb. 2, 2018).

²⁰³ See Joana Ferreira, *United States Unemployment Rate*, TRADING ECONOMICS (Jan. 5, 2018, 2:21 PM), <https://tradingeconomics.com/united-states/unemployment-rate>.

²⁰⁴ See Targeted Employment Area, *supra* note 41.

²⁰⁵ N.J. 358, 218th Assem. B. (N.J. 2018).

²⁰⁶ *Id.*

²⁰⁷ 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).

²⁰⁸ See *The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter *EB-5 Targeted Employment Areas Hearing*] (statement of Sen. Patrick Leahy).

arguments and justifications for implementing reforms to bring the EB-5 visa back to its original mission of providing economic stimulation to American communities that need it the most.

B. Job Creation and Regulation of Regional Centers

USCIS approves and designates regional centers for participation in the Immigrant Investor Pilot Program.²⁰⁹ USCIS currently administers compliance reviews of regional centers “to enhance EB-5 program integrity and verify information in regional center applications and annual certifications.”²¹⁰ USCIS terminates designations of regional centers which fail to maintain their eligibility under the regulations. In 2017, USCIS took several steps to increase the vetting process for regional centers, regional center principals, and investors. IPO created a Compliance Division to conduct regional center compliance reviews, including the review of all regional centers’ annual certifications.²¹¹ USCIS released new forms to better acquire and verify information from investors and regional centers. In 2017 alone, USCIS terminated over eighty regional center designations. Also in 2017, USCIS began publishing regional center termination notices to increase transparency.

The vague definitions of “direct” and “indirect” jobs make it easier for regional centers to avoid the job creation requirement. Being that indirect jobs may be ancillary to the commercial enterprise, they may include service providers or equipment manufacturers of the enterprise.²¹² Other qualifying jobs may include those that are created in the community in which the project is located, for example, income that is spent by EB-5 project employees.²¹³ Some lawyers have claimed that regional center investors have two ways of proving indirect job creation.²¹⁴ First, based off their capital infusion to the regional center enterprise, such as a construction loan to a developer.²¹⁵ Second, based off hiring a qualifying

²⁰⁹ See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 18.

²¹⁰ *EB-5 Regional Center Compliance Reviews*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-regional-center-compliance-reviews> (last visited, Jan. 17, 2018). The USCIS website offering information on regional center compliance reviews only offers the page in translation to simplified Chinese. See *id.*

²¹¹ *EB-5 Investor Visa Program Hearing*, *supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

²¹² See *Job Creation Requirement: In-Depth*, ZHANG & ASSOCIATES, P.C., <https://www.hooyou.com/eb-5/job.html> (last updated, June 9, 2017).

²¹³ See *id.*

²¹⁴ See *id.*

²¹⁵ See *id.*

worker that can be used to show that this hiring led to a job creation elsewhere.²¹⁶ The above examples demonstrate how far removed the jobs “created” may actually be, but may nonetheless fulfill the job creation requirement.

There is a conflict of interest with regional center principals also being real estate developers. Principals benefit from not having to create extra jobs because they do not have to pay for the hiring and training of new personnel for each job – whether it relates to the construction or management of the project. This raises the question of how many “direct” and cognizable jobs these projects are creating. “In 2013 the Inspector General for the Department of Homeland Security harshly criticized USCIS’s management of the EB-5 program, saying poor record keeping made it impossible to verify claims of jobs created, and rules don’t allow the agency to punish regional centers over instances of fraud.”²¹⁷ Another conflict of interest is that principals may be considered investment advisers, depending on their communications with investors.

