

Center for Regulatory Effectiveness

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January 17, 2018

Office of the General Counsel
Attn: Regulatory Affairs Law Division
US Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

Re: Petition for Rulemaking; Petition to Amend 8 CFR Part 204, EB-5 Immigrant Investor Program

Dear Regulatory Affairs Law Division:

The Center for Regulatory Effectiveness (CRE), a regulatory watchdog established by former senior career officials from the Office of Management and Budget, hereby submits the attached Petition for Rulemaking. DHS should address this petition *prior* to USCIS's promulgating its final rule on modernizing the EB-5 Immigrant Investor Program [RIN 1615-AC07];¹ USCIS may want or need to modify its rule based on DHS's resolution of the petition.

The EB-5 program is vexed with long-standing problems which have sapped Congressional and public confidence in the program. These problems have been documented by the DHS Office of Inspector General, the US General Accountability Office, and through Senate and House hearings. The three primary areas of concern federal watchdog concern are (1) lack of jobs creation in rural areas (2) the inability of the program to document that it has created any jobs at all and (3) gerrymandering of Targeted Employment Area (TEA) boundaries.

CRE's Petition proposes simple, practical reforms to the EB-5 program that would implement recommendations from the DHS OIG and from GAO. The proposed reforms are based on a strict reading of 8 U.S.C. § 1153(b)(5)(B), a reading which requires that jobs be created in rural and high unemployment areas in order for the project's investors to qualify for the TEA investment level. By contrast, the agency's traditional reading of the statute has focused on the location of the investment project rather than the location of the jobs created through the investment.

CRE's proposed reforms would

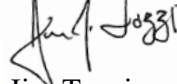
1. Stimulate job creation in rural areas by allowing EB-5 investors to take credit for hiring people who live on farms and in small towns—America's heartland—for accounting, marketing, and countless other "back office" jobs via telecommuting. Job creation in high unemployment areas would be similarly stimulated by allowing workers to telecommute.

¹ 82 Fed. Reg. 4738-68. Friday, January 13, 2017.

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2. Require that EB-5 projects document, at the zip code level, where and how many TEA-related jobs are being created via mandatory reporting to DHS/USCIS, reporting that would be supported by W-2 forms or other auditable employment records.
3. End gerrymandering of TEAs by ending the incentive for investors to claim that projects are located in a high unemployment area.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is written in a cursive style with a large, stylized initial "J".

Jim Tozzi

Member, Board of Advisors

Attachment: Petition for Rulemaking; Reforming the EB-5 Program to Create Jobs in Rural America & Areas of High Unemployment

**Reforming the EB-5 Program to Create Jobs in
Rural America & Areas of High Unemployment**

PETITION FOR RULEMAKING

Petition to Amend 8 CFR Part 204)
EB-5 Immigrant Investor Program)
)

January 2018

Jim Tozzi
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**Reforming the EB-5 Program to Create Jobs in
Rural America & Areas of High Unemployment**

PETITION FOR RULEMAKING

The Center for Regulatory Effectiveness (CRE) seeks a rulemaking to amend 8 CFR §204.6(j)(6), the portion of the Department of Homeland Security/US Citizenship and Immigration Services' regulations which requires EB-5 applicants¹ to "show that the new commercial enterprise has created or will create employment in a targeted employment area." CRE's goal in filing this petition is to obtain the implementation of:

1. A 2013 DHS Office of Inspector General Report Recommendation that federal regulations be updated and clarified to "give the U.S. Citizenship and Immigration Services the authority to verify that the foreign funds were invested in companies creating U.S. jobs."²
2. A 2015 US General Accountability Office Recommendation that USCIS track, verify, and report "jobs created through the EB-5 Program."³

The petition would implement the above recommendations by:

1. Amending the targeted employment area provision of the EB-5 program so that it creates employment for people who live in rural and high unemployment areas.
2. Establishing a system for documenting and reporting on the jobs that are created by immigrant investors for people who live in rural and high unemployment areas.

This petition's subject matter overlaps major elements of the DHS/USCIS rulemaking on modernizing the EB-5 Immigrant Investor Program [RIN 1615-AC07].⁴ Since (1) this petition seeks the implementation of federal watchdog recommendations that predate USCIS's NPRM and (2) DHS states in its Current Unified Agenda of Regulatory and Deregulatory Actions that there is no legal deadline for the rulemaking,⁵ DHS should address this petition *prior* to USCIS's promulgating the final rule; USCIS may want or need to modify its proposal based on DHS's resolution of the petition.

