<u>Questions for the Record</u>
<u>Hearing on the EB-5 Regional Center Program</u>
<u>December 7, 2011</u>

<u>To Mr. Divine</u>:

What oversight is conducted by USCIS to ensure that jobs created by the EB-5 program are being filled by legal residents of the United States and not by individuals here unlawfully?

> **RESPONSE:** Two years after initially immigrating, investors must file Form I-829 to remove conditions on permanent residence. In this filing, investors must show that the enterprises into which they maintained their investment created 10 new full-time U.S. jobs. When the jobs were created directly by the enterprise or other job creating enterprise, the investor must submit direct proof that the workers whose jobs are claimed are authorized to work in the U.S., presenting such documents as the enterprise's I-9 forms (E-Verify where voluntarily used), payroll records, W-2s, etc. USCIS double checks the information about such workers against databases to which it has access, and sometimes USCIS determines that the workers are not authorized, giving the investor the opportunity to demonstrate otherwise (or for the employer to use USCIS' notice to lead to termination of unauthorized workers and hiring of authorized workers). USCIS is quite stringent about these rules, and some investors' representatives have complained that USCIS' documentary requirements and process are unreasonable and beyond its authority in EB-5 cases, but USCIS has defended and persisted in the practice.
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> When the investor claims credit for indirect job creation based on economic projections (available with regional center affiliation), specific workers are not required to be identified, and the only process ensuring that the workers in those jobs are authorized are the employment verification requirements applicable to all U.S. employers (I-9, etc.).

Has USCIS ever, to your knowledge, considered requiring regional centers to use E-Verify as a means of participation in the program?

> **RESPONSE:** Not to my knowledge, though some Regional Center programs do use it. I do not believe current legislation allows USCIS to require any employer to use E-Verify, as the statute provides that it is a voluntary program.

Are there any requirements of employers to monitor or verify the immigration status of their workforce?

> **RESPONSE:** Yes. Every employer is required to complete Form I-9 to verify the employment authorization of each worker.

If E-Verify were a prerequisite for participation in the EB-5 program, how would you envision it working? Would centers be required to use it for their employees? How would we ensure that direct and indirect jobs created are run through the electronic verification system as well?

> **RESPONSE:** It is conceivable that the "new commercial enterprise" into which the EB-5 entity places his capital could be required to use E-Verify, but some already do, and those that

don't face the audit of USCIS in I-829 adjudication ostensibly against the same types of data involved in E-Verify. But over 90% of EB-5 investors involve projects with regional affiliation, and most jobs claimed involve indirect job creation under employers over whom the EB-5 investor and regional center have little if any control. Requiring use of E-Verify for any more than direct jobs would likely have little real effect or would inhibit economic impact of the program by severely limiting the market and scope of development projects eligible for EB-5 capital investment.

Mr. North and others have expressed concern about the calculation used to determine the number of jobs created by each investment. How are the job creation figures confirmed by USCIS?

RESPONSE: For direct jobs, USCIS requires direct proof including I-9s, payroll records, W-2s, etc. For indirect jobs, USCIS requires the investor to provide proof that the enterprise into which he has invested, and any "job creating enterprise" into which the capital might have been forwarded as equity or loan, has satisfied its own business plan and met the economic accomplishments that serve as the basis for projections of indirect job creation made by an economist using well-accepted economic methodologies routinely used by state, local, and national government bodies for various economic development purposes, including IMPLAN, REDYN, and RIMS II.

Is there diligent vetting before investors are able to adjust to permanent legal residents? If so, please explain.

RESPONSE: Yes. Before an investor can obtain conditional residence, USCIS must approve an I-526 petition in which it determines that the business plan for job creation is detailed and credible. Before an investor can have conditions removed two years later, USCIS must determine in I-829 petition adjudication that the investor kept the minimum capital plowed into job creating activity (with no money siphoned off for organizational or promotional expenses) and created the jobs as described above. This is a tedious petitioning process that usually involves scores or hundreds of pages.

To your knowledge, how often do foreign investors keep their capital in a regional center beyond the initial two year requirement? Are there instances, to your knowledge, in which investment funds have been removed immediately after the end of the two year period? If so, has the withdrawal of funds had a detrimental impact on the business or entity it had been invested in?

RESPONSE: I have yet to see an enterprise affiliated with a Regional Center able to repay after only a two year term of residency. [But note that I do not have comprehensive awareness of the practices and accomplishments of all regional center projects.]

Mr. Stenger discussed how his regional center requires investors to stay committed to the project for five years, beyond the 2 years required to get a green card. Please explain, to the best of your ability, what other regional centers require of their investors, particularly the time frame for investors to stay connected to the center.