C. Securities Reform

Securities regulations exist to protect investors, even though EB-5 visa recipients are not American citizens. “Investors have been defrauded; they have lost money and their immigration benefits have been put in jeopardy.”²¹⁸ There are many cases of investors being defrauded, and it is only if the perpetrator is caught that they can receive any sort of remedy.²¹⁹ For Chinese nationals, there is heightened risk for investors with their capital controls and regulation of outbound real estate investments. Not only are Chinese nationals taking a risk with their investment funds, they are doing it while under the eye of the laws of their home country, where there will be likely repercussions if done without approval.²²⁰

²¹⁶ *See id.*

²¹⁷ Dave Boyer, *Visas for Wealthy Soar Under Obama Despite Fraud Concerns*, WASH. TIMES (Dec. 29, 2014), <https://www.washingtontimes.com/news/2014/dec/29/visa-program-for-rich-investors-raises-concerns-on>.

²¹⁸ 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).

²¹⁹ *See, e.g.*, Press Release, *Chicago Man Allegedly Exploited U.S. Visa Program to Defraud Chinese Investors of \$160 Million in Purported O’Hare Complex*, U.S. DEP’T OF JUSTICE (Aug. 24, 2014), <https://www.justice.gov/usao-ndil/pr/chicago-man-allegedly-exploited-us-visa-program-defraud-chinese-investors-160-million>.

²²⁰ *Andy J. Semotiuk*, EB-5 Investor Immigration Program Faces New Challenges From Kushner’s Involvement, FORBES, <https://www.forbes.com/sites/andyjsemotiuk/2018/02/15/eb-5-investor-immigration-program-faces-new-challenges-from-kushners-involvement/#6d276f26bfbe> (Feb. 15, 2018) (discussing the implications of China’s capital controls on EB-5 investments from Chinese nationals).

USCIS collaborated with the SEC to better administer the EB-5 program. In particular, the SEC provided USCIS with training to help them detect securities violations, including securities fraud, relating to such EB-5 investments.²²¹ The SEC explained that these “coordinated regulatory and education efforts . . . have also been effective in sending a deterrent message to the EB-5 marketplace and increasing awareness of potential risks to investors who participate in this USCIS program.”²²²

Some believe that increased regulation of the EB-5 program and more enforcement actions are on the horizon.²²³ The EB-5 visa has been under the scrutiny of FINRA and the SEC since at least 2015.²²⁴ “What has put the EB-5 program on FINRA’s and the SEC’s radar is that sometimes unregistered professionals have helped the foreign investor place those assets.”²²⁵ Receiving compensation for helping these clients or for referring them to the regional center is considered a securities transaction.²²⁶

Key issues exist with enforcing U.S. securities regulations on EB-5 investments. The SEC does not administer the EB-5 program, so it does not receive or review EB-5 or regional center applications.²²⁷ These applications are reviewed by USCIS, which focuses on immigration, not securities law. The result is that there is little “regulatory transparency” with such non-domestic offers and securities sales.²²⁸ With the increasing collaboration between USCIS and the SEC, the public can have greater confidence that information is being accurately verified. However, thorough vetting cannot happen until USCIS is given that power by Congress.

USCIS is working with the FBI, among several other government agencies, to identify issues with the EB-5 program. Recent subpoenas on Kushner Enterprises by the SEC and the U.S. Attorney’s Office for the Eastern District of New York are evidence of increased involvement by government agencies in looking into the validity and efficacy of EB-5 programs. “In carrying out the Commission’s mandate to investigate and prosecute violations of the federal securities laws, however, the SEC’s Division of Enforcement scrutinizes allegations regarding specific

221 *See id.*

222 *Id.*

223 *See id.*

224 *See* William Mack, *U.S. Securities Regulators Take Notice of EB-5*, EB5 INSIGHTS (April 7, 2015), <https://www.eb5insights.com/2015/04/07/u-s-securities-regulators-take-notice-of-eb-5>.

225 Andrus, *supra* note 140.

226 *Id.*

227 *See EB-5 Regional Center Program Hearing*, *supra* note 103 (statement of Stephen L. Cohen, Assoc. Director, Division of Enforcement, U.S. Securities and Exchange Commission).

