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A DIVE INTO EB-5: A NEED FOR COMPLETE MODERNIZATION OF U.S. INVESTOR-BASED IMMIGRATION PROGRAM OR EB-5 (EMPLOYMENT-BASED IMMIGRATION: FIFTH PREFERENCE)

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I. INTRODUCTION

Congress implemented the Employment-Based Immigration: Fifth Preference EB-5 program (“EB-5” or “EB-5 program”) in 1990 to stimulate the United States economy by making foreign investors eligible for permanent residency in exchange for capital investment and job creation.¹ However, the program has many flaws and has come under scrutiny due to economic, societal, and regulatory changes² since its implementation. The economy has improved dramatically, as unemployment has reached fifty-year lows³, and U.S. Stock Markets are in the vicinity of all-time highs.⁴ Society itself has evolved

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¹ *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/eb-5> (last visited Dec. 1, 2019).

² Tiffanie Darke, *The 1990s: When Technology Upended Our World*, HISTORY, <https://www.history.com/news/90s-technology-changed-culture-internet-cellphones>. (last updated Jan. 31, 2019).

³ As of October, 2019, the unemployment rate was at 3.5 percent; the last time the unemployment rate reached this level was in December of 1969. *The Employment Situation – September 2019*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/news.release/pdf/empisit.pdf> (Oct. 4, 2019).

⁴ *Historical Chart Gallery of Market Indexes*, STOCKCHARTS, <https://stockcharts.com/freecharts/historical/marketindexes.html> (last visited Oct. 9, 2019) (indicating the indexes for Dow Jones Industrial, Dow Jones Utility, Dow Jones Transport, S&P 500, NYSE, Nasdaq). U.S. Stock Markets’ can be used to predict the future of the economy. Brad Comincioli, *The Stock Market As a Leading Indicator: An Application Of Granger Causality*, Illinois Wesleyan – The University Avenue Undergraduate Journal of

dramatically due to rapid technological advancement.⁵ The program is vulnerable in many aspects. These vulnerabilities include attempts to file fraudulent documentation, fraudulent use of funds by project developers, corruption, issues with background checks, document verification, national security concerns, lack of statistical data and information, complications of regulation, lack of oversight, and more.⁶ Even though the program's vulnerabilities are often exploited,⁷ EB-5 has drawn an immense influx of foreign investment and has led to the creation of jobs, the two primary purposes of the program.⁸ Despite its success, the program's vulnerabilities need to be addressed by Congress and the Department of Homeland Security ("DHS").

The United States Citizenship and Immigration Services ("USCIS") is a department of DHS, which administers and enforces the U.S. immigration and naturalization systems.⁹ USCIS established five preference categories for individuals in search of permanent worker visas, ranging from first preference, EB-1, through fifth preference, EB-5,¹⁰ and applicants are required to meet different criteria to be eligible for each visa category.¹¹ Critics of the program

Economics (1996), Vol. 1, Iss. 1, Art. 1, <http://www2.econ.iastate.edu/classes/econ302/vandewetering/grangercausality.htm> (last visited Oct. 9, 2019).

⁵ Darke, *supra* note 2 ("The Untold Story of the 90s": "That period of the '90s from the fall of the Berlin wall to 9/11 was one of extraordinary transformation societally, economically and in our politics." (statement by Florida Senator Marco Rubio).

⁶ See generally Carla N. Argueta & Alison Siskin, *EB-5 Immigrant Investor Visa*, CONG. RESEARCH SERV., R44475, (Apr. 22, 2016), <https://fas.org/sgp/crs/homesec/R44475.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ *About Us*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/aboutus> (last visited Feb. 2, 2019).

¹⁰ *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers> (last visited Dec. 2, 2019).

¹¹ There are a number of ways for foreign nationals to obtain lawful permanent residency (get a Green Card) through employment in the United States. Employment-based (EB) or "preference immigrant" are categorized as first preference through fifth preference. The first preference (EB-1) category is for people with extraordinary ability. This includes foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics. Applicants in this category are required to submit extensive documentation showing sustained national or international acclaim in their field of expertise. These applicants must be continuing work in the U.S. in the field associated with their extraordinary ability. Applicants can file an Immigrant Petition for Alien Worker, Form I-140. The second preference (EB-2) category is for foreign nationals outstanding professors or researchers with at least three years' experience who are recognized internationally. Applicants must be in pursuit of tenure at a university or other institution of higher education. The prospective employer is required to provide a job offer and file a Form I-140. The third preference (EB-3) category is for skilled workers, professionals, or other workers. A prospective employer must file a Form I-140 to

refer to it as “pay-to-play,”¹² a way for wealthy foreigners to use their financial resources as an investment in the U.S. in order to expedite visa acquisition and ultimately obtain citizenship. The EB-5 program draws great scrutiny for this connotation even though there are only 10,000 visas allotted to this preference, typically less than 3 percent of all visas issued to noncitizens of the U.S.¹³ The Department of Homeland Security (“DHS”) took 27 years, from 1992 to 2019, to implement overdue amendments addressing the major issues with the EB-5 program.¹⁴ On July 24, 2019, DHS published rules and regulations modernizing the EB-5 program, which go into effect November 21, 2019. The amendments addressed some of the issues that have been associated with the program.¹⁵ Amending the program required DHS to walk a fine line between overstepping its authority but correcting major issues with the program.

More fully modernizing EB-5 is vital to the future success of the program. Congress should utilize other countries’ investor-based immigration requirements to modernize the program. Modernizing the program should also promote flexibility in the program’s administration to account for inevitable changes in economic conditions. Maintaining an investor-based immigration program is

be approved by USCIS and subsequently the applicant is required to receive labor certification by the Department of Labor. The fourth preference (EB-4) category is for certain special immigrants, these include religious workers, special immigrant juveniles, Afghanistan or Iraq nationals, international broadcasters, or employees of an international organization or family members of employees of international organizations. The fifth preference (EB-5) category is for investors and their family members that meet minimum investment requirements and minimum job creation, as discussed in this note. *See id*; *Green Card for Employment-Based Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/employment-based> (last updated Oct. 19, 2017); *Employment-Based Immigrant Visas*, U.S. DEP’T OF STATE – BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html> (last visited Oct. 10, 2019).

¹² John Vecchione & Anne Weismann, *No More Pay-to-Play Green Cards*, WALL STREET JOURNAL (Sept. 18, 2018, 6:49 PM), <https://www.wsj.com/articles/no-more-pay-to-play-green-cards-1537310970> (indicating just one example).

¹³ For perspective, according to the Report of the Visa Office 2018, the number of Immigrant Visas Issued and Adjustments of Status that occurred were 363,573; employment preference (EB-5) constituted 139,483 or 38.4%; EB-5 visa issuance alone amounted to 9,602 visas or 2.6%. *Table V (Part 3) Immigrant Visas Issued and Adjustments of Status Subject to Numerical Limitations, Fiscal Year 2018*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2018.html> (last visited Dec. 1, 2019).

¹⁴ *See generally* 8 C.F.R. §§ 204, 216 (2019).

¹⁵ Amendments published in 8 C.F.R. § 204, 216 (2019) are addressed in Section VII of this Note.

vital in order to compete with other countries; however, the current vulnerabilities of the program are abused by applicants at a regional center (“RC”s). Changes should incentivize the use of the program while also deterring overuse of the program. Recent amendments to the program are a starting point, but Congress needs to implement a more in-depth modernization of the abused EB-5 program. This modernization should include an increase project oversight, implementing a third investment tier, implementing a net worth requirement, implementing an endorsement requirement, and it should promote increased data, document collection, and financial oversight.

Section II of this Note gives a background of the requirements of the program, including statistical information, definitions, and explanations of important terms, application, and petition requirements, and other important information necessary to understand the EB-5 program. Section III discusses the history of the program and how the program’s administration has shifted since its inception. Section IV discusses the economic and societal changes that have occurred in the U.S. over the past three decades and how these changes have led to an increased desire for EB-5 visas. Section V reviews the various vulnerabilities of the program, including corruption, uneven distribution of visa issuance, lack of oversight, and lack of statistical data. Section VI discusses similar investor-based and similar immigration programs of other countries, aspects of those programs that may be beneficial to utilize in EB-5, and how aspects of these programs can enhance the current EB-5 Program. Section VII discusses DHS’s amendments to the EB-5 program. Section VIII suggests alterations that would improve the function and transparency of EB-5. Section IX comprehensively summarizes this Note.

II. APPLICANT REQUIREMENTS

USCIS administers the EB-5 program, which includes approving investors for the program based on whether they meet several requirements; in achieving approval, the investor and his dependents obtain permanent residency. First, a non-citizen EB-5 applicant must invest in either: a new commercial enterprise established after November 29, 1990, purchase an existing business that is restructured to create a new commercial enterprise, or expand an existing business through investment which increases the number

of employees or net worth by 40-percent.¹⁶ A commercial enterprise is defined as “for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity, which may be publicly or privately owned.”¹⁷ Next, the investment in the new commercial enterprise must create 10 full-time positions for at least 10 qualifying employees; the new commercial enterprise, or a subsidiary, must itself be the employer of the qualifying employees.¹⁸ If the new commercial enterprise is within an RC,¹⁹ then the full-time jobs can be created in one of two ways: by a direct employer-employee relationship between the enterprise and the person it employs, or the full-time job can be created indirectly, outside the enterprise but created as a result of the enterprise.²⁰ A qualifying employee is:

a U.S. citizen, lawful permanent resident, or
other immigrant authorized to work in the United States
including, but not limited to, a conditional resident, a

¹⁶ *About the EB-5 Visa Classification*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa-classification> (last updated Oct. 15, 2019).

¹⁷ *Id.*

¹⁸ *Id.* Independent contractors or the creation of jobs for third party entities do not count in calculating how many jobs were created.

