Why Congress Must Let EB-5 Regional Centers Expire

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Summary

The EB-5 program's regional centers, supposedly created to benefit the American economy in rural and depressed areas, in fact provide little economic benefit to the public. Even the Washington Post's editorial board is critical of the EB-5 program, saying that the government does not sell but "gives away its visas to private businesses, who then market them for their benefit." (*Washington Post*, Sept. 6, 2015) Furthermore, the U.S. Citizenship and Immigration Services (USCIS), which runs the program, has proved unable to prevent it from being a magnet for fraud. As *Fortune* magazine has said, USCIS is "accustomed to processing visas and conducting immigrant background checks" and is "ill-equipped to review business plans, job- creation studies, and securities offerings," unlike other agencies whose mission it is to do so, such as the Securities and Exchange Commission (SEC). (*Fortune*, July 24, 2014)

History of the EB-5 Program

The EB-5 Immigrant Investor Program (EB-5), which was first created by Congress in 1990, is a program that allows foreigners to obtain green cards for themselves and their immediate family members by investing in a USCIS approved U.S. business that "creates or preserves" 10 full time jobs. (USCIS.gov, About the EB-5 Visa; *see* Immigration and Nationality Act (INA) § 203(b)(5); 8 U.S.C. §1153(b)(5), regulated under 8 CFR §204.6) It is the fifth out of five "employment-based" (EB) visa categories that prioritize immigrants on their skills, and accounts for 3% of employment-based visas granted. (Brookings-Rockefeller Report, Feb. 2014, p. 3) Originally, the program required that those jobs be directly created by the new commercial enterprise, and immigrant investors had to prove the money invested was earned legally and fully at risk. (*Id*., p. 4)

However, participation in the program was low, so in 1993, Congress created the "Immigrant Investor Pilot Program" in 1993, setting aside 3000 visas (out of 10,000 for the whole EB-5 program) for immigrants who invest within designated "Regional Centers." (*See id*.; *see* USCIS memo, Mar. 18, 2009) The regional centers now operate side by side with the original program, which still remains subject to EB-5's original requirements. (Brookings-Rockefeller Report, Feb. 2014, p. 4) The "regional centers" are defined by USCIS as "any economic entity, public or private, which is involved with the promotion of economic growth." (*Id*.) The regional centers serve as intermediaries to provide immigrants with projects and process their investments. (*Id*.) The idea was that the regional centers would allow the pooling of investor money. Significantly, projects processed by the regional centers do not have to create jobs directly—the job creation definition was expanded to include **"indirect"** jobs. (*Id*.) Because the job creation requirements are easier to satisfy and require only half the investment of the original program, today the vast majority of approved EB-5 visas are granted through the regional centers, even though the original program is still operating. (*Id*.)

The number of applications to the program by would be immigrant investors has increased at a rapid rate since 2007, and much of this rise is due to an increase in Chinese investors. (*Id*. at 8-9)

Expiring Provisions

Right now, the regional center provisions of the EB-5 program will expire if Congress takes no action. Congress last reauthorized the EB-5 regional centers in 2012, for three years. (S. 3245) However, Congress is currently considering a short-term funding extension—known as a continuing resolution (CR)—that would temporarily extend the EB-5 regional center program. Instead, Congress should let the regional center program expire, so that only the original EB-5, which requires actual job creation, continues.

Requirements of EB-5: The Original Program and the Regional Center Program

In order to be eligible for the visa (including for immediate family members), EB-5 investors must 1) invest in a new "commercial enterprise" that 2) "creates or preserves" at least 10 full time jobs for qualified U.S. workers within two years of the immigrant's entrance into the U.S. (8 U.S.C. §1185(b)(5); USCIS.gov, About the EB-5 visa) Both the original program and the regional center program must fulfill these requirements. (*Id*.)

Original EB-5 Program

If the application for an EB-5 visa is made through the original program, rather than through the regional centers, the amount of the investment must be $1 million. (*Id*.) The 10 jobs created must be "direct." "Direct" jobs are: "actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital." (*Id.*)

Regional Centers

If the investment is processed through one of the regional centers, these requirements are looser. The amount of the investment required is only half as much, $500,000. (*Id*.) In addition, the jobs that are created may be "indirect." (*Id*.) "Indirect" jobs are those that are: "shown to have been created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor." (*Id*.)

The justification for the relaxed requirements for regional centers is that they process investments in either a "Targeted Employment Area" or a "rural" area. (*Id*.) A "Targeted Employment Area" is: "an area that, at the time of investment, is a rural area or an area experiencing unemployment of at least 150 percent of the national average rate." (*Id*.) A rural area is: "any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census." (*Id*.)

