

**TESTIMONY**  
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Hearing on  
“The Distortion of Targeted Employment Areas: Time to End the Abuse”

Before the  
Committee on the Judiciary  
U.S. Senate  
Washington, D.C.  
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Chairman Grassley, Ranking Member Leahy and Distinguished Members of the Committee:

Thank you for inviting me to testify today about the EB-5 immigrant investor program.

My name is Gary Friedland. I am a Scholar-in-Residence at the NYU Stern School of Business.

I have conducted research on various aspects of the EB-5 program and have prepared several academic papers with my NYU Stern colleague Jeanne Calderon. We jointly teach a course that focuses on the legal, tax and finance aspects of commercial real estate transactions. We created the course and developed all of the course materials. A segment of this course focuses on foreign investment in the United States, including EB-5 capital. Professor Calderon was unable to attend today’s hearing due to teaching commitments. This testimony reflects our collective views.

Our first paper was released in early 2015 and provides a comprehensive overview of how EB-5 capital has become a mainstream source of capital to fund large-scale real estate development projects in major urban areas. We also compiled an extensive database of 25 of the largest real estate development projects that are utilizing, or have utilized, EB-5 capital, *each* ranging from \$50 Million to \$600 Million, with a cumulative potential EB-5 capital raise of \$4.6 Billion.<sup>1</sup> We recently supplemented the database with 27 additional large-scale real estate projects that are utilizing EB-5 capital, with a cumulative potential raise in excess of \$5.6 Billion.<sup>2</sup> Thus, our

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<sup>1</sup> Jeanne Calderon and Gary Friedland. *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. (May 22, 2015). New York University Stern Center for Real Estate Finance Research. Available at:

<http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%2005.24.2015.pdf>

<sup>2</sup> Jeanne Calderon and Gary Friedland. *EB-5 Capital Project Database: Revised and Expanded* (March 29, 2016). New York University Stern Center for Real Estate Finance Research. Available at:

combined databases examine 52 large-scale real estate projects with a potential cumulative capital raise in excess of \$10 Billion, which would require more than 20,000 immigrant investors that would translate to more than 50,000 visa applications.

Our second major paper was released as a working draft on December 23, 2015 within a week after the Grassley-Leahy reform bill, S. 1501, failed in mid-December of 2015. This paper focuses on the definition of urban area Targeted Employment Areas (“TEAs”) and related matters because those were the most controversial portions of the reform bill. We described the three alternative approaches considered by the discussion drafts based on the S. 1501 in December 2015 (the “Discussion Drafts”). We compared each of the alternatives. We also explained how each of the alternatives might have impacted projects in New York City. We focused on New York City because it is at the epicenter of the debate. We also illustrated these points with maps and data. The most recent version of this paper is dated February 6, 2016.<sup>3</sup> We will refer to this paper as “TEAs under EB-5 2.0.”

On February 11<sup>th</sup>, Professor Calderon testified at the hearing entitled “Is the Investor Visa Program an Underperforming Asset?” before the House Judiciary Committee. Subsequent to her testimony, we prepared a paper focusing on possible reform by USCIS of the TEA definition.<sup>4</sup>

This morning my testimony will focus on TEAs: the original intent of the EB-5 law; testing the effectiveness of any new TEA proposals; “gerrymandering;” USCIS’ role in fostering gerrymandering and its authority to designate TEAs; proposed standards to be implemented to define a TEA; and visa reserves.

### *EB-5 Program*

In 1990, Congress created the fifth employment-based preference (EB-5) immigrant visa category for foreign nationals seeking to invest in a commercial enterprise that will create at least 10 U.S.