¹⁹ Congress established the Immigrant Investor Pilot Program (“Regional Center Program”) in 1992, Section 620 of Public Law 102-395, 11 U.S.C. 1153 note as amended, which has been renewed and amended numerous times. This program authorized the designation of RCs to promote economic growth. RCs are entities “designated by USCIS that sponsor[] capital investment projects for investment by EB-5 investors.” Kate Kalmykov & James Cormie, *EB-5 Regional Center*, EB-5 INVESTORS, <https://www.eb5investors.com/eb5-basics/eb-5-regional-center>. (last visited Mar. 16, 2019). RCs are public or private economic units in the U.S. that aid in promoting economic growth, particularly designated by USCIS for participation in the Immigrant Investor Program. RCs do this by combining funds from multiple EB-5 investors and essentially pooling these funds to sponsor a specific project. As of October 7, 2019, there are 819 approved RCs; however, approval as a RC does not constitute USCIS endorsement of activities of that RC and does not guarantee compliance with U.S. securities laws, nor does it minimize or eliminate risk for the investor. USCIS provides a list of approved RCs, but also disclaims investment liability on its Immigrant Investor Regional Centers webpage. USCIS further provides that the information available on this webpage is for informational purposes only. See Kate Kalmykov & James Cormie, *EB-5 Regional Center*, EB-5 INVESTORS, <https://www.eb5investors.com/eb5-basics/eb-5-regional-center>. (last visited Mar. 16, 2019); *EB-5 Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers> (last updated Mar. 8, 2019); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993., Pub. L. No. 102-395, § 610, 106 Stat. 1874 (1992).

²⁰ See *About the EB-5 Visa Classification*, *supra* note 16.

temporary resident, an asylee, a refugee, or a person residing in the United States under suspension of deportation. This definition does not include the immigrant investors, their spouses, sons, or daughters; or alien in any nonimmigrant status (such as an H-1B nonimmigrant) or who is not authorized to work in the United States.²¹

Full-time employment means a qualifying employee who works a minimum of 35 hours per week for the new commercial enterprise or indirectly due to the new commercial enterprise with the allowance of a job-sharing arrangement.²² This is met as long as the weekly work hour requirements are met by the job sharing individuals in the same full-time position.²³ Finally, the minimum capital investment amount that must be met is generally one million dollars or five hundred thousand dollars in a rural or high unemployment area for petitions filed before November 21, 2019.²⁴ A high unemployment area is an area that, at the time of investment, has experienced an unemployment rate of at least 150 percent of the national average rate.²⁵ As defined by USCIS, a rural area is a region not within either a metropolitan statistical location as determined by the DHS or the outer boundary of a city or town having a population of 20,000 or more in consonance with the most recent decennial census of the U.S.²⁶ This designation may include towns and cities with populations greater than 20,000 if the town or city is outside a metropolitan statistical area (“MSA”).²⁷ High unemployment areas and rural areas are distinguished together as Target Employment Areas (“TEAs”).²⁸

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* For petitions filed after November 21, 2019, the minimum investment amounts for TEAs and non-TEAs are \$900,000 and \$1.8 million respectively due to implemented amendments that go into effect on that date. Compare 8 C.F.R. §§ 204, 216 (2019) with C.F.R. §§ 204, 216 (2016); see Section VII of this Note.

²⁵ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 17.

²⁶ 8 C.F.R. 206(i) (2019).

²⁷ *Id.*

²⁸ See *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/eb-5> (last visited Dec. 1, 2019).

Applicants²⁹ must take numerous steps to be granted permanent residency in the U.S.³⁰ The application process requires a potential immigrant investor to submit Form I-526, Immigrant Petition by Alien Entrepreneur to USCIS.³¹ The applicant must meet each element of the petition or application by a preponderance of the evidence.³² If the Form I-526 is approved, then either a Form I-485, Application to Register Permanent Residence, or a DS-260, Application for Immigrant Visa and Alien Registration, is to be filed with the U.S. Department of State for an EB-5 visa abroad for the purpose of seeking admission to the U.S.³³ After approval of either of these documents, the EB-5 investor and the investors' derivative family members are granted a two-year conditional permanent residency in the U.S.³⁴ An investor may file "Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, within the 90-day period immediately before the second anniversary of the EB-5 investor's admission to the United States as a conditional permanent resident,"

²⁹ Applicants seek to obtain approval from USCIS to partake in the program; whereas petitioners refer to investors that are seeking to upgrade or change their status from permanent resident (green card) to full citizenship (U.S. citizen). For simplicity, applicants and petitioners will generally be referred to as "applicants," but applicant and petitioner may be used interchangeably. The use of these terms varies depending on where the investor is in the process.

³⁰ See generally *EB-5 Investors*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-investors> (last visited Dec. 1, 2019).

³¹ *Id.* Necessary documentation includes: Form I-526, Immigrant Petition by Alien Entrepreneur, which also requires evidence of new commercial enterprise investment, evidence that the investor is or will be engaged in the management of the new commercial enterprise through either "day-to-day managerial control or through policy formulation", evidence of investment of required capital amount (\$1.8 million or \$900,000 depending on the area), proof that the funds being utilized were "obtained through lawful means" (by any one of the following: "foreign business registration records", relevant enterprise entity, personal, or any other tax returns filed within the last 5 years, evidence identifying any other source of capital, certified copies of judgments or civil/criminal litigation (pending or otherwise) involving money judgments from any court in or outside the United States within the past 15 years), evidence that the new commercial enterprise will create at least 10 full-time positions for qualifying employees or a business plan showing that the nature of the projected size of the new enterprise will result in a need for at least 10 qualifying employees, and evidence that the number of existing employees is or will be maintained for a 2-year period, with photocopies of tax records, Form I-9, Employment Eligibility Verification, or other relevant documents for qualifying employees, along with a business plan in support of the petition. *Id.*

³² *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (Assoc. Comm'r Examinations Oct. 20, 2010).

³³ *EB-5 Investors*, *supra* note 30. The use of these petitions will depend on the individual's immigration status and wherein the process the individual is.

³⁴ *Id.*

which will remove conditions from the lawful permanent resident's status of the investor and investor's dependents.³⁵

III. THE EVOLUTION OF EB-5

The Immigration Act of 1990 established the Immigrant Investor Program, which was expected to bring immediate benefit to the U.S. economy.³⁶ Section 121(b)(5) of the Immigration Act of 1990 created a new immigration category for investor immigrants as a way to inject capital into the U.S. while also creating jobs for U.S. workers.³⁷ If an individual met the statutory requirements of the EB-5 program, the individual would effectively be on a fast track to obtaining a visa by “purchasing” citizenship through investment without having to wait for green card approval that can take from 6 months to 10 years.³⁸ The congressional intent of the program was not to incentivize “purchasing visas,” but to inject capital into the U.S. from non-citizens by creating a program that allowed investment in businesses to create jobs for American workers.³⁹ One scholar believes that:

The requirement of active engagement in the new enterprise is aimed at targeting an entrepreneur's human capital investment contribution; this demonstrates Congress's intent to attract entrepreneurs and not merely investors. The Senate Report also reveals specifically that the purpose of the EB-5 program was to create jobs for U.S. workers and to

³⁵ *Id.*

³⁶ Elliot Fertik, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, U. PA. J. INT'L BUS. L. 649, 650 (1995).

³⁷ See Immigration Act of 1990, 8 U.S.C. § 1101, § 121(b) (1990).

³⁸ See generally P.J. Tobia & Marina Lopes, *How Chinese Millionaires Buy U.S. Citizenship*, PBS NEWSHOUR (May 14, 2015, 11:07 AM), <http://www.pbs.org/newshour/updates/chinese-millionaires-buy-u-s-citizenship/> (providing an Audio Clip); *How Long Does it Take to Get a Green Card?*, VISAGUIDE.WORLD, <https://visaguide.world/us-visa/green-card/processing-time/> (last visited Apr. 6, 2019).

³⁹ Beth MacDonald, *The Immigrant Investor Program: Proposed Solutions to Particular Problems*, 31 LAW & POL'Y INT'L BUS. 403, 409 (2000) (“The main goals of the program are to create new employment for U.S. workers and to infuse new capital into the country and not to provide immigrant visas for wealthy individuals.”(internal quotations omitted).

infuse new capital into the U.S. economy, “not to provide immigrant visas to wealthy individuals.”⁴⁰

Further, Congress’s intent was to incentivize individuals with backgrounds and knowledge of creating or running successful businesses to do so within the U.S. rather than to implicitly allow the benefits of their expertise to be utilized in other areas of the world.⁴¹ The idea of the program initially worked in theory; the early frameworks needed reform in order to ensure the EB-5 program worked effectively.⁴²

In the late 1990s, judicial decisions increased the detail requirements necessary for applicants’ business plans to be approved that are not addressed by the initial statute. Over time, decisions in a number of cases increased regulatory scrutiny in reviewing business plans by potential investors by the Administrative Appeals Office (“AAO”). The AAO reviews USCIS denials of I-526 Petitions, ultimately to review appeals.⁴³ In deciding *In re Ho*,⁴⁴ the Board of Immigration Appeals⁴⁵ determined that a proposed potential business plan by an investor has a heightened level of detailed requirements that must be met in order for the petition to be approved.⁴⁶ *In re Ho* creates a much more detailed requirement for a business plan than is required

⁴⁰ Annie Anjung Lin, *Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors*, 18 CHAP. L. REV. 527, 537-38 (2015).

⁴¹ *EB-5 Immigrant Investor Program*, *supra* note 28.

⁴² MacDonald, *supra* note 39, at 410-13 (explaining the weakness of the 1990 Act).

⁴³ 8 C.F.R. § 204.6 (2019).

⁴⁴ *In re Ho, Petitioner*, 22 I. & N. Dec. 206 (Assoc. Comm’r Examinations 1998) (citing 8 C.F.R. § 204.6(J)(4)(I)).

⁴⁵ *Glossary: Board of Immigration Appeals*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary?topic_id=b#alpha-listing (last visited Apr. 6, 2019). The part of the Executive Office for Immigration Review that is authorized to review most decisions of Immigration Judges and some types of decisions of Department of Homeland Security officers.