RESPONSE: USCIS will not approve a project that will remove EB-5 capital from job-creating activity (resulting in return of capital to the EB-5 investor) before the removal of conditions from the EB-5 investor's permanent residence. Given the time it takes to subscribe all the investors in a project, for the investors to obtain I-526 approval and immigrate initially, for the two years of conditional residence to be completed, and for I-829 adjudication to finish, many enterprises affiliated with regional centers rule out "liquidity events" and return of the pooled EB-5 capital earlier than five years from subscription in order to ensure enough time for all those things to occur. But an enterprise could instead just prohibit liquidity events leading to return of EB-5 capital until removal of conditions from residence of affected EB-5 investors, and there should be nothing wrong with this. If the investment enterprise is able to sell or refinance the business and recoup all the investment capital, or if the job creating enterprise is able to fully pay off a loan, after two years, three years, five years, whatever the term, it should not be prohibited from doing so. In today's economic climate, there are few qualifying EB-5 investments that can accomplish this even in five years.

What do you think is the appropriate dollar amount required by foreign investors in the regional centers? To your knowledge, has USCIS ever considered increasing the amounts required, given that they have the authority to do so? Would it be beneficial to raise investment requirements, perhaps to levels similar to those required in Canada and Australia? Please explain.

RESPONSE: To my knowledge, the U.S. EB-5 program's job creation requirement is unique among the world's most well-known immigrant investor programs and serves an important legislative policy. Some countries require higher investment than $500,000 in some instances, but none that do (to my knowledge) require investment risk and job creation. I do not see the value to the nation in raising the amount of the investment as long as the job creation requirement is met. If the relative value of $500,000 becomes too low for businesses obtaining it to use it to create 10 jobs, then developers will not be able to organize projects requiring only that amount, and the market naturally will move to a higher amount. $500,000 is a lot of money for one person or family to risk in one business. U.S. securities laws generally require investors to show they have at least $1 million in net worth or $200,000 annual income, and most EB-5 investors I have known have quite a bit more than that. Raising the minimum investment above $500,000 will tend to reduce the number of investors able or willing to take the risk the U.S. requires, which will only reduce the number of jobs created. That would seem to be self-defeating.

To your knowledge, does USCIS maintain any records of regional centers which have not adhered to program requirements?

RESPONSE: Yes.

In such instances, what was done to rectify the situation by USCIS?

RESPONSE: First, USCIS constantly calls regional centers into compliance by adjudicating their applications for initial and amended regional center designation and their affiliated investors' permanent residence filings. In all these filings, USCIS evaluates the arrangements in the projects that have been guided by the regional center. Regional centers frequently change their project structures to come into compliance and gain approval. USCIS keeps records of all of those adjudications, although they are varied and case-specific. Second, USCIS has the authority to revoke a regional center's designation, and it keeps records of those proceedings. I am aware of two instances of this, but there may be more. Revocations could arise from USCIS determinations that a regional center lacks meaningful activity, that the regional center is not founded on practices calculated to meet the program's goals, or that the regional center has not actually done what it said it was doing (or was doing bad things). Third, USCIS has required periodic filings of regional centers relating to their practices and accomplishments. USCIS has records of those filings.

What immigration implications are in play for foreign investors if a regional center fails? Are these investors, if they do not yet have a green card, allowed to remain in the United States or are they required to depart the country? To your knowledge, has an investor ever been allowed to remain in the United States even when the investment did not create the desired outcomes of the EB-5 program?

RESPONSE: If a regional center-affiliated commercial enterprise into which EB-5 investors have placed capital fails economically, then ostensibly the investors will lose money, and if the required jobs are not created and maintained then the investors will be unable to have conditions removed from their residence, their conditional residence will be terminated, and they will be subject to removal, subject to opportunities to petition in connection with another investment or seek residence in some other category. [Even apart from other categories of residence, DHS might choose to parole the investor temporarily for purposes of testimony against wrongdoers.]

If a regional center itself loses its designation or goes out of business, it is not clear to me what happens to the investors in commercial enterprises affiliated with that center. It is possible that USCIS could allow the investor already approved for conditional residence to proceed with the investment as long as the investor and enterprise comply with continued investment and job creation requirements and supply reports to USCIS.

Would you support making more information about EB-5 regional centers – including financial statements, names of investors, and investment outcomes - more available to the public? If so, what information could be made available via USCIS' website to increase transparency over the program?

RESPONSE: The more I think about it, the less I think it would help, and it could cause confusion and drive good people away. The program's goal is to foster <u>private</u> investments. People will be less likely to get involved, whether as developers or as investors, if they must do their business in a fish bowl. We already have rules and process to allow people who really need information about regional center arrangements to get it. Developers needing building or other permits must disclose as much as any other developer. Employers using EB-5 capital must submit filings to government offices about their employees' pay, benefits, workplace saftey, and other aspects just as any other employer. Prospective investors can ask the Offeror anything they want to know, and that might include statistics and explanations about the filings of other investors in projects affiliated with that Offeror or regional center.