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<http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Capital%20Project%20Database%20-%20Revised%20and%20Expanded.pdf>

<sup>3</sup> Jeanne Calderon and Gary Friedland. *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. (Last revised February 6, 2016) New York University Stern Center for Real Estate Finance Research. Available at:

<http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

<sup>4</sup> Jeanne Calderon and Gary Friedland. *Reflections on the Judiciary Committee Hearing Reflections on the Judiciary Committee Hearings on EB-5 Reform Part I: Possible TEA Reform by USCIS* (February 29, 2016) New York University Stern Center for Real Estate Finance Research. Available at:

<http://www.stern.nyu.edu/sites/default/files/assets/documents/Reflections%20on%20the%20Judiciary%20Committee%20Hearings%202.29.2016.pdf>

jobs per investor.<sup>5</sup> Its purpose is to stimulate the U.S. economy through job creation and capital investment.<sup>6</sup>

Underutilized since its enactment in 1990, the EB-5 Program became popular during the financial crisis when conventional sources of capital dried up. As the market has rebounded, EB-5 capital has evolved into a mainstream source of capital, particularly for real estate development projects.<sup>7</sup>

### *What is a TEA?*

The statute provides that “[I]n general,” the minimum amount of capital to be invested by an immigrant seeking an EB-5 visa is \$1,000,000. The amount is reduced to \$500,000 if the investment is made in a project located in a TEA.<sup>8</sup> Thus, a project’s qualification as a TEA determines whether the immigrant can qualify for the EB-5 visa by making an investment of \$1,000,000 or \$500,000. Investors strongly prefer to minimize the amount they invest in a project utilizing EB-5 capital. They typically accept a rate of return of less than 1% per annum under the typical loan structure because their motive for making the investment is to obtain a visa.<sup>9</sup>

The statute provides two routes for a project location to qualify as a TEA. First, any project located in a rural area qualifies. In urban areas, a project qualifies only if it is located in “an area which has experienced high unemployment (of at least 150 percent of the national average rate).”<sup>10</sup> We will refer to this as a “high unemployment area.”

### *What Was Congress’ Original Intent in Establishing the TEA Concept?*

The controversy surrounds the determination of what constitutes a “high unemployment area” in an urban area.<sup>11</sup> The statute objectively defines “high unemployment” by reference to the national average unemployment rate. However, the “area” or boundary against which the high unemployment should be measured is not defined in the statute. Presumably, Congress left it to the Federal immigration agency to make this determination. As discussed below in the *USCIS* section, unfortunately the agency did not take the opportunity to define this. The plain meaning

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<sup>5</sup> Immigration Act of 1990, Pub. L. 101-649, Stat. (November 29, 1990).

<sup>6</sup> USCIS Policy Memorandum (PM-602-0083), May 30, 2013. Available at: <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

<sup>7</sup> See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

<sup>8</sup> INA § 203(b)(5)(C); 8 C.F.R. § 204.6(f). Technically, the statute authorizes a third minimum investment level - an amount up to \$3M - for areas of unemployment “significantly below” the national average unemployment rate . INA § 203(b)(5)(C)(iii).

<sup>9</sup> See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

<sup>10</sup> INA § 203(b)(5)(B)(ii).

<sup>11</sup> Again, a rural area qualifies as a TEA, irrespective of the relevant unemployment rate.

of the scope of the intended “area” is not clear; thus, we turned to the legislative history to determine Congressional intent.

The legislative history is illuminating. The original bill that became the Immigration Act of 1990, S. 358<sup>12</sup>, included an employment-based visa for immigrants who invest capital in a new commercial enterprise that creates 10 jobs per investor. The required investment amount was set at a single level - \$1,000,000.<sup>13</sup>

On July 13, 1989, the day the Senate bill was later approved by the full Senate, Senators Boschwitz and Gramm introduced an amendment that ultimately became the framework for the TEA definition incorporated in the Immigration Act of 1990 (the “Immigration Act”). This amendment established two-tiers of investment: one at “not less than \$1,000,000”, and the other at “not less than \$500,000” for investments in “rural areas or areas which have experienced persistently high unemployment...of at least one and one-half times the national average rate.”<sup>14</sup> The Amendment did not use the term “Targeted Employment Area,” but the definition is substantially the same as the language that appears in the EB-5 section of the Immigration Act. Without this amendment, the TEA concept might not exist.