228 *Id.*

investments arising out of the EB-5 program.”²²⁹ “EB-5-related inquiries have been a small but growing percentage of the approximately 15,000 tips, complaints, and referrals that the SEC receives each year.”²³⁰

Although SEC enforcements outside of the EB-5 industry may indicate an increased focus on broker-dealer activity, the SEC has not announced enforcement actions related to EB-5 broker-dealer activity.²³¹ Migration agents, who are also sometimes referred to as migration brokers, are arguably acting as brokers when marketing EB-5 programs and regional centers to investors. “Certain participants in EB-5 transactions have been issued subpoenas from the SEC Division of Enforcement requesting information about their fundraising activities, including parties to whom such participants paid commissions.”²³² This note further questions whether migration agents acting as brokers on behalf regional centers are under the SEC’s jurisdiction, and if so, under what circumstances. Despite the lack of enforcement actions thus far, this note argues that there is reason to believe that broker-dealer activity will face increased scrutiny by the SEC, and perhaps FINRA, in the future.

Under the Securities Act, companies offering or selling securities are required to register the offerings with the SEC, unless there is an exemption available.²³³ Under Regulation D, Rule 501(a) holds that accredited investors may be exempt from registration, and the rule outlines who may be an accredited investor.²³⁴ The rule enumerates several categories of persons of which may qualify as an accredited investor.²³⁵ The language of Rule 501(a) creates a direct conflict of interest. If the issuer of the security, such as the regional center or NCE, is charged with deeming a potential investor as an accredited investor, they are likely to benefit from approving the investor. Several regional centers are run by real estate developers. If these regional centers are conducting the securities offerings, they will be biased in their “reasonable belief” that an investor is in fact accredited. This leaves the door open for many unregulated securities offerings, because they are not required to be brought under the scope of the SEC.

Although there is increased collaboration between USCIS and the SEC, the question then is: to what extent does the SEC regulate these

229 *Id.*

230 *Id.*

231 *See* Tishler, *supra* note 141.

232 *Id.*

233 *See* Investor Bulletin: Private Placements Under Regulation D, *supra* note 161

234 *See id.*

235 *See* 17 C.F.R. § 230.501(a) (2012).

offerings, to determine whether the offering is being conducted pursuant to federal securities laws? Rule 501(a) makes it easier to contravene supervision of the SEC, and thus makes an EB-5 investment increasingly risky for investors.

D. Fraud, Abuse and National Security Risks

As previously mentioned, cases of fraud are widespread with the EB-5 program.²³⁶ Take the Jay Peak Vermont Ski Resort, where over \$50 million of investors' money was used by Jay Peak's owner to buy various other properties, instead of its intended use in creating a new commercial enterprise.²³⁷ As a result of this misappropriation, the SEC entered into an \$84 million settlement in winter of 2018.²³⁸ This is only one of many cases of fraud which are all clearly detrimental to the investors and to those expecting to receive or work on the particular project.

Serious concerns were raised about the EB-5 program being used to launder money, execute terrorist activity, and "by foreign governments to conduct economic espionage."²³⁹ A May 2017 fraud assessment conducted by USCIS revealed nineteen cases of confirmed national security concerns related to the EB-5 visa, concerning terrorism, espionage, and information and technology transfers.²⁴⁰ USCIS recently investigated the possibility that the EB-5 program may have been "abused by Iranian operatives to infiltrate the United States."²⁴¹ These issues raise serious concerns about the EB-5 program that Congress will hopefully address in the near future.

²³⁶ See Sustad, *supra* note 84

²³⁷ See Catherine Wilson, *Accused EB-5 Visa Fraud Organizer Reaches \$84 Million SEC Settlement*, DAILY BUS. REV. (Feb. 2, 2018, 4:34 PM), <https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2018/02/02/%E2%80%8Baccused-eb-5-visa-fraud-organizer-reaches-84-million-sec-settlement>.