The Department of Homeland Security's regulations (6 CFR §3.7) state that "DHS will be better positioned to understand and respond to a rulemaking petition if the petition describes with reasonable particularity the rule that the petitioner is asking DHS to issue, amend, or repeal, and the

¹ The US GAO estimates "that almost all petitioners, 99 percent, elected to invest in a TEA..." Statement of Rebecca Gambler Director, Homeland Security and Justice Issues Before the Committee on the Judiciary, House of Representatives, "IMMIGRANT INVESTOR PROGRAM Proposed Project Investments in Targeted Employment Areas," GAO-17-487T, Wednesday, March 8, 2017, p. 4.

² US Department of Homeland Security, Office of Inspector General, "United States Citizenship and Immigration Services' Employment Based Fifth Preference (EB5) Regional Center Program," OIG-14-19, December 2013, p. 14.

³ US GAO, Report to Congressional Requesters, "IMMIGRANT INVESTOR PROGRAM Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," August 2015, GAO-15-696, p. 46.

⁴ 82 Fed. Reg. 4738-68. Friday, January 13, 2017.

⁵ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1615-AC07>.

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factual and legal basis for the petition. For instance, DHS would be better able to understand and respond to a petition that includes—

- (1) A description of the specific problem that the requested rulemaking would address;
- (2) An explanation of how the requested rulemaking would resolve this problem;
- (3) Data and other information that would be relevant to DHS’s consideration of the petition;
- (4) A description of the substance of the requested rulemaking; and
- (5) Citation to the pertinent existing regulations provisions (if any) and pertinent DHS legal authority for taking action.”

Accordingly, this petition will address each of the above points.

I. The Specific Problem that the Requested Rulemaking Would Address

A. Legal Problem. The regulatory text in 8 CFR §204.6(j)(6)(i) and (j)(6)(ii)(A) fails to implement the controlling statute.⁶

The law states that “Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.” [Emphasis added.] The implementing regulations, however, contain no such requirement and, instead, only ask that the applicant show that the new commercial enterprise is principally doing business within a rural⁷ or high unemployment⁸ area. These regulations do not implement their legislative mandate.

DHS’s Office of Inspector General found that “USCIS cannot demonstrate that foreign funds were invested in companies creating U.S. jobs.”⁹ The OIG report explained that the agency “cannot demonstrate that the program is improving the U.S. economy and creating jobs for U.S. citizens as intended by Congress.”¹⁰ In the agency’s Comments on the report, USCIS states “The draft report observes, correctly, that it is often impossible for USCIS to conclusively verify job creation in EB-5 cases.”¹¹

⁶ 8 U.S.C. § 1153(b)(5)(B)(i)

⁷ 8 CFR §204.6(j)(6)(i).

⁸ 8 CFR §204.6(j)(6)(ii)(A).

⁹ US Department of Homeland Security, Office of Inspector General, “United States Citizenship and Immigration Services’ Employment Based Fifth Preference (EB5) Regional Center Program,” OIG-14-19, December 2013, p. 7.

¹⁰ Id., Executive Summary.

¹¹ Id., p. 27.

The current regulations do not conform to Congressional intent because they do not ensure that *any* jobs are actually created in TEAs even though TEA projects account for virtually all EB-5 petitions.

B. Policy Problem. The EB-5 program remains unable to demonstrate that it is creating any jobs for people living in rural and high unemployment areas years after the problem was first documented. Even though the DHS OIG audit was performed in 2013, the Inspector General’s 2016 testimony before the Senate Committee on Homeland Security and Governmental Affairs echoed the audit report. The Inspector General testified that “USCIS is unable to demonstrate the benefits of foreign investment into the U.S. economy. Although USCIS requires documentation that the foreign funds were invested in the investment pool by the foreign investor, the implementing regulation does not provide USCIS the authority to verify that the foreign funds were invested in companies creating U.S. jobs.”¹²

The Inspector General also explained that it is “impossible for USCIS to determine whether the foreign funds actually created U.S. jobs. Consequently, the foreign investors are able to gain eligibility for permanent resident status without proof of U.S. job creation.”¹³

The testimony of DHS’s Inspector General followed similar testimony earlier in the year by the GAO. GAO, following an investigation and report, testified before the House Judiciary Committee that

our work indicates that USCIS does not have a valid and reliable methodology for reporting on the program’s economic benefits.