Senator Boschwitz’s remarks on the floor of the Senate make clear his purpose in creating the TEA. He opened his remarks by stating that the amendment was offered to “attract significant investment in rural America.” He pointed out that he was “especially concerned with the rural investment this amendment would support.”<sup>15</sup>

Senator Boschwitz explained that investments in rural or high unemployment areas were intended for those who invest in “rural or depressed areas.” The Senator continued that he “sees no reason to shut out willing investors while our small towns and inner cities across America are facing hard times.”<sup>16</sup>

Although the amendment did not include a requirement that the immigrant demonstrate that the enterprise would not otherwise be able to obtain financing, the Senator expressed his concern that “[rural] areas have great difficulty attracting the investment capital so needed for economic growth.”<sup>17</sup>

The amendment included a visa reserve or set aside for 2,000 investors in rural areas. The Senator noted that in addition to these reserved visas, the remaining visas could also be used by

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<sup>12</sup> S. 358, 101<sup>st</sup> Cong. 1989-1990.

<sup>13</sup> Id.

<sup>14</sup> Amendment #264 to S. 358 (July 13, 1989)

<sup>15</sup> 135 Cong. Rec. S7,858-02 et seq. (July 13, 1989)

<sup>16</sup> Id.

<sup>17</sup> Id. However, the amendment’s text did not include a “but for” test.

rural investors.<sup>18</sup> Senators Boschwitz and Gramm obviously expected greater rural investment participation than the EB-5 Program has achieved.

Thus, the Senators created the TEA concept to incentivize rural projects and, to a lesser extent, enterprises in depressed areas or inner cities. Conspicuously absent from the Senator Boschwitz's extensive remarks was any reference to high unemployment areas. It appears that the amendment inartfully defined depressed areas or inner cities by utilizing the "high unemployment area" concept as a method to define those areas.

In connection with the Conference Committee Report to the Immigration Act, Senator Paul Simon echoed Senator Boschwitz's sentiments:

"[W]e are mindful of the need to target investments to rural America and areas with particularly high unemployment – areas that can use the job creation the most... America's urban core and rural areas have special job creation needs."<sup>19</sup>

Furthermore, Senator Simon recognized the importance of establishing a wide spread between the standard investment amount of \$1,000,000 and the reduced amount to attract investors to targeted employment areas: "The Attorney General is authorized to set the required investment at a lower amount but at least \$500,000. Clearly, the closer the Attorney General sets this to \$500,000, the more we can encourage investments in these critical areas."<sup>20</sup>

Finally, when the EB-5 Program was created, Congress expected that most foreign investors would invest at the \$1,000,000 amount. Senator Simon continued: "One section of the [Immigration Act of 1990] that I am particularly pleased to have included from my original bill is the employment generating investor visa provision...The general rule – and the vast majority of investor immigrants will fit in this category – is that the investor must invest \$1 million and create 10 U.S. jobs."<sup>21</sup>

It is obvious that when Senators Boschwitz and Gramm proposed the TEA concept in 1989, and when the law was enacted a year later, Congress did not contemplate the current, predominant use of EB-5 capital. The percentage of projects qualifying as TEAs has skyrocketed from the early years of the Program to the point where almost 98% of EB-5 projects qualify as a TEA.<sup>22</sup> We note

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<sup>18</sup> Id. The Immigration Act increased this reserve to 3,000, when the quota amount increased from 6,800 to 10,000, but maintained essentially the same percentage of visa reserves to the annual quota for this category, 30%.