²³⁸ See *id.*

²³⁹ *EB-5 Investor Visa Program Hearing*, *supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

²⁴⁰ *Id.*

²⁴¹ Brian Ross & Matthew Mosk, *The \$500,000 Green Card: Are Suspected Criminals, Spies and Terrorists Buying Their Way into America?*, ABC NEWS, <https://abcnews.go.com/Nightline/fullpage/500000-green-card-eb-visa-program-28662457> (last visited Aug. 2, 2018).

E. USCIS's Implemented and Proposed Changes to the EB-5 Program

In recognizing its inadequacies, USCIS has taken affirmative actions to better administer the EB-5 program.²⁴² This includes the creation of a Fraud Detection and National Security EB-5 Division.²⁴³ “USCIS has invested in the specialties needed to manage the complex EB-5 caseload by hiring staff with expertise in economics, law, business, finance, securities, and banking to review cases and to enhance consistency, timeliness, and integrity within the program.”²⁴⁴

Through the USCIS Administrative Site Visit Verification Program, employees from the Investor Program Office (IPO) and Fraud Detection and National Security Directorate (FDNS) have visited project sites for the new commercial enterprises and job-creating entities.²⁴⁵ While fifty sites were visited in 2016, 232 sites were visited in 2017.²⁴⁶ USCIS has since hired more officers to conduct EB-5 site visits.²⁴⁷

USCIS entered into a memorandum of understanding with the Financial Crimes Enforcement Network (“FinCEN”) to increase access to FinCEN’s holdings and services.²⁴⁸ FinCEN is a bureau within the U.S. Department of Treasury that works to protect the financial system through combating money laundering and promoting national security.²⁴⁹ This reflects USCIS’s intent to address abuse and national security concerns. In 2018, DHS proposed several changes to the EB-5 program. First, to increase the minimum investment amount. The general investment amount would be raised to \$1.8 million to reflect the current value of the original investment amount, \$1 million, which was established by Congress in 1990.²⁵⁰ DHS calculated this investment amount by accounting for inflation from 1990 to 2015, by using the unadjusted Consumer

²⁴² Letter from Jeh C. Johnson, U.S. Secretary of Homeland Security, to Charles E. Grassley, U.S. Senator, and Patrick J. Leahy, U.S. Senator (April 27, 2015) (on file with U.S. Dep’t of Homeland Security).

²⁴³ *See id.*; *see also Is the Investor Visa Program and Underperforming Asset?: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 9 (2016) [hereinafter *Investor Visa Program Hearing*] (statement of Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services).

²⁴⁴ Letter from Jeh C. Johnson, *supra* note 243.

²⁴⁵ *EB-5 Investor Visa Program Hearing*, *supra* note 6. (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

²⁴⁶ *See id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *About*, FINCEN, <https://www.fincen.gov/what-we-do> (last visited July 31, 2018).

²⁵⁰ *EB-5 Investor Visa Program Hearing*, *supra* note 6 (statement of L. Francis Cissna, Director, U.S. Citizenship and Immigration Service).

Price Index for All Urban Consumers (CPI-U).²⁵¹ DHS proposed the minimum TEA investment be risen to \$1.35 million, which is 75% of the proposed general investment minimum.²⁵² “DHS believes this would help strike a better balance between investments at the standard and reduced thresholds and reduce the degree to which the differential between the thresholds affects investment decisions.”²⁵³ DHS proposed that there are continuous adjustments to the general minimum investment amount.²⁵⁴ Over the past few years, USCIS has taken steps to improve EB-5 administration based on the CPI-U, and similar adjustments to the TEA minimum investment amount to follow that number every five years.

DHS proposed two changes to the TEA designation process, “to ensure consistency in TEA adjudications, ensure that TEA designations more closely adhere to congressional intent for such designations, and to avoid gerrymandering.”²⁵⁵ First, DHS proposed that they would set TEA designations, and that states would no longer have the authority to do so.²⁵⁶ As Director Cissna of USCIS noted, “[t]hese changes would help address inconsistencies between and within states in designating high-unemployment areas and better ensure that the reduced investment threshold for TEAs is reserved for areas experiencing significantly high levels of unemployment, as Congress intended.”²⁵⁷ Second, in determining a TEA, DHS would include within a TEA a project’s census tract or tracts, along with any adjoining census tracts.²⁵⁸ Director Cissna argued that this new designation standard would remove the possibility of gerrymandering areas to include within TEAs areas that do not qualify.²⁵⁹ The intent of this change is to reserve TEA designation for the areas that truly deserve it.