Outside of a dynamic information exchange, information about outcomes could be misleading. For instance, USCIS might deny an I-526 petition of an investor in a project based solely on inadequacy of proof of source of funds, and statistics about a regional center including such denials might convey inaccurately that the investment was not qualifying. Petitions might be denied for very technical reasons of timing (such as that there was a clause in one of the project documents that USCIS felt was not compliant, and to cure the problem the parties had to change the documents and re-file the petition).

Regional centers with successful completed projects have their own incentive to publicize that success but with regard to restrictions arising from securities laws. If a regional center wants to organize a true "public offering" requiring an SEC registration statement, then all that information will be public.

USCIS has begun this year to gather data from each regional center about the investment dollars and job creation of the various enterprises in each center, and USCIS will convey that information to Congress. USCIS can follow up on those reports, asking for whatever additional information seems warranted from the initial reports. This seems to be enough for now.

Aside from reforms made public by USCIS, are you aware of any other changes to the processing or administration of the EB-5 regional center program in response to the failure of some regional centers, such as the bankrupt dairy farm in South Dakota, the Mojave Dessert in California, and the real-estate development in El Monte, California? Please elaborate.

RESPONSE: I do not believe that the examples mentioned reflect problems requiring changes to legislation associated with regional centers or anything else. The EB-5 program as interpreted by USCIS explicity requires investors to take risks. Sometimes risk results in loss. These losses have been well publicized, and that will continue. If investors in those projects did not ask enough questions, perform other due diligence, or heed disclosed or obvious risks, then they are stuck with loss. If they were mislead, U.S. and state securities and other laws may provide some recourse. The known experience of loss should drive prospective investors to require comprehensive information, and enforcement of securities and other laws in these projects as appropriate will deter other developers from engaging in misleading offerings.

What can be done by USCIS to ensure that EB-5 promoters are acting responsibly and disseminating only reliable information on the EB-5 program when abroad? Would you support the creation of a registry to track individuals who are promoting the program abroad?

RESPONSE: Misrepresentation in the sale of securities is as old as the concept of a security. People have a tendency to take advantage of each other. Securities laws have built up in this and other countries mainly to prohibit misleading information about investment opportunities, but not to prohibit the offering of risky investments whose risks are disclosed to the investors. EB-5 investments are no different than any other securities offerings in this regard. In EB-5 there is the added goal of obtaining U.S. immigration status and the risk that it might not work out. When investors are adversely affected by non-compliant securities offering practices, U.S. and state securities laws provide redress in various ways, including private lawsuits, agency enforcement, and even criminal prosecution. U.S. and state securities laws generally do not try to regulate the way securities may be offered exclusively in other countries, leaving that up to the other countries, some of whom deal more severely with securities fraud than we do. But there is no exemption from the rule against misleading an investor anywhere in offering a security in a U.S. investment. I see no need for more rules about these matters in EB-5 offerings than already exist for all offerings.

One step that might make sense is for USCIS to forward to the SEC copies of projects filings if USCIS has some reason to think that the filings deserve SEC review. For all I know, that might already be happening. I know I have heard Director Mayorkas say publicly that USCIS is cooperating with SEC to deal with misrepresentation involved in marketing of EB-5 investment offerings.

What effect has dishonest promotion abroad had on the confidence of foreign investors? Are you aware of any instances where a promoter has been dishonest, or has lured investors to the U.S. under false pretenses? Please elaborate.

RESPONSE: I have not had personal experience with investors who claimed to have been misled. I have heard rumors about agents in other countries suggesting that the projects they promote are guaranteed or risk free, but all the documents my clients take pains to prepare go overboard in disclosing the risks involved with the investment, and investors sign agreements confirming that they have read all these warnings before they can invest. IIUSA promotes such practices among regional centers and affiliated enterprises. I have seen foreign agents negotiate effectively for better protections and security before they promote a project. I have been impressed with the level of scrutiny that foreign agents have applied to investment offerings, finding little inconsistencies that lawyers even overlooked-- showing that they care what is in those documents. I expect that publicity about the business failures your earlier question mentions will spur more skepticism, caution, and due diligence on the part of investors.

One issue that has concerned me is disclosure of fees. I believe that an investor deserves to know if someone advising him to invest in a project is receiving a fee from the offeror. I have had to push clients to disclose in offering documents that agents might earn such fees. One improvement might be to require that EB-5 filings include documentation reflecting the involvement of any agent including a disclosure by that agent of any fees earned from the offeror, directly or indirectly.

No federal program is without fault or cumbersome red tape. What one complaint do regional centers lodge most often when discussing the program or the application process?