<sup>19</sup> 136 Cong. Rec. S 17,106, 17,110 (October 26,1990)

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> The percentage of conditional visas issued based on investing in projects in a TEA rose from 10% in 1992, to 41% in 2002 to an estimated 98% in 2014. See DHS Yearbook of Immigration Statistics (FY1992-FY2013); State Department preliminary data (FY2014). Also see Lazaro Zamora and Theresa Cardinal Brown. *EB-5 Program: Successes, Challenges, and Opportunities for States and Localities*. (September 2015). Bipartisan Policy Center.

that each of the 52 projects contained in our combined databases appears to be located in a TEA.<sup>23</sup>

### *EB-5 Capital is a Subsidy Available to All Projects, Not Limited to Projects Located in TEAs*

The required amount invested by the immigrant is typically deployed to the project as a below-market rate loan.<sup>24</sup> The immigrant invests in the project solely to qualify for a visa. The visa eligibility motivates the investor to accept negligible returns that result in a below-market interest rate loan being made available to the developer's project.<sup>25</sup> This savings to the developer is the equivalent of a government subsidy that is available because the government is willing to issue an EB-5 visa to the immigrant as the incentive for his investment.<sup>26</sup>

Although the subsidized, inexpensive capital is accessible to all developers who participate in the EB-5 program, the reduced investment amount (\$500,000) is limited to those projects that are located in a TEA. The purpose of the EB-5 program generally is to promote jobs and capital investment by immigrant investors. The purpose of the TEA is to provide a discounted investment amount for only those investors who invest in projects that meet the TEA definition. Yet, over time, the Program's purpose and the TEA's purpose - to identify those locations that deserve a special incentive - have become intertwined.

However, some developers contend that if the TEA designation were not extended to their projects then, as a practical matter, the government subsidy would not be available to them because immigrant investors would pursue investments only in TEA projects. Given that virtually all projects currently qualify for TEA status, no data exists to support or refute this contention.

### *The Prevalence of Urban Area TEA Projects in Today's Market*

Due to the manner in which the TEA rules are applied under the current system (described in the *USCIS* section below), almost all areas in the entire country qualify as a TEA. Thus, the discounted investment level is available for immigrant investors in essentially all projects.

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<sup>23</sup> See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1. Note that we do not possess a copy of each TEA designation letter issued by the relevant state to verify the TEA status of each project.

<sup>24</sup> See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

<sup>25</sup> Id. The proceeds invested in the EB-5 vehicle are typically deployed to the project as a mezzanine loan at a discounted rate compared to the rate charged by conventional mezzanine lenders.

<sup>26</sup> The benefit to the U.S. economy is the creation of jobs and capital investment by the immigrant investor. However, a GAO Report points out the USCIS methodology might overstate some of the economic benefits derived from the EB-5 Program. For example, EB-5 capital is credited with 100% of the jobs created by the project even though the project may be primarily funded with capital from other sources. USCIS does not track whether alternative sources of capital might be available to fund the project if EB-5 capital were not provided. Government Accountability Office. *Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits* (August 2015). Available at: <http://www.gao.gov/assets/680/671940.pdf>.

Currently, despite the \$500,000 statutory spread between the minimum amount required to be invested in a TEA project (\$500,000) and a non-TEA project (\$1,000,000), in the real world the spread is \$0 because virtually all project locations qualify as a TEA. Immigrants have the choice to invest in any project type in any location at the same discounted investment amount of \$500,000. Consequently, it is not surprising that a substantial percentage of immigrant investors select projects located in thriving, urban areas by well-financed developers with a strong track record of successfully completed projects. These projects are more likely to be completed, and on time. The investors perceive that these types of projects will accelerate the time frame within which they will secure the visa and safely recover the \$500,000 investment. The current trend does not necessarily mean that the immigrants would avoid projects located in rural or depressed areas. Instead, given the same required investment amount, they prefer to invest in projects located in thriving, urban areas.

#### *Factors to be Considered by Congress in Redefining TEAs*

If Congress seeks to limit the project locations that qualify as a TEA, then it must establish clear, unambiguous and objective criteria to determine which locations are deserving of the incentive that permits immigrants to invest a discounted amount. Investors in all other projects would be required to invest at a higher investment amount, so a spread between the minimum investment amounts would be achieved in practice.<sup>27</sup>

Of course, Congress is not bound or limited by its original intent for establishing the TEA concept with a reduced investment amount. The 2016 reauthorization presents Congress with an opportunity to take a fresh look at the TEA definition. Congress may decide to consider which locations and/or project types should be entitled to the discounted investment amount. In making this determination, Congress might wish to consider the manner in which the EB-5 Program has evolved, as well as how our nation's cities have changed since 1990.