⁴⁶ *In re Ho, Petitioner*, 22 I. & N. Dec. 206 (Assoc. Comm’r Examinations 1998) at 213. The business plan must include a verifiable need for 10 or more full-time workers, when the workers will be hired, a description of the business to be run, the businesses objectives, a detailed market analysis that includes names of competitors and their strengths/weaknesses, similarity or difference of the competition’s products and pricing, a description of prospective customers and target market, a description of applicable manufacturing processes, supply sources, materials required, contracts executed and any details included, marketing strategy (pricing, advertising and servicing), organizational structure, sales, cost and income projections and detail the bases as additional verification. *In re Ho, Petitioner*, 22 I. & N. Dec. 206 (Assoc. Comm’r Examinations 1998) at 213.

by the language of the Federal Regulation.⁴⁷ The standard established by *In re Ho* may have been to clarify and establish the criteria for the business plan; nonetheless, it may have overstepped the intended criteria of the § 204.6 *Petitions for Employment Creation Aliens*.⁴⁸

Similarly, the AAO decision in *In re Izummi*⁴⁹ altered the traditional requirements of the statute. In *In re Izummi*, the Board of Immigration Appeals greatly heightened the requirements for promissory notes, which are commonly used in the I-526 Petition to secure investment funds.⁵⁰ Often, investors do not have the required minimum investment amount in liquid assets, so they “execute promissory notes with family members, banks, loan companies, etc.”⁵¹ to show a lawful source of funds.⁵² *In re Izummi* requires an analysis of what a third party will pay for the note, and in addition, requires that all money due on the promissory note be payable within 2 years precluding extensions to be made to the payment schedule.⁵³ This heightened standard was not in the plain language of § 204.6, and it has been argued that this standard makes promissory notes practically unusable for investments that would otherwise qualify for the program.⁵⁴

IV. CHANGING TIMES

In the time leading up to the implementation of EB-5, the U.S. economy in the 1980s showed signs of weakness. From August 1987 to October 1987, the S&P 500 dropped 36%, and from July 1990 to October 1990, it dropped 20%, triggering a recession until March 1991;⁵⁵ the U.S. stock market seemed to be sputtering. This

⁴⁷ *In re Ho, Petitioner*, 22 I. & N. Dec. 206 (Assoc. Comm’r Examinations 1998) at 213 with 8 C.F.R. § 204.6 (2016).

⁴⁸ Emily C. Kendall, *Green Cards As the Ultimate Dividends: Why Improving the U.S. Investment Visa Program Will Encourage the Economic Recovery by Increasing Foreign Investment and Creating Jobs for Americans*, 27 GEO. IMMIGR. L.J. 579, 587 (2013).

⁴⁹ *Matter of Izummi*, 22 I. & N. Dec. 169, 193 (Assoc. Comm’r Examinations 1998).

⁵⁰ *Id.*

⁵¹ 8 C.F.R. § 204.6 (2016) (amended 2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ H. Ronald Klasko, *The Precedent Decisions—Unprecedented Restrictions on Foreign Investors*, in FLORIDA BAR AND INTERNATIONAL LAW SECTION COURSEBOOK 2 (1999), available at <https://www.iv-law.com/wp-content/uploads/2013/09/EB-5-investor.pdf>.

⁵⁵ Caleb Silver, *What to Expect for the Markets in February*, INVESTOPEdia, <https://www.investopedia.com/what-to-expect-for-the-markets-in-february-4586352> (last

incentivized Congress to create a program promoting the generation of capital investment and jobs in the U.S. after the U.S. stock market dipped substantially in October 1987, and again in October 1990.⁵⁶ The program's intent of sparking investment by non-citizens to create jobs for qualified workers that do not have to be U.S. citizens benefits the U.S., especially because the U.S. unemployment rate fluctuated between 5.2 percent in 1989 and 7.5 percent in 1992.⁵⁷ The Program was implemented in 1990 as "Congress established the EB-5 program to stimulate the U.S. economy by giving foreign entrepreneurs the opportunity to permanently live and work in the United States after they have invested in an American commercial enterprise" as a response to the poor economic environment.⁵⁸ Congress estimated that as many as 4,000 foreign investors and their families would utilize the program to seek legal residence in the U.S., bringing with them \$4 billion in investment, ultimately creating 40,000 jobs each year.⁵⁹

During the period following the EB-5 program's inception, the U.S. economy experienced major improvements, including an increase in the gross domestic product ("GDP"), a decrease in unemployment and an increase in U.S. stock markets.⁶⁰ Nevertheless, there is no data suggesting that these improvements in the economy were caused by EB-5.

However, the program's intended bolster to the economy is unnecessary when unemployment is low, currently 3.5 percent as of October 4, 2019, compared to 7.5 percent in 1982,⁶¹ which may have triggered discussions of an immigrant investor or similar programs. Fewer than 10 percent of the total available EB-5 visas were issued

updated Feb. 1, 2019). (referring to a chart provided by Pension Partners named "S&P 500 Bear Markets (defined by 20% Peak to Trough Decline): 1929 – Present").

⁵⁶ *Dow Jones - 100 Year Historical Chart*, MACROTRENDS, <https://www.macrotrends.net/1319/dow-jones-100-year-historical-chart> (last visited Oct. 15, 2019).

⁵⁷ *The Employment Situation – September 2019*, *supra* note 3; *Databases, Tables & Calculators by Subject*, U.S. DEP'T LABOR, https://data.bls.gov/timeseries/LNU04000000?periods=Annual+Data&periods_option=specific_periods&years_option=all_years (last visited Dec. 1, 2019).

⁵⁸ *History of the EB-5 Program*, EB-5 INVESTORS, <https://www.eb5investors.com/eb5-basics/history-of-eb5> (last visited Dec. 1, 2019).

⁵⁹ Christine Ryan, *Too Porous for Protection? Loopholes in EB-5 Investor Visa Oversight Are Cause for National Security Concern*, 16 SAN. DIEGO. INT'L. L.J. 417, 425 (2015) (citations omitted).

⁶⁰ See Lin, *supra* note 40; *EB-5 Immigrant Investor Program*, *supra* note 41; MacDonald, *supra* note 39.

⁶¹ *The Employment Situation – September 2019*, *supra* note 3.

between 1990 and 2010.⁶² This statistic shows that the program was not initially utilized as intended, partially due to the strict requirements and restrictions that were later loosened or eliminated to increase EB-5 use.⁶³ The 2008 financial crisis was another reason for the program's increased use as credit markets tightened and the regulatory environment of financing changed.⁶⁴

There is a large disparity in data distributed by various agencies and groups regarding investment and job creation. According to USCIS, from 1990 to 2014, the EB-5 program has created more than 73,730 jobs and has generated more than \$11.2 billion in investment.⁶⁵ On the other hand, a 2017 report from the U.S. Department of Commerce stated that in fiscal years 2012 and 2013 respectively, the program generated \$5.8 billion in financing and was expected to have created at least 174,000 jobs.⁶⁶ This large disparity in data supports the implementation of a data collection requirement regarding EB-5 investment and job creation, which can show EB-5's success or lack thereof more accurately. There is no data to suggest a direct causal connection between improvements in the economy and the initial legislative intent. It is possible that an improving U.S. economy and the deterioration of the global economy may be the direct cause of the increased desire to use the program after 2010.⁶⁷ Francis James Sensenbrenner, Jr., a Republican, who represents Wisconsin's 5th congressional district in the United States House of Representatives since 1979 stated: "[b]ut even if I don't like to admit it, the world has changed since we created the program in 1990."⁶⁸

⁶² Ryan, *supra* note 59, at 425.

⁶³ *Id.*

⁶⁴ *EB-5 Financing*, EB-5 INVESTORS, <https://www.eb5investors.com/eb5-basics/eb-5-financing> (last visited Oct. 15, 2019).

⁶⁵ *The Department of Homeland Security's Proposed Regulations Reforming the Investor Visa Program*: Hearing Before the Committee on the Judiciary H.R., 115th - 4 Cong. 8 (2017) at 8 (providing statement of the Honorable F. James Sensenbrenner, Wisconsin, Chairman, Subcommittee on Immigration and Border Security, Committee on the Judiciary).

⁶⁶ *Id.* at 10 (providing statement of the Honorable Zoe Lofgren, California, Ranking Member, Subcommittee on Immigration and Border Security, Committee on the Judiciary).

⁶⁷ See generally Ismael Fernandez, *An Economic Perspective on Investing in EB-5 Projects in the U.S.*, EB-5 INVESTORS (Jun. 21, 2018), <https://www.eb5investors.com/magazine/article/economic-perspective-investing-eb5-projects-united-states>.

⁶⁸ *The Department of Homeland Security's Proposed Regulations Reforming the Investor Visa Program*, *supra* note 65, at 8.

V. PITFALLS OF EB-5

The EB-5 program has its fair share of vulnerabilities, as acknowledged by overseeing agencies. In October of 2013, USCIS and the U.S. Securities Exchange Commission (“SEC”) published an investor alert to warn EB-5 investors that RCs have falsely guaranteed a return and misused funds provided by EB-5 Investors.⁶⁹

A. Lack of Applicant Diversity

EB-5 visas are not issued evenly among individuals from various parts of the world but are predominantly issued to individuals from China. With the immigration demographic constantly changing, along with an economy that has grown tremendously since 2008, the number of applications received by USCIS has increased from 1,258 in 2008 to 12,165 in 2017.⁷⁰ Visas are unevenly allocated to citizens of various countries as evidenced in 2014, when 10,692 applications were approved, over 85 percent of which were granted to Chinese investors.⁷¹ This bias potentially lies in the immense population and the strong economy of China, but as the statistics show, a larger number of individuals from China are issued visas than individuals from the rest of the countries in the world combined. An inherent unfairness exists for applicants who cannot obtain a visa due to the allocation of the majority of EB-5 visas to Chinese nationals.

USCIS is not set up to evaluate business plans. USCIS usually processes issuance of visas, not complicated financial instruments and business plans.⁷² According to Peter Alkind, an investigative reporter for Fortune Magazine, USCIS is

really ill-equipped to provide oversight of
whether these business deals are actually creating jobs

⁶⁹ *Investor Alert: Investment Scams Exploit Immigrant Investor Program* (Oct. 1, 2013), U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranhtml.html.

⁷⁰ *Number of Form I-526, Immigrant Petition by Alien Entrepreneur, by Fiscal Year, Quarter, and Case Status 2008-2018*, U.S. CITIZENSHIP & IMMIGR.SERVS., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performance_data_fy2018_qtr2.pdf (last visited Oct. 15, 2019).

⁷¹ Taylor C. Byrley, *Selling Citizenship to the Highest Bidder: A Proposal to Reform the United States EB-5 Investor Visa Program* (citing *FY 2014 EB-5 Statistics By Immigrant Origin Table*), 27 *IND. INTL. & COMP. L. REV.* 79, 96 (2017).

⁷² Tobia & Lopes, *supra* note 38.