F. Congressional Actions

Congress must authorize USCIS to better manage the EB-5 program. Director Cissna laid out USCIS’s four main requests for authorization from Congress.²⁶⁰ First is the power to regulate regional center principals

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.*

²⁵⁸ *See id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.*

and associated commercial enterprises.²⁶¹ Currently, USCIS does not have the power to prohibit persons with certain criminal, fraud, and securities-related violations from participating in regional centers and associated commercial enterprises.²⁶² In addition, USCIS argues that “regional center principals should be . . . U.S. citizens.”²⁶³ Second, is to authorize USCIS to enhance the reporting and auditing process of regional centers.²⁶⁴ Presently,

USCIS is not . . . authorized to enhance the regional center annual reporting process, including requiring, as appropriate, certification of the regional center’s continued compliance with U.S. securities laws; disclosure of any pending litigation; details of how investor funds were utilized in a project; an accounting of jobs created; and the progress toward completion of the investment project.²⁶⁵

This particular authorization is aligned with my argument that changes are necessary to ensure compliance with U.S. securities laws. This request from USCIS highlights the extreme lack of oversight on the financial aspects of the EB-5 program. Third, Congress should “authoriz[e] USCIS to act quickly on criminal and security concerns” as they arise.²⁶⁶ “Criminal activity or national security concerns are [currently] not statutorily included among the bases [on which USCIS can] terminate a regional center.”²⁶⁷ “Currently, in instances where USCIS has criminal or security concerns about a regional center, USCIS has to either demonstrate these concerns are related to the regional center’s failure to promote economic growth, or demonstrate the regional center’s failure to promote economic growth separately from any criminal or security concerns”²⁶⁸ Lastly, Congress should give USCIS the authority to sanction regional centers when it is appropriate to do so.²⁶⁹ Without these authorizations, especially the authority to sanction, USCIS cannot hold regional centers and their principals accountable, and thus cannot assure transparency nor lawfulness of the EB-5 program.

261 *See id.*

262 *See id.*

263 *Id.*

264 *See id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *See id.*

IV. CONCLUSION

In 2018, immigration issues came to the forefront of American politics more than ever. Every day national headlines reflect widespread concern over U.S. immigration policies. In 2017, there were 832 proposed and 49 enacted bills related to immigration. Of those bills, 39 proposed and 3 enacted bills pertain to the EB-5 visa. As immigration continues to be a nationally-contested issue, particular issues will be identified with our present immigration system – including the administration of the EB-5 visa.

As the EB-5 program has grown, so should its regulation to ensure that its proper purpose is carried out and that the legality and ethics of the program are maintained. The proposed changes by USCIS must be effectuated, and USCIS must continue to regulate and oversee the EB-5 program. Individual agencies, such as USCIS, DHS and the SEC, have already taken steps to remediate some of the issues surrounding the EB-5 program. New EB-5 regulations must be targeted and direct, to safeguard that the program is administered thoroughly and with its original intent. As Senator Leahy said, “powerful corporate interests must not be allowed to derail improvements that can guard against fraud, protect investors, and help our most distressed communities.”²⁷⁰

This note finds persuasive the reasoning of Director Cissna, Senators Leahy and Grassley, former Secretary Johnson, and Jeanne Calderon and Gary Friedland on the reforms. Moreover, this note suggests that Congress should authorize USCIS to further administration of the EB-5, to protect investors and the projects they invest in, and to follow the original intent of EB-5.

²⁷⁰ 162 CONG. REC. S5966 (daily ed. Sept. 22, 2016).