Specifically, USCIS’ methodology may understate or overstate program benefits in certain instances. This is because USCIS’ methodology is based on the minimum program requirements of 10 jobs and a \$500,000 investment per investor, rather than data collected by USCIS about the number of jobs created and amounts invested.

*We recommended that USCIS track and report such data.*¹⁴

II. How the Requested Rulemaking Would Resolve the Problems

The requested amendment of §204.6(j)(6) would emphasize the hiring, and documenting the hiring, of people who live in rural and high unemployment areas. In 1991, an enterprise’s principle place of business may have been a reasonable proxy for identifying where its jobs were located. In 2017, thanks to the internet, an enterprise may directly create many jobs far from its principle place of business. These telecommuting technology jobs are in diverse fields including finance, marketing,

¹² Department of Homeland Security, Office of Inspector General, Testimony of Inspector General John Roth Before the Committee on Homeland Security and Governmental Affairs United States Senate “The Security of U.S. Visa Programs,” March 15, 2016, p. 9.

¹³ Ibid.

¹⁴ “Is the Investor Visa Program An Underperforming Asset?” Hearing Before the Committee On the Judiciary, House of Representatives, One Hundred Fourteenth Congress, Second Session, February 11, 2016, Serial No. 114–58, pp. 18-19.

and cybersecurity. Moreover, innovative commuting strategies such as “Google buses,”¹⁵ offer additional ways for new commercial enterprises to hire people who live in TEAs irrespective of where the enterprise is located.

The widespread use of remote communications technologies and private and public transit strategies means that DHS is able to explicitly align its implementing regulations with the statutory text by allowing new commercial enterprises to meet §204.6(j)(6) requirements by hiring people who live in TEAs irrespective of where the enterprise is located. If amended as recommended in Section IV, the EB-5 program would create benefits for rural areas and for high unemployment areas by aligning the regulations to the statute’s objective of creating new employment for people in TEAs.

- Rural Areas. People who live on farms and in small towns—America’s heartland—would be able to be employed by distant new EB-5 funded commercial enterprises without leaving their homes and communities.
- High Unemployment Areas. People who live in areas of high unemployment would gain new opportunities to work in skilled EB-5 funded jobs without needing to commute.

The rulemaking recommended in Section IV would:

1. Allow a new commercial enterprise to qualify for TEA status, irrespective of its primary place of business, if it documents hiring the requisite number of people who live in rural and high unemployment areas.
2. Document, at the zip code level, where and how many TEA-related jobs are being created via mandatory reporting to DHS/USCIS that would be supported by W-2 forms or other auditable employment records.

The rulemaking would resolve the legal problem by requiring that new commercial enterprises “create employment in” rural and high unemployment areas. The rulemaking would resolve the policy problem by implementing the DHS OIG’s recommendation to verify that the foreign funds are “invested in companies creating U.S. jobs” and the GAO recommendation to report on the verified jobs created through the EB-5 program.

III. Data and other information that would be relevant to DHS’s consideration of the petition

The EB-5 program’s failure to demonstrate that it generates jobs in rural and high unemployment areas has been extensively documented by the Department’s Office of Inspector General, the US GAO, and through Congressional oversight hearings. CRE submits the following documentation to DHS in support of this petition.

¹⁵ George Avalos, “Google buses, other corporate shuttles are popular, poll suggests,” *The Mercury News*, June 28, 2017. <http://www.mercurynews.com/2017/06/28/google-buses-corporate-shuttles-popular-poll/>

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A. DHS Office of Inspector General Report and Testimony

- Department of Homeland Security, Office of Inspector General, “United States Citizenship and Immigration Services’ Employment Based Fifth Preference (EB5) Regional Center Program,” OIG-14-19, December 2013.¹⁶
- Department of Homeland Security, Office of Inspector General, Testimony of Inspector General John Roth Before the Committee on Homeland Security and Governmental Affairs United States Senate “The Security of U.S. Visa Programs,” March 15, 2016¹⁷