. . . [and] actually sound, if the people running them are credible, there's no review of whether the principals who are raising hundreds of millions of dollars actually have any past history of past financial fraud or legal problems.⁷³

This is why other federal agencies need to get more involved with the administration of EB-5 and further documentation must be required of all parties involved to expedite claims if wrongdoing is found.

B. Foreign Corruption

The EB-5 program is vulnerable to corruption in various aspects. One possible explanation for the trend that Chinese investors account for a substantial number of EB-5 investors: compensation to agents who assist in finding wealthy investors. The program could also be sought after by corrupt foreign officials as a way to escape prosecution in their home country. U.S. projects and RCs contract with Chinese placement agents to facilitate fundraising for projects.⁷⁴ This removes the necessity for Chinese investors to communicate directly with U.S. RCs.⁷⁵ Middle-man brokers take this facilitative role to lessen the probability of cultural or communicative problems, but these agent companies are closely regulated by the Chinese government.⁷⁶ The Chinese government's Exit-Entry Bureau requires a bond amounting to approximately \$300,000 from each agent making the agent companies state-managed entities.⁷⁷ Agents have the ability to control which projects obtain Chinese investor capital and how much capital these projects receive.⁷⁸ Agents are compensated extremely well for this service and "in many instances obtain equity interests in the U.S. projects."⁷⁹ USCIS and the SEC require full disclosure of sponsors and ownership structure for entities being created or utilized;

⁷³ *Id.*

⁷⁴ Shae Armstrong, *Secret Payments from U.S. EB-5 Regional Centers to Chinese State-Run EB-5 Agents Violate the Foreign Corrupt Practices Act*, CTR. FOR IMMIGR. STUD. (Jun. 28, 2016), <https://cis.org/Secret-Payments-US-EB5-Regional-Centers-Chinese-StateRun-EB5-Agents-Violate-Foreign-Corrupt>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

however, many projects and RCs fail to disclose and maintain the precise organizational structure of these entities.⁸⁰ Although EB-5 and similar programs were not intended to be a means to safe-haven for corrupt officials, anyone with sufficient funds, intelligent counsel, and minimally sufficient evidence of funds can obtain a U.S. visa through the program. Powerful foreign officials suspected of corruption have utilized the EB-5 program for visas to attempt to escape prosecution in their home country.⁸¹ Wealthy Chinese criminals and corrupt political figures have sought other countries' investor-based immigration programs as a means of fleeing and expediting citizenship to escape the clutches of prosecution.⁸²

There has also been a possible breach of the Foreign Corrupt Practices Act ("FCPA").⁸³ Antibribery provisions of the FCPA make it unlawful for a U.S. person to make payments to foreign officials, principals of foreign officials and employees of government-managed enterprises for the purpose of obtaining business.⁸⁴ American project principals' payments to Chinese governmentally managed agents in the form of monetary compensation or compensation through an ownership interest in a project which appears to violate the FCPA if these acts are considered bribery.⁸⁵ This form of bribery holds penalties of up to \$2 million in fines to RCs. RC directors, officers, stockholders, employees, and agents face possible imprisonment for up to five years or \$100,000 fines for bribery.⁸⁶ Regardless of the exact

⁸⁰ *Id.*

⁸¹ Kyra Gurney, Anjali Tsui, David Iaconangelo, & Selina Cheng, *Suspected of Corruption at Home, Powerful Foreigners Find Refuge in the U.S.*, PROPUBLICA (Dec. 9, 2016, 9 AM), <https://www.propublica.org/article/corrupt-foreign-officials-find-refuge-in-united-states>.

⁸² Andy J. Semotiuk, *EB-5 Fraud Highlights Risks Of Investor Program*, FORBES (Jan 5, 2015, 1:50 PM), <https://www.forbes.com/sites/andyjsemotiuk/2015/01/05/the-eb-5-investor-program-risks-and-rewards/#1fb1dd6d43a5> (referring to an increase of corrupt Chinese officials seeking to utilize the Australian Investor Based Immigration program, similar to the EB-5 program of the United States; there is cause for concern that this problem will also occur, if it has not already, through the utilization of the EB-5 Program).

⁸³ Armstrong, *supra* note 74.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ David North, *EB-5 Gets 2 More Years, and Defrauded Millions Are Recovered in Vt.*, CTR. FOR IMMIGR. STUDS. (Feb. 8, 2018), <https://cis.org/North/EB5-Gets-2-More-Years-and-Defrauded-Millions-Are-Recovered-Vt>. Mr. North, a Fellow of the Center for Immigration Studies, is an internationally recognized authority on immigration policy. His concentration is predominantly on the interaction between immigration and domestic systems, such as education and labor markets. He has examined legal, illegal, and temporary migration, as well as immigration law enforcement and refugee resettlement policies, for a variety of governmental and non-governmental agencies, both in the US and overseas. Prior to his work

penalty, numerous EB-5 investors were effected in the Vermont case.⁸⁷ This could affect projects that petitioners have invested in, either directly or indirectly if individuals involved in EB-5 investments get implicated in the commission of illegal acts related to EB-5.

C. RC Issues

There is a major concern over the inappropriate practices of RCs. RCs have also been accused of “economic gerrymandering” by the Government Accountability Office (“GAO”), academics, and a wide variety of news sources.⁸⁸ According to Gary Friedland, a scholar-in-residence at New York University Stern School of Business, “[RCs are] able to artificially expand the area for which the high unemployment rate is to be tested to include remote census tracts with exceptionally high unemployment rates that do not reflect the economic condition of the tract in which the project is located.”⁸⁹ This practice is visible because many of the EB-5 investment funds are allocated to projects in some of America’s richest areas.⁹⁰ RCs aggregate census tracts across a large distance, even across state lines

at the Center, Mr. North conducted two studies for the Alfred P. Sloan Foundation on what happens to foreign-born students in science and engineering when they attend American graduate schools. He also conducted a year-long evaluation of the impact of the 1986 Immigration Reform and Control Act for the Ford Foundation. In earlier years he served in the U.S. Labor Department as the Assistant for Farm Labor to the U.S. Secretary of Labor, and as the executive director of LBJ’s Cabinet Committee on Mexican-American Affairs. Both assignments involved extensive contact with U.S. immigration policy. His work overseas included research for the German Marshall Fund of the U.S. in Europe and Canada; diaspora research for a post-Duvalier government of Haiti, and immigrant investor program research for Australia. Mr. North has testified frequently before the Senate and the House as well as before every federal immigration policy commission since the 1970’s. His analysis and commentary have appeared on CNN, in the Economist, the Melbourne Age (Aus.), the Auckland Star (NZ), and the International Labour Organization. Mr. North has been a guest on national broadcasts and cable news programs, from Fox News to NPR. Mr. North received a Fulbright Scholarship to attend Victoria University in Wellington, New Zealand, where he earned a MA (NZ). He is a magna cum laude graduate from Princeton University. *David North*, CTR. FOR IMMIGR. STUDS., <https://cis.org/North> (last visited Oct. 15, 2019).

⁸⁶ *Supra* note 45, at 7 (referring to a statement made by the Honorable John Conyers, Jr., Michigan, Ranking Member, Committee on the Judiciary).

⁸⁷ *EB-5 Gets 2 More Years, and Defrauded Millions Are Recovered in Vt.*, *supra* note 86.

⁸⁸ *Supra* note 65, at 7 (referring to a statement made by the Honorable John Conyers, Jr., Michigan, Ranking Member, Committee on the Judiciary).

⁸⁹ Miriam Valverde, *Mostly True: Leahy Claim on Immigrant Investment Through EB-5 Program*, POLITIFACT (Mar. 21, 2017, 5:34 PM), <https://www.politifact.com/truth-o-meter/statements/2017/mar/21/patrick-leahy/leahy-eb-5-visas/>.

⁹⁰ *Id.*

in order to manipulate areas into being coined TEAs or economically distressed areas.⁹¹ In an attempt to put an end to this “economic gerrymandering” of TEAs by state-run RCs, DHS issued an amendment removing power from the states to determine what projects fit into TEA designation and issued this power to DHS.

A massive EB-5 scandal struck Vermont in 2018 at the hands of Ariel Quiros and Bill Stenger, project developers for the Jay Peak Resorts projects.⁹² Quiros and Stenger were accused of misusing nearly \$200 million of nearly 800 EB-5 investor funds in a Ponzi scheme for a series of developments around the Jay Peak area of Vermont.⁹³ Quiros, a Miami businessman, agreed to settle with EB-5 investors for close to \$84 million.⁹⁴ Also entangled in the scandal are Raymond James Financial and Citibank.⁹⁵ Raymond James Financial is the brokerage firm that placed the funds into Quiros’ margin accounts and Citibank was also implicated in the scheme.⁹⁶ Citibank agreed to settle with EB-5 investors for more than \$13.3 million and Raymond James Financial agreed to settle claims against it for \$150 million.⁹⁷ As a matter of business judgment, settlement was entered into voluntarily by Quiros, Stenger, Raymond James, and Citibank⁹⁸ which did not involve an admission of culpability implying that investors who had lost large sums of money had a strong claims against those involved in the scheme.⁹⁹ This scheme occurred at the hands of a Vermont run RC and investors funds were luckily recovered.¹⁰⁰ There are questions still surrounding the scheme regarding the states

⁹¹ *Id.*

⁹² North, *supra* note 86.

⁹³ Anne Galloway, *EB-5 Chief was Repeatedly Shut Down in Efforts to Audit Jay Peak*, VTDIGGER (Sept. 20, 2018), <https://vtdigger.org/2018/09/20/eb-5-chief-repeatedly-shut-efforts-audit-jay-peak/>.