As Congress considers the appropriate revisions to the TEA definition, it should be mindful that the EB-5 Program was woefully underutilized until the Program was liberalized and became more readily available as a funding source for real estate development projects. As recently as 2009, the USCIS Ombudsman conducted a study to determine ways to promote the Program in danger of being terminated for lack of use.<sup>28</sup> Furthermore, the increased investment activity under the Program has coincided with the rising percentage of projects that have qualified as a TEA, as well

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<sup>27</sup> A separate but related issue is the required investment amount for a TEA and a non-TEA project. The last discussion draft based on S.1501 set the amounts at \$800,000 and \$1,000,000. We believe the spread between the two amounts is more important than the absolute dollars. However, we do not have any data to support the appropriate spread necessary to stimulate investment in TEA projects based on a reduced investment amount, nor the amount that would result in a substantial reduction in investment in non-TEA projects with a greater required investment amount.

<sup>28</sup> [https://www.dhs.gov/xlibrary/assets/CIS\\_Ombudsman\\_EB-5\\_Recommendation\\_3\\_18\\_09.pdf](https://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf)

as the rebound in the real estate market.<sup>29</sup> Thus, Congress' proposed action requires a delicate balance between appropriately narrowing the scope of the TEA and building in flexibility to avoid the Program reverting to the underutilized state that existed before 2010. This is particularly important as the current stock market activity may signal more fragile economic conditions on the horizon.

The current use of the EB-5 Program is radically different than when it was created in 1990 as a direct investment program. The current EB-5 capital market is dominated by real estate development projects in urban areas, where it is commonplace for EB-5 capital raises to exceed \$50M.<sup>30</sup> EB-5 capital typically represents less than 30% of such projects' total capital costs. Similarly, the economic conditions and development patterns in many inner cities in 2016 are much different than those that existed in 1989 and earlier, especially in Gateway cities where immigrants are investing. Congress should take these factors into account as it decides which locations and/or project types deserve the TEA entitlement or equivalent incentives.

It is easy to justify extending the TEA discount to certain project types irrespective of location. S. 1501 and the Discussion Drafts proposed that the reduced TEA investment amount be available for certain project types regardless of location, including public infrastructure projects, manufacturing projects and closed military bases.<sup>31</sup> This reflects an updated approach to the types of projects to be incentivized. Unlike the urban area TEA definitions contained in S.1501 and the Discussion Drafts, these favored project types apparently did not engender controversy as the bill underwent revision during December of 2015.

The challenge is to develop a TEA definition for urban areas that Congress determines is appropriate to incentivize. Our "TEAs under EB-5 2.0" paper explores the three alternatives considered by S. 1501 and the Discussion Drafts.<sup>32</sup> We realize, however, that when Congress introduces a new reform bill later this year, the bill might not reflect any of those alternatives.

### *Congress Should Test its Proposed New TEA Definition to Determine its Effectiveness*

Once Congress determines the approach it intends to follow, we recommend that Congress test whether that approach is likely to be effective to significantly reduce the number of project

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<sup>29</sup> USCIS' liberal policy changes in 2009 made EB-5 capital accessible to a wider range of real estate development projects. See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

<sup>30</sup> See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

<sup>31</sup> Public infrastructure projects are particularly appropriate given that in recent years real estate development projects receive the dominant share of EB-5 capital deployment, which, taken together with all types of development, contributes to the increased burden on our nation's crumbling infrastructure. A liberal interpretation issued by USCIS in 2009 greatly expanded the types of real estate development projects that could utilize EB-5 capital.

<sup>32</sup> See *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 3.



locations that qualify as a TEA. This would be similar to the approach we followed in our recent “TEAs under EB-5 2.0” paper.