RESPONSE: Processing times are just too long. People normally don't try to set up a regional center unless they have an investment project they want to subscribe. Getting a regional center application adjudicated has been taking 9 months or more, and some are now pending longer than a year. And once a regional center is approved and investors file I-526 petitions, they are waiting 8 months for adjudication, while their capital languishes in escrow. Anything more than three months is a meaningful impediment to getting EB-5 capital to good projects, many of which cannot wait around for delay like that. USCIS leadership has been trying to staff up, but they are not making headway in processing times as volume increases. I think this underscores the need to pass S.642 to make the program permanent so that USCIS can plan and budget for proper staffing for speedy adjudication.

Mr. North suggested that USCIS's attempt to streamline the program is simply a way to find a way to a "yes" for applicants. How do you respond?

RESPONSE: Some people will use any fact to criticize something. He uses the fact that USCIS has denied cases involving unauthorized employment to suggest that the program spawns unauthorized employment. He uses the fact that USCIS has revoked regional centers to suggest that regional centers have run amok. The efforts USCIS has used to "streamline" the process include the following:

- Allowing a regional center to file an application for approval of a project even apart from initial regional center designation, rather than waiting for individual investors to file their I-526 petitions about the project. Before, if USCIS had an issue with a project, it would have to scattershot queries about its concerns to each of the investors in the context of their I-526. This was the equivalent of a home inspector at final inspection telling the home buyer that the subdivision's roads and setbacks are out of code or the easements are wrong, and it was not businesslike. USCIS listened to stakeholder input and used it to fashion a process to adjudicate an "exemplar" petition by the regional center, to resolve issues about the project early dealing with the developer, who then could offer an approved project to investors who can be more confident that their petition will be approved if their source of funds is legitimate.
- Allowing the regional center and the adjudicator to have email interaction about a pending regional center application. These regional center filings and adjudications are far and away more complicated than any other immigration filing I know of, as reflected by the $6,230 filing fee with is about 20 times larger than the $325 fee for an L-1 petition. Using the normal "request for evidence" process can lead to interminable adjudication, because sometimes the applicant cannot understand the question, and the adjudicator does not really understand the complex documents. The email procedure allows the possibility of getting the question straight before answering it. The result should be to increase the chances that a well-intended regional center applicant with a job creating project can resolve an adjudicator's concern or can tweak a provision in a complex securities offering document to more clearly fit the requirements. Americans wanting the chance at jobs from these EB-5 investments should expect no less.

Mr. North suggested that USCIS is not the ideal agency to screen these foreign investments. He suggested that the program is grounded in the wrong place. Would it be beneficial to involve other agencies with more experience? If so, which agencies? To your knowledge, has USCIS ever convened inter-agency discussions to improve the way they process the applications or review the business plans? To your knowledge, does USCIS converse regularly with the Securities and Exchange Commission on regional centers and the investments they bring in?

RESPONSE: USCIS does partner with other agencies such as the Securities and Exchange Commission and the Department of Commerce (including SelectUSA), although I do not claim to know specifics of interagency interaction. The adjudication ultimately results in an immigration benefit, and that involves USCIS, which is the right agency to handle this. USCIS needs to beef up its staff with people who understand economic theory of job creation, entrepreneurship, and business transactions, and USCIS states it is in the process of doing so.

What oversight is in place to ensure investments come from reliable foreign sources? What instances, if any, have there been of EB-5 investors providing money from sources which are hostile or contrary to the values of the United States? If there’s question or concern about the investment, what process does USCIS undertake to notify other agencies, such as the CIA, the FBI, or other money laundering-interested agencies?

RESPONSE: USCIS unabashedly applies a "hypertechnical" analysis in scouring the investor's proof of the source of the funds and the path to the investment enterprise. Investments associated with countries subject to foreign assets control require prior clearance from the Treasury Department's Office of Foreign Assets Control (OFAC). Banks receiving the funds apply terrorist screening. USCIS and the Department of State run fingerprints and biographic data against various criminal and national security and international security databases and watch lists. I cannot speak further about USCIS cooperation with other law enforcement and national security agencies in the context of their immigration adjudications. Regional centers have a natural interest in avoiding investment from shady sources.

To the best of your knowledge, what do regional center charge to investors beyond the $500,000 or $1,000,000 investment? Do centers typically charge "processing fees?" Please explain what charges are assessed to investors and what purpose those fees serve.

RESPONSE: Regional centers typically charge EB-5 investors between $25,000 and $60,000 beyond the capital investment to be used for administrative expenses of organizing the regional center and the investment enterprise and offering and marketing the investment opportunity, because USCIS does not allow the minimum capital investment of $1,000,000 or $500,000 to be used for such purposes, so that the capital is only plowed into job creating activity.