⁹⁴ See North, *supra* note 86; Galloway, *supra* note 94. 4

⁹⁵ North, *supra* note 86.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* According to North, these funds were obtained by EB-5 investors “through settlements, not judgments laid down by someone in a black robe. In each case the party coughing up the millions the party coughing up the millions did so as a considered business judgment, thinking that the terminations of the court actions rather than continuing to fight the cases would be to their interest.” *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

mismanagement of the RC overseeing the projects, based on what the state should have done and intentionally did not do.¹⁰¹

Contrast the Vermont scandal with a complete loss of funds without recovery through an RC run by South Dakota.¹⁰² A receiver of funds could not be located, no financial institutions named, and the funds remain missing, wiping out the complete investment of EB-5 investors.¹⁰³ There are substantial differences in the handling of the Vermont and South Dakota cases by each state and by the SEC.¹⁰⁴ Remarkably, DHS did not head the problem but decided to oust the two state governments in operating the RCs as middleman agencies.¹⁰⁵ In light of these extreme examples, changes to the EB-5 program continue to be ignored amidst extension of the program without any significant alterations beyond the recent amendments.¹⁰⁶

D. Background Verification and Processing

Problems exist in the background verification process of EB-5 applicants. In one case, the Mexican government sought the arrest of a former Mexican Government Official, Hector Hernandez Javier Villarreal, for embezzling millions of dollars in government funds.¹⁰⁷ Villarreal, the former Secretary Executive of the Tax Administration Service of Coahuila, Mexico, obtained a U.S. visa through EB-5 after posting a \$1 million bond.¹⁰⁸ Texas authorities later arrested Villarreal after a routine traffic stop, leading to the search of his vehicle in which authorities discovered a shotgun and \$67,000 in cash in his vehicle.¹⁰⁹ He obtained an EB-5 visa almost immediately for offering to invest \$500,000 in the U.S.¹¹⁰ This serves as an example of a corrupt high-profile foreign government official who utilized EB-5 by investing

¹⁰¹ *Ex-Jay Peak Owner to Pay in EB-5 Visa Fraud Case* (July 12, 2018 5:32 PM), ASSOCIATED PRESS – BURLINGTON FREE PRESS, <https://www.burlingtonfreepress.com/story/news/local/2018/07/12/jay-peak-eb5-visa-fraud-case-vermont-immigrant-investor-lawsuit-settled/36824023/>.

¹⁰² North, *supra* note 86.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *The Department of Homeland Security's Proposed Regulations Reforming the Investor Visa Program*, *supra* note 65, at 38-39 (statement of Louie Gohmert of Texas).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

illegally obtained funds to escape justice in his home country, even though he was wanted by a country he embezzled large amounts of money from.

More recently, cases involving statutory interpretation of “capital” in 8 C.F.R. § 204.6 and the 10,000-visa cap have stirred discussion regarding EB-5. In *Huashan Zhang v. United States Citizenship & Immigration Services*,¹¹¹ the court determined that “capital” encompassed cash loan proceeds that can be utilized by an investor-alien as an investment.¹¹² It is unclear how this decision will impact EB-5, but if this decision concretely allows the use of loan proceeds as “capital” for investment, 8 C.F.R. § 204.6 could possibly be amended to preclude use of loan proceeds as “capital.”¹¹³ This could open the doors to applicants who do not personally own the funds but specifically take out a loan big enough to meet the minimum investment requirement which would greatly expand access to the EB-5 program to anyone who can obtain a loan. While this is viewed by some as an expansion of EB-5, in *Feng Wang v. Pompeo*,¹¹⁴ USCIS was successful in a suit by Chinese investors attempting to apply visa caps only to principal investors rather than to principal investors and their dependents.¹¹⁵ David North believes that if USCIS had lost, the EB-5 program would have more than doubled in size.¹¹⁶

VI. COMPARABLE PROGRAMS

Utilizing requirements, methodologies, and ideas of other countries’ investor-based and similar immigration programs is one way to ensure that the program is competitive and efficient but not exclusive. A number of countries around the world also maintain their own investor-based visa and immigration programs which are similar to the U.S. EB-5 program. The goal of these programs is ultimately the same as the EB-5 Program: increase foreign investment directly into the country by incentivizing visas and citizenship through

¹¹¹ *Huashan Zhang v. United States Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32 (D.D.C. 2018). Zhang et al. appealed this decision on January 29, 2019, to the US Court of Appeals for the D.C. Circuit and are awaiting decision (as of Oct. 15, 2019).

¹¹² *See generally id.*

¹¹³ 8 C.F.R. § 204.6 (2019).

¹¹⁴ *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13 (D.D.C. 2018).

¹¹⁵ *See generally id.*

¹¹⁶ David North, *USCIS Wins Big EB-5 Court Case* (Dec. 11, 2018), CTR. FOR IMMIGR. STUDS., <https://cis.org/North/USCIS-Wins-Big-EB5-Court-Case>.

considerable investment.¹¹⁷ The requirements of each program and the residency status granted to visa holders under each of these programs vary by country; some countries only grant conditional residency while others grant full permanent residency.¹¹⁸ Utilizing specifications of other countries' investor-based immigration programs could improve the current EB-5 program, making it more competitive with other countries' programs. Some programs offer "citizenship-by-investment," issuing investors passports directly due to investment within a given period of time and others offer "residency-by-investment," which initially offers investors residency that allows future application for citizenship or a passport after living in a given country for a set time period, usually a number of years.¹¹⁹ The type of investment plays a role in the amount required to obtain the visa or citizenship in many of these programs.¹²⁰ Other countries' investor-based immigration programs may not be as sought after as the EB-5 Program due to what the U.S. offers individuals: the world's largest economy and a fast track to citizenship in a country where it could otherwise take up to several years to become a naturalized citizen, depending on the nature and circumstances of an individual applicant.¹²¹

A. UK Similar Programs and Immigrant Investor Programs

The United Kingdom maintains an investor-based immigration program that requires a greater investment, imposes constraints on residency, and places limitations on the type of investment as compared to EB-5.¹²² The Tier 1 Investor Visa Program in the United

¹¹⁷ *International Immigrant Investor Programs*, EB5 INVESTORS, <https://www.eb5investors.com/eb5-basics/international-immigrant-investor-programs> (last visited Oct. 15, 2019).

¹¹⁸ *Id.*

¹¹⁹ See *Quick Comparison of Countries offering CBI/RBI schemes*, BEST CITIZENS (Nov. 30, 2018), <https://best-citizenships.com/2018/11/30/quick-countries-comparison-for-cbi-rbi-schemes/> (last visited Dec. 1, 2019).

¹²⁰ *Id.* (listing countries that have or had investor-based visa and immigration programs with a short summary comparing the program of each country.)

¹²¹ *Historical National Average Processing Time for All USCIS Office*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/historic-pt> (last visited Oct. 15, 2019).

¹²² *Compare Investor Visa (Tier 1)*, GOV.UK, <https://www.gov.uk/tier-1-investor> (last visited Oct. 4, 2018) with *Permanent Workers*, *supra* note 10.

Kingdom requires a minimum investment of £2 million, plus fees, for a maximum visa lasting three years and four months with the option to apply to extend the visa for another two years.¹²³ To extend the visa, an individual must have over £2 million under his control in the UK, “have invested those funds in share capital or loan capital in active UK companies, and invested this within 3 months of their ‘investor start date,’” an investor may extend if the investor invested in UK government bonds before March 29, 2019.¹²⁴ Extensions are typically granted as long as these requirements are met and, after the extension term is finished, a visa holder can apply for Indefinite Leave to Remain, also known as permanent residency.¹²⁵ The Tier 1 Investor Visa Program also allows an investor and his family to obtain permanent residency after two years if the individual invests a minimum of £10 million over three years or three years if the individual invests a minimum of £5 million.¹²⁶ Generally, the investment options are relatively restricted to shares in UK companies.¹²⁷ These funds are typically held for two to three years, disallowing investors from growth of capital because any bonds or shares sold must be replaced with other investments of the same kind until an individual gains permanent status or leaves the UK.¹²⁸ With changes being made to the UK immigration rules in the midst of Brexit, as of March 29, 2019, the individual must have held the funds for 2 years prior to investment in the UK; investors will no longer be able to invest in UK Government debt and bonds after of March 29, 2019.¹²⁹

Implementation of some UK Tier 1 Investor Program requirements may be beneficial to EB-5. The capital requirement amounts are far greater than the minimum requirements of the EB-5 program yet still incentivize successful investments and permanent residencies,¹³⁰ making it more difficult for investors to obtain a visa.

¹²³ *Investor Visa (Tier 1)*, *supra* note 122.

¹²⁴ *Investor Visa (Tier 1)- Extend Your Visa*, GOV.UK, <https://www.gov.uk/tier-1-investor/extend-your-visa> (last visited Oct. 25, 2019).

¹²⁵ *Tier 1 (Investor) Visa*, UK VISA BUREAU, , <http://www.visabureau.com/uk/investor-visa.aspx> (last visited Oct. 15, 2019).

¹²⁶ *Investor Visa (Tier 1)*, *supra* note 123.

¹²⁷ *Id.*

¹²⁸ Carter Thomas, *Tier 1 Investor vs Tier 1 Entrepreneur* (Sept. 13, 2016), <https://www.carterthomas.co.uk/2016/09/13/tier-1-investor-vs-tier-1-entrepreneur/>.

¹²⁹ Daniel Waldron & Sanwar Ali, *Tier 1 Investor Visa Changes & Tier 1 Entrepreneur End 29 03* (Mar. 12, 2019, 2:21 AM), WORKPERMIT.COM, <https://workpermit.com/news/tier-1-investor-visa-changes-tier-1-entrepreneur-end-29-03-20190312>.

¹³⁰ *Compare Investor Visa (Tier 1)*, *supra* note 123 *with Permanent Workers*, *supra* note 10.

The Tier 1 Investor Visa program places restrictions on individuals which prevent them from investing in property, management of property, and development of property,¹³¹ forcing more direct investment in businesses rather than strictly construction and development projects, unlike EB-5. Further, this limitation is established to ensure that the Tier 1 Investor Immigration route promotes competitiveness between businesses in the UK, but does not limit them from investment in companies that predominantly partake in the construction of real estate.¹³²

The UK also formerly offered the Tier 1 Entrepreneur Visa¹³³, which is no longer available to applicants in the UK.¹³⁴ The Innovator visa and the Start-up visa have effectively replaced the Tier 1 Entrepreneur Visa.¹³⁵ These visas contain some overlapping characteristics with EB-5. The Start-up category is open to foreigners who desire to establish a business that is determined by an endorsing body to be innovative, viable, and scalable in the UK for the first time.¹³⁶ This category grants 2 year temporary residency to an approved applicant but is not a pathway to settlement in the UK.¹³⁷

¹³¹ *Id.* Real estate investment a considerable source of investment opportunity for EB-5 investors, whereas this restriction on investment in the United Kingdom limits the uses of the program.