B. United States General Accountability Office Reports and Testimony

- US General Accountability Office, Report to Congressional Requesters, “Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits,” GAO-15-696, August 2015.¹⁸
- US General Accountability Office, Testimony before the Committee on the Judiciary, House of Representatives, “Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits,” GAO-16-431T, February 11, 2016.¹⁹
- US General Accountability Office, Report to Congressional Requesters, “Immigrant Investor Program: Progress Made to Detect and Prevent Fraud, but Additional Actions Could Further Agency Efforts,” GAO-16-828, September 2016.²⁰
- US General Accountability Office, “Immigrant Investor Program: Proposed Project Investments in Targeted Employment Areas,” GAO-16-749R, September 19, 2016.²¹
- US General Accountability Office, Testimony before the Committee on the Judiciary, House of Representatives, “Immigrant Investor Program: Proposed Project Investments in Targeted Employment Areas,” GAO-17-487T, March 8, 2017.²²

C. United States Senate Committee on the Judiciary Hearings

- Full Judiciary Committee Meeting, “The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?” February 2, 2016.²³

¹⁶ https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf.

¹⁷ <https://www.oig.dhs.gov/assets/TM/2016/OIGtm-JR-031516.pdf>.

¹⁸ <https://www.gao.gov/assets/680/671940.pdf>.

¹⁹ <https://www.gao.gov/assets/680/675138.pdf>.

²⁰ <https://www.gao.gov/assets/680/679723.pdf>.

²¹ <https://www.gao.gov/assets/680/679859.pdf>.

²² <https://www.gao.gov/assets/690/683231.pdf>.

²³ <https://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed>.

- Full Judiciary Committee Meeting, “The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse,” April 13, 2016.²⁴
- D. United States Senate Committee on Homeland Security and Government Affairs Hearing
 - Full Committee Hearing, “The Security of U.S. Visa Programs,” March 15, 2016.²⁵
- E. United States House of Representatives Judiciary Committee Hearings
 - Full Committee, “Is the Investor Visa Program an Underperforming Asset?” February 11, 2016.²⁶
 - Full Committee, “The Department of Homeland Security’s Proposed Regulations Reforming the Investor Visa Program,” March 8, 2017.²⁷

IV. The Substance of the Requested Rulemaking

CRE petitions DHS to initiate a rulemaking proposing to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 204—IMMIGRANT PETITIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1324a, 1641; 8 CFR part 2.

2. Section 204.6 is amended by:

- a. Revising paragraphs (j)(6), (j)(6)(1), and (j)(2);

The revisions read as follows:

§ 204.6 Petitions for employment creation immigrants.

* * * * *

(j) * * *

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²⁴ <https://www.judiciary.senate.gov/meetings/the-distortion-of-eb-5-targeted-employment-areas-time-to-end-the-abuse>.

²⁵ <https://www.hsgac.senate.gov/hearings/the-security-of-us-visa-programs>.

²⁶ <https://judiciary.house.gov/hearing/is-the-investor-visa-program-an-underperforming-asset/>.

²⁷ <https://judiciary.house.gov/hearing/department-homeland-securitys-proposed-regulations-reforming-investor-visa-program/>.

(6) If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by documentation that the new commercial enterprise is hiring ten or more people who live in:

(i) A rural area, a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) A high unemployment area, a metropolitan statistical area, a specific county within a metropolitan statistical area, a county in which a city or town with a population of 20,000 or more is located, or a census tract in a city or town with a population of 20,000 or more which has experienced an average unemployment rate of 150 percent of the national average rate.

V. Pertinent Existing Regulations Provisions and Pertinent DHS Legal Authority for Taking Action

The “Legal Authority” section of DHS/USCIS’s EB-5 Immigrant Investor Program modernization rulemaking details the Department’s authority to undertake the petitioned for rulemaking:

“The Secretary of Homeland Security’s authority for the proposed regulatory amendments is found in various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, as well as the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Public Law 102-395, 106 Stat. 1828; the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758; and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, including establishing such regulations as the Secretary deems necessary to carry out his authority; section 101(b)(1)(F) of the HSA, 6 U.S.C. 111(b)(1)(F), which establishes that a primary mission of DHS is to ensure that the economic security of the United States is not diminished by the Department’s efforts, activities, and programs; and section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.”²⁸

²⁸ 82 Fed. Reg. 4739-40.