Individuals must file a Form I-924 with USCIS to become an approved regional center. (Form I-924) USCIS requires that the center then report operational and financial data annually on Form I-924 A after that. (Form I-924A) Regional centers are meant to develop investment projects, recruit investors, and play a "brokering" role between immigrants, their money, and the business of investing it. (Brookings-Rockefeller Report, Feb. 2014, p. 10)

Growth of the Regional Centers and Signs of Trouble

According to an analysis by the Brookings Center in 2014, there were only 16 regional centers opened from the beginning of the program until 2007, but after that, the number of regional centers entered a period of explosive growth. (*Id*. at 5) As of September of this year, USCIS had approved 732 regional centers across the country. (USCIS.gov, Immigrant Investor Regional Centers) Much of this post 2007 growth came as a result of commercial real estate developers seeking funding from Chinese investors. (Brookings-Rockefeller Report, Feb. 2014, p. 9, *see also* Savils Studley Insights, Mar. 16, 2015) In the real estate downturn of 2008-2009, sources of domestic investment in real estate dried up, and major developers began forming regional centers in order to attract capital from foreigners instead. (*Id*.)

While they are supposed to favor economically distressed areas, the regional centers do not have much difficulty in gerrymandering their boundaries in order to bypass this requirement. (Brookings-Rockefeller Report, Feb. 2014, p. 17-18; *Seattle Times*, Mar. 7, 2015) When setting up a regional center, areas that are actually economically distressed can be combined with hot real estate areas, such that unemployment in the entire geographic region served by the regional center meets the requirement of 150% of the national average. (*Id*.) Thus, for instance, a regional center might fund a luxury commercial real estate investment in a wealthy urban area while taking advantage of the loosened requirements meant to promote investments in rural or economically distressed areas. (*Id*.)

The regional centers have also often been troubled by allegations of fraud. For instance, in February 2013, the Securities and Exchange Commission (SEC) filed a lawsuit against a regional center owner in Chicago for attempting to defraud investors of over $150 million. (Brookings-Rockefeller Report, Feb. 2014, p. 11) In fact, in October 2013, the SEC and USCIS jointly issued an investor warning to look out for fraudulent investor scams exploiting the EB-5 program. (SEC Alert, Oct. 9, 2013) More recently, last June, the SEC charged two firms for illegally brokering $79 million in investments under the EB-5 program. (SEC Release, June 23, 2015)

Government Investigators Have Criticized the Program

The Department of Homeland Security Office of Inspector General (OIG) and the Government Accountability Office (GAO), in the last two years have audited the EB-5 program and found the regional centers were not being managed effectively and have not properly guarded against fraud. (OIG Report, Dec. 2013; GAO Report, Aug. 2015)

The OIG found two main reasons that USCIS was not effectively managing the regional centers—it fails to apply its own regulations consistently and it also does not have the legislative authority to guard against fraud or national security concerns. (OIG Report, Dec. 2013, at p.1, 5) USCIS, the OIG found, does not always ensure that regional centers "meet program eligibility requirements." (*Id.*) It did not always document responses and decisions to outside parties, causing it to appear vulnerable to outside pressure. (*Id.*) The EB-5 program also requires expertise in areas that are well beyond the scope of USCIS' mission—which is to provide citizenship and immigration services. (*Id.* at p. 6-7) Therefore, it is not well qualified to conduct the kind of business analysis needed to determine if the programs are really providing a benefit to the economy. (*Id.*) For instance, USCIS regulations of the program allow foreign investors to take credit for jobs that, in fact, US investors are creating—meaning that USCIS is unable to demonstrate economic benefits to the program. (*Id.*)

The GAO came to similar conclusions as the OIG. (GAO Report, Aug. 2015) GAO found that USCIS had identified "unique fraud risks" in the EB-5 program, and that their past assessments of fraud would not necessarily help them stop it in the future, because fraud in the EB-5 program was "constantly evolving." For instance, USCIS could not verify that funds invested in the program were earned lawfully earned, and they had trouble preventing various schemes to defraud investors. (*Id.*)

American Citizens Don't Have Much to Show for EB-5 Program

The EB-5 program only accounts for a small amount of foreign investment in the United States. According to the Brookings Institution, the U.S., as of 2014 when it wrote its report, brings in $204 billion in direct foreign investment annually. (Brookings-Rockefeller Report, Feb. 2014, p. 10) By 2014, the EB-5 program had only brought in $5 billion since its inception—and in return, 8,580 visas were granted to investors through the program, with 16,582 other visas going to family members. (*Id*. at 9) Even the $5 billion invested cannot simply be considered wealth given to the American economy for the use of current American citizens—as it might be, if, say, USCIS had simply charged each of these new visa holders $500,000 for their visa, to be deposited into the U.S. Treasury. After all, the new EB-5 visa holder still owns the investment itself and is entitled to all of the returns on investment that it will earn in the future. As noted in the *Washington Post*: "[a]ll taxpayers get are the highly attenuated benefits of economic development — with no guarantee, or even any likelihood, that the visas couldn't have been put to more productive use by someone else. Let hotel developers compete for capital in the marketplace like everyone else." (*Washington Post*, Sept. 6, 2015)

Conclusion

While government auditors and private organizations that have investigated the EB-5 program have all found deep problems with the regional centers and recommended various reforms, Congress' best course on the EB-5 regional centers is also the easiest—to do nothing. The regional centers, which are the true source of the abuse in the EB-5 program, will expire if Congress takes no action. They are beyond reforming, and should simply be allowed to end naturally.