¹³² *Id.*

¹³³ *Entrepreneur Visa (Tier 1)*, GOV.UK, <https://www.gov.uk/tier-1-entrepreneur/print> (last visited Oct. 14, 2019).

¹³⁴ Thomas, *supra* note 128.

¹³⁵ Caroline Nokes, *Statement of Changes in Immigration Rules: Written statement-HCWS1159* (Dec. 6, 2018), [WWW.PARLIAMENT.UK](http://www.parliament.uk), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-06/HCWS1159/>. The UK Tier 1 Entrepreneur program is no longer available for new applicants, but individuals who want to setup or run a business in the UK may apply to do so under through the Innovator visa program or the Start-up visa. *Id.*

¹³⁶ *Immigration Rules Appendix W: Immigration Rules for Workers (PARTW1: AVAILABLE CATEGORIES)*, GOV.UK, <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-w-immigration-rules-for-workers>. (last updated Oct. 31, 2019).

¹³⁷ This program allows a noncitizen to invest in a business in the UK, but must develop, join, or take over a UK based business. The individual must be a director, self-employed person, or actively involved in running the business. Further investment and expansion of the business over time are prerequisites to establishing permanent citizenship if that is the ultimate goal of the individual. Business plans must be submitted and this route requires more documentation backing the individual and investment plan than is required for the Tier 1 Investor program. One benefit of the Entrepreneur program over the Investor program is that there is greater potential to make higher returns. However, this comes with the need for the entrepreneur to demonstrate the ability to understand the English language and life in the UK, “genuine entrepreneur” possessing skills, and necessary experience to develop a business in

The pathway to obtain a settlement in the UK, even for Start-up visa holders, is through the Innovator visa.¹³⁸ The Innovator visa is for more experienced business owners who seek to establish a business in the UK.¹³⁹

In order to obtain an Innovator visa, an applicant must meet four criteria. The applicant must want to run or establish a business in the UK, the applicant must be from outside countries in the European Economic Area (“EEA”) and Switzerland,¹⁴⁰ the applicant must meet the eligibility requirements.¹⁴¹ Eligibility requirements include an applicant receiving an endorsement letter that the prospective business is innovative, viable, and scalable,¹⁴² the applicant must meet the English language requirement, the applicant must be at least 18 years

the UK. Carter Thomas, *supra* note 128. The investment requirement varies depending on the source of the funds. A £50,000 investment must be from “a UK entrepreneurial seed funding competition endorsed by the Department for International Trade, a UK government department making funds available for the purpose of setting up or expanding a UK business, or a venture capital firm registered with the Financial Conduct Authority.” HS Immigration Consultants, *Tier 1 (Entrepreneur) visa*, <https://www.hsic.co.uk/services/points-based-system/tier-1-entrepreneur-visa/> (last visited Dec. 2, 2019). Whereas a £200,000 investment must be “your own, made available to you by other people (‘third parties’), such as a spouse, partner or investor, or in a joint account with your spouse or partner but only if they are not applying for a Tier 1 (Entrepreneur) visa.” Breytenbachs Immigration Consultants, *Tier 1 Entrepreneur*, <https://bic-immigration.com/uk-immigration/tier-1-entrepreneur/> (last visited Dec. 2, 2019). Both investment amounts apply if a previous investment has been made within the past 12 months of application. The Tier 1 Entrepreneur Program had similar aspects to a combination of various aspects of U.S. Employment Based Immigration programs, EB-1 through EB-5. *Compare Permanent Workers*, *supra* note 10 with Thomas, *supra* note 128; *Tier 1 Investor Visa UK*, VISAGUIDE.WORLD, <https://visaguide.world/europe/uk-visa/business/tier-1-investor/> (last updated Aug. 14, 2019); *Entrepreneur Visa (Tier 1)*, *supra* note 133.

¹³⁸ Applicants may progress from the Start-up visa to the Innovator visa if the applicant’s business receives endorsement from an endorsing body.

¹³⁹ *Immigration Rules Appendix W: PART W1 AVAILABLE CATEGORIES*, *supra* note 136.

¹⁴⁰ EEA countries include countries in the European Union (Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK), and countries that are in the area but not necessarily part of the European Union (Iceland, Liechtenstein, and Norway). *See Countries in the EU and EEA*, GOV.UK, <https://www.gov.uk/eu-eea>. (last visited Oct. 15, 2019). The UK plans on leaving the EU, but it is presumed that this requirement is subject to minimal alteration in accordance with Brexit. *Id.*

¹⁴¹ *Innovator Visa*, GOV.UK, <https://www.gov.uk/innovator-visa/eligibility> (last visited Oct. 15, 2019).

¹⁴² For a list of approved bodies that may issue endorsement letters, see *Guidance: Innovator Endorsing Bodies*, GOV.UK, <https://www.gov.uk/government/publications/endorsing-bodies-innovator/innovator-endorsing-bodies> (last updated Oct. 25, 2019).

of age, the applicant must be able to prove enough personal funds to support themselves (at least £945 in the applicant's bank account, not including investment funds, for 90 consecutive days before submitting the application), and evidence of investment funds from any source amounting to at least £50,000.¹⁴³ An applicant will receive a 3 year temporary residence in the UK and a visa holder may apply for a 3 year extension of the visa with no limit on the number of extensions but must also submit an endorsement letter evidencing that the business is active and legally doing business.¹⁴⁴ If an applicant wants to settle in the UK, the applicant must apply to settle and must also receive an endorsement letter from an approved body showing: the business is actively doing business.¹⁴⁵ The applicant must also show the venture meets any two of the following requirements:

- (i) At least £50,000 has been invested into the business and actively spent furthering the business plan assessed in the applicant's previous endorsement.
- (ii) The number of the business's customers has at least doubled within the most recent 3 years and is currently higher than the mean number of customers for other UK businesses offering comparable main products or services.
- (iii) The business has engaged in significant research and development activity and has applied for intellectual property protection in the UK.
- (iv) The business has generated a minimum annual gross revenue of £1 million in the last full year covered by its accounts.
- (v) The business is generating a minimum

¹⁴³ *INNOVATOR Immigration Rules Appendix W: PART W6 SPECIFIC REQUIREMENTS – INNOVATOR*, supra note 137.

¹⁴⁴ GOV.UK, *Innovator visa – Switch to this visa*, <https://www.gov.uk/innovator-visa/switch-to-this-visa>. (last visited Oct. 14, 2019); see generally *Immigration Rules Appendix W: PART W1 AVAILABLE CATEGORIES*, supra note 136. See supra note 45 for more detail.

¹⁴⁵ If the applicant is relying on endorsement under the same business criteria, the endorsement letter must confirm all of the following: (a) The applicant has shown significant achievements, judged against the business plan assessed in their previous endorsement. (b) The applicant's business is registered with Companies House and the applicant is listed as a director or member of that business. (c) The business is active and trading. (d) The business appears to be sustainable for at least the following 12 months, based on its assets and expected income, weighed against its current and planned expenses. (e) The applicant has demonstrated an active key role in the day-to-day management and development of the business. (f) The endorsing body is reasonably satisfied that the applicant will spend their entire working time in the UK on continuing to develop business ventures. *Immigration Rules Appendix W: PART W1 AVAILABLE CATEGORIES*, supra note 137.

annual gross revenue of £500,000 in the last full year covered by its accounts, with at least £100,000 from exporting overseas. (vi) The business has created the equivalent of at least 10 full-time jobs for resident workers. (vii) The business has created the equivalent of at least 5 full-time jobs for resident workers, which have an average salary of at least £25,000 a year (gross pay, excluding any expenses).¹⁴⁶

For Innovator visa holders who want to utilize the criteria for creating jobs, the jobs must exist for the previous 12 months and be in accordance with UK minimum wage legislation, and a full-time job must be for at least 30 hours a week.¹⁴⁷ However, an applicant cannot qualify by establishing the same criterion twice.¹⁴⁸ In cases where multiple applicants are granted temporary residence through the creation of the same business, each applicant is obligated to demonstrate each criterion on their own.¹⁴⁹

These two UK visa categories require an applicant to meet more conditions subjecting the applicant to more scrutiny by the Minister of State for Immigration than an EB-5 applicant is subject to by USCIS.¹⁵⁰ Unlike RCs, the use of the endorsement bodies is due to “the principle that it is [the endorsing bodies], rather than the Home Office, who are best placed to assess and identify innovative business ideas and talent.”¹⁵¹ Requiring endorsement of the business plan before an applicant is approved, when the applicant seeks reapproval, and when the applicant seeks permanent settlement is an efficient way to ensure that the business plan is being followed. Also, the endorsement requirement allows a competent third party to assess the success of the business, while also ratifying the business’s actions. This ratification would allow endorsing parties to be held accountable

¹⁴⁶ *Immigration Rules Appendix W: PART W6.: SPECIFIC REQUIREMENTS – INNOVATOR*, *supra* note 137.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* An investment of £100,000 (or two £50,000 investments) will not be sufficient and requires one of the other criterion to be established in order for settlement to be granted. *Id.*

¹⁴⁹ *Immigration Rules Appendix W: PART W6.: SPECIFIC REQUIREMENTS – INNOVATOR*, *supra* note 137.

¹⁵⁰ *Compare Immigration Rules Appendix W: PART W6.: SPECIFIC REQUIREMENTS – INNOVATOR*, *supra* note 137 with *Permanent Workers*, *supra* note 10.

¹⁵¹ *Start-Up and Innovator Visas: Guidance for Endorsing Bodies*, GOV.UK – HOME OFFICE at 2 (version 11/2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834100/Endorsing_body_guidance_V._10-19.pdf.

for ventures that the party endorses. The lower requisite investment amount of £50,000 could draw more interest from foreign individuals who do not have funds to meet the higher required investments of EB-5.

