Office of the
Citizenship and Immigration Services Ombudsman

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EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS

March 18, 2009

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

I. EXECUTIVE SUMMARY

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

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

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

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

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

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For these reasons, the Ombudsman recommends that USCIS:

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

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

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

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

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

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

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

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

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

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

II. BACKGROUND

Purpose and Terms of the EB-5 Program

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

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

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

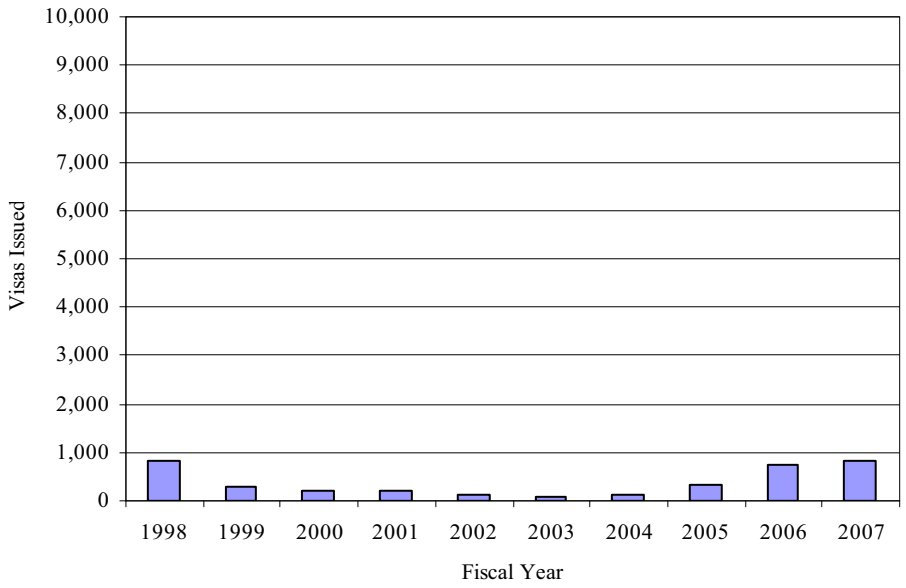
[7] INA § 203(b)(5)(A)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii).

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

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

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

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



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

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

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

Pilot Regional Center Program

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

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

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

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

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

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

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

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

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

[17] *See supra* note 15.

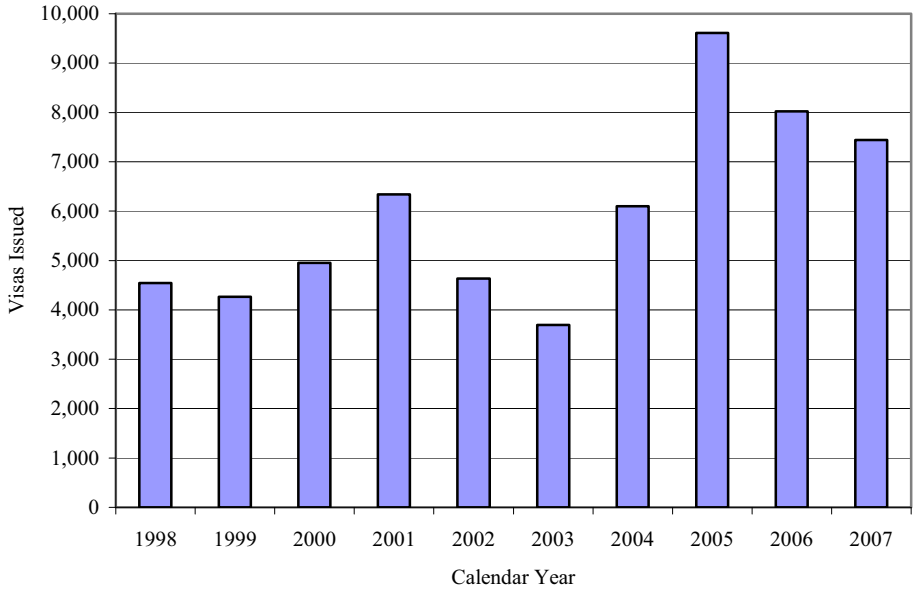
[18] *Id.* at p. 32.

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

Foreign Competition and Response

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

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



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

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

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

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

Uncertainty Has Plagued the EB-5 Program From Its Inception

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

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

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

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

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

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

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

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

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

Figure 3: Changes in Selected EB-5 Legal Guidance

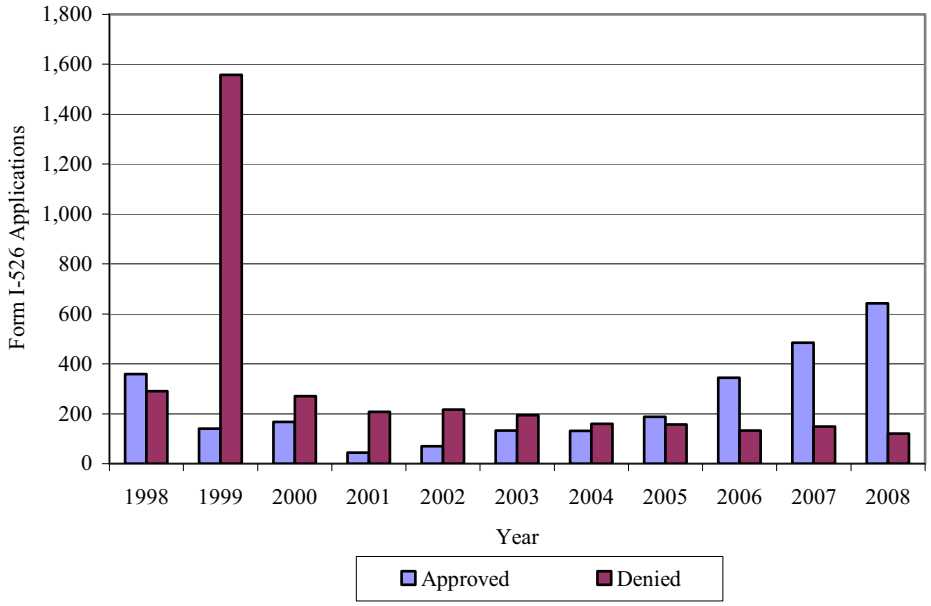
Issue	Pre-1998 AAO Decisions	Post-1998 AAO Decisions
Establishment of "new" enterprise	Business must be created after November 1990	Investor must personally be involved in establishment of business[27C]
Source of funds	General representation and proof of legal generation of fund accepted	Legal generation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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

Case Processing Procedures

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

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

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

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

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

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

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

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

[37] *Supra* note 35.

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

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

Recent EB-5 Stakeholder Meetings and Feedback

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

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

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

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

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

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

III. ANALYSIS

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

Accordingly, the Ombudsman makes the following recommendations to USCIS:

1. Quickly Finalize the Special Legislation Regulations.

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

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

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

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

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

[41] *Supra* note 27.

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

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

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

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

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

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

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

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

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

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

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

4. EB-5 Rulemaking Is Needed.

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

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

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

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

5. Form An EB-5 Advisory Group.

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

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

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

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

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

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

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

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

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

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

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

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

8. Actively Promote the EB-5 Program.

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

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

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

IV. CONCLUSION

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

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