B. Canada's Past and Present Immigrant Investor Programs

Canada's Federal Immigrant Investor Program, terminated in 2014, contained aspects potentially useful to revamp the EB-5 Program. The Canadian Federal Immigrant Investor Program required an investor to have a required minimum net worth of \$1.6 million Canadian dollars ("CAD").¹⁵² The program was contingent on an investment of \$800,000 CAD with the Canadian government, which is reimbursed to the investor without interest after the 5-year visa period.¹⁵³ Also, rather than forcing applicants to apply for permanent residency after the initial term of the program, an investor would receive full permanent residency status once the program is complete.¹⁵⁴ This program was extremely sought after due to a 700 applicant cap which led to a 12-year wait period for new applications, which led to a closure to new applicants in 2012 and full termination in 2014.¹⁵⁵ A Government of Canada News Article titled "Terminating the Federal Immigrant Investor and Entrepreneur Programs" cited a change in the global economy, free flow of investments across borders, low-interest rates, global investor based immigration competition, lack of long-term positive impact on the economy and employment, low language ability of immigrant investors, and limitations on the government's use of investor capital.¹⁵⁶

¹⁵² *Investor Visa*, CANADIANVISA.ORG, <https://canadianvisa.org/canada-immigration/business/investor-visa> (last visited Dec. 1, 2019).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *International Immigrant Investor Programs*, *supra* note 117; *Immigrant Investor Program*, GOV'T OF CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/investors.html> (last visited October 15, 2019) (citing GOVERNMENT OF CANADA, *ARCHIVED – Notice – Termination of backlog applications in the federal Immigrant Investor Program and federal Entrepreneur Program* (referencing link in "Bill C-31 became law – archived" text), <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-termination-backlog-applications-federal-immigrant-investor-program-federal-entrepreneur-program.html> (last visited October 6, 2018)).

¹⁵⁶ *Terminating the Federal Immigrant Investor and Entrepreneur Programs – Backgrounder*, GOV'T OF CANADA,

Canada has since replaced the Canada Immigrant Investor Program with the Immigrant Investor Venture Capital (“IIVC”) Pilot Program.¹⁵⁷ To be eligible for the program, candidates must: possess a legally acquired net worth of \$10 million, must invest \$2 million in the IIVC Fund for 15 years without a guaranteed return.¹⁵⁸ The net worth requirement excludes individuals who obtain a \$10 million net worth through inheritance.¹⁵⁹ The value of an investor's primary residence does not apply to the net worth calculation.¹⁶⁰ An assessment of the candidates' net worth will be done to ensure the net worth was acquired through legal means.¹⁶¹ The investment of \$2 million must be committed for 15 years and gains or losses will depend on the IIVC Fund's performance.¹⁶² Further, a candidate must prove to be proficient in speaking, writing, reading and listening English or French by meeting the Canadian Language Benchmark.¹⁶³ Finally, candidates must have completed a “Canadian post-secondary degree, diploma or certificate of at least one year or a foreign equivalent, validated by an Education Credential Assessment.”¹⁶⁴

Implementation of numerous requirements utilized by the terminated Canada Federal Immigrant Investor Program and IIVC program may be beneficial to EB-5. A net worth requirement increases the likelihood that an investor will invest more than just the minimum required investment amount. Government retention of funds, either through investment fund or otherwise, ensures that businesses and project developers do not utilize investor funds in risky and illegal ways. Automatic permanent residency keeps investors from continually having to follow through with USCIS to attain full residency which was likely the investor's goal in utilizing EB-5 in the first place. Implementation of a language proficiency requirement may

<https://www.canada.ca/en/news/archive/2014/02/terminating-federal-immigrant-investor-entrepreneur-programs.html> (last modified Feb. 11, 2014).

¹⁵⁷ *Immigrant Investor Venture Capital (IIVC) Program*, IMMIGRATION.CA, <https://www.immigration.ca/immigrant-investor-venture-capital-iivc-program> (last visited Oct. 15, 2019).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Due diligence assessments of net worth must be completed by BDO USA, LLP, Deloitte Forensic Inc., EY, KPMG LLP, PricewaterhouseCoopers (PwC) LLP, or Raymond Chabot Grant Thornton Consulting Inc. *See id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

benefit applicants in assimilating to their new communities by making communication easier between the immigrant with settled citizens.

C. Australia's Immigrant Investor Program

Australia's Investor visa—Subclass 891 allows an investor to stay in Australia indefinitely and apply for Australian citizenship.¹⁶⁵ To obtain an Investor visa, an investor must hold a Subclass 162 – Investor (provisional) visa.¹⁶⁶ The requirements for the Subclass 162 visa include ability to invest \$1.5 million Australian Dollar (“AUD”) into a particular investment within a reasonable time, notifying the appropriate state, and must have a vocational level of English, either hold in at least one of the prior 5 years of investment worth of \$1.5 million AUD or hold a ten percent share and direct involvement in a particular business, prove successful business experience, no participation in improper business activities, prove a net assets of \$2.25 million AUD, and meet legislative health requirements, be of good character.¹⁶⁷ After being approved for the Subclass 162 visa, an applicant must hold a designated \$1.5 million AUD for four years and have lived in Australia for two of the past for years to apply for the Subclass 891 investor visa.¹⁶⁸

D. Suggested Implementations to EB-5 from Foreign Programs

A full modernization of EB-5 could constitute implementing certain aspects of other countries' investor-based immigration programs. A net worth requirement should be required similar to that of Canada's Investor Immigrant Program and that of Australia's Investor Immigrant Program. The net worth requirement should be at least double the value of the applicant's investment. The applicant should also be required to show proof of prior business experience, as

¹⁶⁵ *Subclass 891 Investor Visa*, AUSTRALIAN GOVERNMENT – DEP'T OF HOME AFFAIRS, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/investor-891> (last updated July 1, 2019).

¹⁶⁶ The Subclass 162 – Investor (provisional) visa class is currently closed (as of Oct. 15, 2019).

¹⁶⁷ *Investor (Provisional) Subclass 162 Visa*, INTEGRATE EMIGRATION, <https://www.immigratingaustralia.com/investoraustralia-investor-migration-provisional-php.php> (last visited Oct. 15, 2019).

¹⁶⁸ *Subclass 891 Investor Visa*, *supra* note 165.

was required by Australia's Subclass 162 visa. Increased oversight of RCs could allow RCs to deliver endorsements upon their review of applicants' business plans, like the UK Tier 1 Innovator and Start-up visas. Finally, a third-tier should be created similar to the IIVC Fund, but more aligned with EB-5's current arrangement, to allow for public infrastructure investment. Implementation of these portions of other countries' investor-based immigration programs with greatly improve the EB-5 program.

VII. A MODERNIZATION OF EB-5 IMMIGRANT INVESTOR PROGRAM

DHS published amendments to the EB-5 program on July 24, 2019.¹⁶⁹ This was the first time the EB-5 program underwent revisions since its enactment. Although DHS was limited to the authority delegated to it by Congress, four major alterations were implemented that become effective as of November 21, 2019.¹⁷⁰ First, the minimum investment amounts were raised.¹⁷¹ Second, USCIS will now determine TEA status by utilizing combined census-tract data.¹⁷² Third, applicants are now able to retain priority date from previously approved petitions.¹⁷³ Fourth, the amendments clarify that investor's family members are required to file independently to remove permanent residency conditions even if they are included on the applicant's petition.¹⁷⁴

The minimum investment amounts were raised: the TEA minimum investment was raised to \$900,000 and the non-TEA minimum investment was raised to \$1.8 million.¹⁷⁵ These amounts were adjusted to account for inflation since the program's establishment in 1992.¹⁷⁶ These amounts will now be changed every 5 years to account for inflation based on the \$500,000 for TEA and \$1 million non-TEA investment requirements established in 1992.¹⁷⁷ To address the "economic gerrymandering" issue, USCIS will now use a

¹⁶⁹ 8 C.F.R. § 204, 216 at 35750 (2019).

¹⁷⁰ *See generally id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 8 C.F.R. § 204, 216 at 35808 (2019).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

combination of census tract data to determine TEAs. Previously, each state could use its own methods to determine what constituted a TEA, which led to major abuse of the minimum investment amount for areas that were not meant to be considered TEAs.¹⁷⁸ Applicants who file before the amendments go into effect on November 21, 2019, will be able to utilize the lower capital investment requirement.¹⁷⁹ It is unclear whether these applicants are subject to the same TEA requirements or how USCIS will assess business plans that utilize designation as a TEA for a project location that would not be considered a TEA after the amendments go into effect.

DHS was optimistic in the time leading up to publishing amendments that implementation of amendments would benefit EB-5. DHS believes that the proposals put forward “would increase the integrity, effectiveness, and economic impact of the program positively, stimulating investment in areas where it is needed most and generating jobs.”¹⁸⁰ However, not everyone believes the program should continue. Steve King, member of the United States House of Representatives and representing Iowa’s 4th congressional district, on behalf of himself and Louie Gohmert, member of the United States House of Representatives, representing Texas’s 1st congressional district, proposed a bill to repeal the program and dismiss all pending petitions and applications of the EB-5 program.¹⁸¹ Mr. King released a statement giving his reasoning for proposing cessation immediately after the introduction of the repeal:

... developers have monopolized the EB-5 program since its creation, exploiting its flaws and fighting against any compulsory reforms. These developers messaged and ‘sold’ the program to investors as an easy way to acquire green cards all the while claiming the current market will not support domestic investment amounts. Under the Obama Administration’s unconstitutional and open immigration policy, applications for EB-5 visas suddenly skyrocketed and now, there is an eight-year waiting list. The result is they are selling access to

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ EB-5 Immigrant Investor Program Modernization, 82 FED. REG. 4738, 4739 (Jan. 13, 2017).

¹⁸¹ H.R. 1502, 115th Cong., 1st Sess. (2017).

citizenship and selling it cheap. While the fraud and abuse of the EB-5 program has been disguised as popularity, the American worker and economy continues to be undermined. Furthermore, the program has been derailed to the point where terrorists can easily target it as the perfect tool for access into American society. I have introduced the repeal of the EB-5 program as Congress cannot continue to turn a blind eye to our flawed immigration laws, hoping terrorists don't exploit our weaknesses.¹⁸²

Mr. King's rationale is partly political in nature, but there is validity to concerns of fraud, abuse, and potential terror threats. King's concerns are were not the same as those shared as reasons for terminating the Canadian Immigrant Investor Program.¹⁸³

The EB-5 Immigrant Investor Program Modernization (2019) by USCIS and DHS did not go far enough. The Purpose of the Regulatory Action: "DHS is updating its regulations governing EB-5 immigrant investors and regional centers to reflect statutory changes and codify existing policies. This final rule also changes areas of the EB-5 program in need of reform."¹⁸⁴ While DHS did not have the authority to alter certain areas of the program, as admitted in the Federal Register,¹⁸⁵ DHS did not go far enough with their alterations. At some point over the past 27 years, Congress should have made some ground on approval for at least minimal alterations to a program that has needed changes for decades. DHS chose to define "public infrastructure projects" as focused on "activities" rather than "areas" as related to Targeted Employment Areas ("TEAs"). This hyper-analysis of the statutory language will unnecessarily inhibit the use of EB-5 funds by governmental bodies for public infrastructure projects. Also, DHS makes numerous attempts to predict the effects of the amendments to the program, while also admitting that there is a lack of data to support not only commenters assertions but their own predictions.¹⁸⁶

¹⁸² Press Release, Steve King, King Introduces Repeal of the EB-5 Visa Program (Mar. 10, 2017), <https://steveking.house.gov/media-center/press-releases/king-introduces-repeal-of-the-eb-5-visa-program>. (Last viewed Nov. 3, 2018).

¹⁸³ See subsection VI.B.

¹⁸⁴ 8 C.F.R. § 204, 216 at 35750 (2019).

¹⁸⁵ *Id.* at 35757.

¹⁸⁶ See generally 8 C.F.R. §§ 204, 216 (2019).

While these amendments are a start, more needs to be done in order to put an end to the ongoing abuses of EB-5. DHS hopes to retain interest from applicants while also deterring some applicants due to how desirable the program has come over time. While other countries implement more expansive changes to their own investor-based immigration programs to meet current times, the U.S. has only been able to implement relatively minimal alterations due to Congressional dysfunction.

VIII. SUGGESTED ALTERATIONS

Reform of the program is necessary to repair the vulnerabilities and abuses that have come about with the expanded interest in the program. A great need exists to increase the standard of review of evidenced funds of investment; documentation including business plans and sources of funds should be assessed on a “clear and convincing standard” rather than a “preponderance of the evidence” standard to ensure documents are valid. USCIS should investigate the investor-immigrants' finances beyond just the amount being utilized to meet the investment amount to ensure that money laundering or other fraudulent acts cannot occur through prospective projects so those projects can't be used to funnel an investors illegally obtained funds.¹⁸⁷ This also needs to be done to ensure that the investor is not making money through other illegal means, even if the funds allocated to investment are verified.

There should be the inclusion of a discretionary net worth requirement. This will ensure an individual can provide further funds in case of unsuccessful business planning or other failures.

The minimum investment requirements should be altered to allow for fluctuation of these amounts with variation in economic conditions, not just to be adjusted to align with monetary inflation since the program's enactment. To go along with this, the 10,000 total EB-5 visa allocation should be able to expand and contract depending on the U.S. economic conditions, which can be done by excluding family members and spouses from the 10,000 EB-5 visa allocation limit, increasing or decreasing the number of visas allocated to EB-5.

A third tier should be added to the program. One option for this tier is to target higher income and more developed areas that require

¹⁸⁷ For example, if an investor invests \$900,00 in a TEA, USCIS should require proof of funds for \$1.8 million and not just the \$900,000 being utilized for the investment.

greater investment and greater job creation. This tier could require a \$2.5 million investment and could require the creation of 20 jobs but will allow for a shorter permanent residency period and a faster track to full U.S. citizenship for areas that are more sought after by investors. Alternatively, this third tier could be limited to use by governmental bodies that need funds in order to complete public infrastructure projects.¹⁸⁸ The structure of this type of tier could be similar to the terminated Canadian Investor Immigration Program, but would not have the current requisite for maximum investment even if the project is not in a TEA.

Further, business plans need to be analyzed by individuals employed by USCIS or outsourced to third-party organizations capable of competently assessing the accuracy and validity of intricate plans. Moreover, ensuring these plans are followed is essential to ensure that investor funds are not misappropriated by individuals utilizing the investment for purposes other than the planned project for which the funds were invested.

Application processing should require more stringent background checks. This could entail requiring a requisite number of references to ensure that individuals utilizing the EB-5 program do not have ties to criminal organizations. Potential investors should have to provide evidence of past business ventures as was required by the Australian Program to prove success or lack thereof if they are not relying on an RC to provide a business plan for them.

The application process must push for a more diverse inclusion of applicants from more than one region of the world to deter an alleged pay to play scheme in China. This can be done by capping the number of petitions that can be filed with USCIS for individuals from countries that make high usage of the program. The diversity requirement should also be implemented to bring individuals of different cultures who may think differently, work differently, or offer different business ideas into a country that has been referenced as the ‘melting pot’ of the world. It can also serve to deter the alleged pay-to-play network that exists in China. There must also be greater

¹⁸⁸ In the 2019 EB-5 Modernization Amendments, DHS refused to include funds for solely governmental body infrastructure projects as a TEA because “public infrastructure projects focus on activities rather than areas” because the suggested criteria for determining a TEA was “not limited to areas as defined by the statute.” 8 C.F.R. § 204 (2016) at 35772 (amended 2019). This hyper-analysis by DHS is unnecessary and detrimental for future use of the program.

oversight over middleman brokers that are utilized abroad, specifically in China, as a means to obtain access to EB-5 visas and funding. Data collection and documentation pertinent to investors and projects will allow a greater level of transparency to the investment process and will allow government officials to assess and address widespread problems in a timelier manner. Misallocated funds would likely be easier to trace.

There must be more disclosure of statistical data, including a registry of individuals utilizing the program; this registry should include project developers in the U.S. and their use of EB-5 funds. This registry's purpose would be to limit fraud and corruption. There must also be stricter and harsher penalties for project developers, regional centers, and states that do not follow program guidelines. In order to ensure project developers do not allocate funds, project developers should not only be required to get initial approval to utilize EB-5 funds but should be required to submit supplementary documentation to USCIS evidencing the use of these funds on a quarterly or biannually to be maintained and continually verified by the registry. Alternatively, a derivative escrow agent could be required to hold the funds subject to USCIS approval for release contingent on USCIS review of the project.

Oversight by other federal agencies could help alleviate fraud and internal bias. Increased involvement of agencies other than USCIS regulation by numerous federal agencies will allow a "check" on the progress of the project, as well as any potential internal bias that exists within USCIS. The Securities and Exchange Commission ("SEC"), Financial Crimes Enforcement Network ("FINCEN"), the Federal Bureau of Investigation ("FBI"), and Immigration and Customs Enforcement ("ICE") to be more involved in the approval and oversight processes of EB-5.¹⁸⁹ The SEC is involved with regulating securities, EB-5 projects often involve the purchase or sale of securities. The SEC will step in when the securities are not issued in accordance with securities laws. FINCEN investigates illicit use of the

¹⁸⁹ The USCIS has a memorandum of understanding with the SEC and FINCEN. A memorandum of understanding describes the terms of an agreement between two parties that is not legally binding, but outlines the parties' responsibilities. It does not create an enforceable contract. *Memorandum of Understanding*, LEGAL DICTIONARY (Jan. 7, 2017), <https://legaldictionary.net/memorandum-of-understanding/>; Dillon Colucci, *Regulatory Bodies with Oversight of an EB-5 Investment*, GREENBERG TRAURIG (Aug. 8, 2016), <https://www.eb5insights.com/2016/08/08/regulatory-bodies-with-oversight-of-an-eb-5-investment/>.

financial system; in the case of money laundering of EB-5 funds through U.S. banking institutions, FINCEN can flag the transaction and notify USCIS. The FBI aids in the background check of investors and verification of their submitted documentation. ICE is one of a few governmental agencies that investigates EB-5 fraud and abuse. Heightened involvement with EB-5 by these agencies will lessen the burden on USCIS even though some of these agencies have nominal involvement. Which will allow for more effective oversight and administration of the EB-5 program.

The Regional Centers must be more highly regulated in order to ensure that “economic gerrymandering” is deterred and punished. The alteration to Census Tract data as a means to determine TEAs rather than state determination may limit gerrymandering, but only time will tell if a loophole in Census Tract data is found. RCs must also face harsher punishment and should risk revocation of approval and credentials if found guilty of illegal activity. RCs, individuals, banks, and anyone involved in the process of implementing and following proposed business plans should also be subject to punishment. Data recordation and transparency will also allow for the program’s success to be weighed more directly. Data recordation and Transparency would cause for smoother regulation of cases so misallocated funds can be recouped faster and at a better efficiency than they currently are.

XI. CONCLUSION

Fraud, corruption, internal bias, an increase of capital requirements, regulation, and data collection of investors and projects are just some of the areas where major alterations could be a key to the future success of the EB-5 program. Even though DHS published crucial amendments to the program, Congress refuses to visit EB-5. Some of the problems with the EB-5 program will exist until those in Congress can put their disagreements aside for the betterment of the program. DHS is handcuffed by limited authority until this Congress can accomplish this. Congress reauthorized the Regional Center (“RC”) Program numerous times through temporary spending measures since its initial enactment. Congress should authorize this program for a longer period of time so that petitioners attempting to use the program are provided certainty that their funds and petitions are not reliant on temporary approvals. The published EB-5

Modernization amendments were long overdue but will cause uncertainty for petitioners and the program alike given Congress's inability to establish permanent alterations. The determination of TEA by Census Tract may limit state gerrymandering, but will remove state discretion on areas the state determines are in need of capital investment of EB-5 funds. This, together with the increase in the minimum investment requirements, may be too much of a deterrent for immigrant investors, most of whom seek to invest the higher investment requirement in order to not be in rural or target employment areas. The Amendments come at a time of U.S. economic strength, but if this strength fades, other countries' investor-based immigration programs may be more desirable than the EB-5 program. The amendments should have been implemented over time, as petitioners flood to USCIS to submit petitions before the amendments go into effect, further increasing already extensive delay times. The implementation of amendments was necessary to fix some long-standing problems, but may lead to unanticipated problems.

Comparing similar programs of other countries, current economic data, future economic outlook, and analyzing problematic areas of the current programs will allow an efficient and necessary alteration to the EB-5 program. While alteration is not necessary to ensure future usage by noncitizens and future benefits for the U.S., it would bolster the program's accordance with the original legislative intent. Immigration to the U.S. has always been a touchstone to expansion and growth. It is vital to allow people to come to the U.S.; nonetheless, the consequences of the EB-5 program must be addressed in order to ensure the future enhanced success of the Immigrant Investor Program.