After we reviewed and analyzed the three urban area TEA definitions considered in the Discussion Drafts, we realized that a mere reading of the proposed statutory language would not provide a reasonable basis for determining whether each alternative would be significantly more restrictive than the TEA methodology permitted under the current system. Since NYC is the epicenter of the debate, we decided to measure the potential impact that each alternative would have upon NYC projects. Some of the results were surprising. For example, two of the project locations that the Wall Street Journal cited as illustrations of inappropriate gerrymandering would continue to qualify under some of the TEA alternatives. This would not have been evident by merely reading the language in the Discussion Drafts.<sup>33</sup>

Congress should apply its proposed TEA approach to existing or completed large-scale real estate projects in major urban areas that have utilized EB-5 capital as part of the capital stack. These types of projects represent a very significant percentage of the EB-5 capital raised nationwide, and thus include a substantial number of the immigrant investors participating in the Program. Like all other EB-5 project locations, virtually all of these large-scale real estate project locations qualify as TEAs under the rules applied by the various states. Most of these projects rely on the unemployment rate experienced by remote tracts to enable the project tract to qualify as a TEA.

As a starting point, we suggest that Congress consider reviewing the 52 large-scale real estate projects in major urban areas that were the subject of our combined databases.<sup>34</sup> The TEA designation letter for each project will reveal the combination of tracts that comprise the particular TEA.

The focus of the review of the TEA designation letter would depend upon the particular TEA definition to be tested. For example, if Congress were to consider the alternative proposed in the Discussion Drafts that permitted the aggregation of 12 or fewer tracts, USCIS (or whomever Congress designates) presumably would review each project file to determine whether the project location qualified as a TEA based on the aggregation of 12 or fewer tracts, or a greater number of tracts.<sup>35</sup> If a high percentage of these project locations or other project locations tested by USCIS qualified as a TEA by combining 12 or fewer tracts, then this would suggest that a different approach should be considered. Otherwise, the proposal would be ineffective to

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<sup>33</sup> Of course, this anecdotal evidence does not demonstrate that the proposed definitions were or were not appropriate.

<sup>34</sup> Although we were able to collect substantial data about these projects from sources other than state or Federal government agencies, we were not able to easily obtain information about the combination of census tracts that formed the TEA or the number of tracts for most of these projects. We believe that most of these projects were not single census tract TEAs, although the San Francisco Shipyard project is probably one of the few exceptions. *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at Note 1.

<sup>35</sup> For purposes of this testing, to keep this simple and to apply the same factor, USCIS should rely upon the same applicable unemployment rates that were used in the applications or petitions relating to these projects.

remedy the perceived abuse because it would apply different rules but yield the same results. We also suggest that Congress map the locations in key cities, taking into account relevant data, to test whether the coverage would extend only, or at least primarily, to the desired locations. We mapped some of the relevant data for locations in New York City as part of our “TEAs under EB-5 2.0” paper.

### *What is Gerrymandering?*

Gerrymandering is a pejorative term for census tract aggregation. In urban areas, the determination of whether a project location qualifies as a TEA depends solely on whether the project is located in a “high unemployment area”. As previously explained, the standard is whether the unemployment rate of the “area” is at least equal to 150% of the national average unemployment rate. Although the statute does not refer to census tracts, the unemployment rate is commonly measured by reference to individual census tracts.<sup>36</sup> Thus, the census tract in which the project is located is the starting point for the determination of whether a project location qualifies as a TEA.

If the census tract in which the project is located (“Project Tract”) meets the TEA’s high unemployment standard, then the Project Tract is a TEA. This is sometimes known as a “single census tract” TEA.<sup>37</sup>

However, in a thriving, urban area many tracts do not qualify as a single census tract TEA. As a city’s economic conditions improve, unemployment rates decline and fewer tracts meet the high unemployment standard. Thus, the project developer seeks to add contiguous tracts to the Project Tract to expand the boundaries of the combined area against which the high unemployment rate will be measured to determine whether this area will constitute a TEA. The practice has developed where project developers in urban areas add contiguous census tracts to the Project Tract until the combined area achieves a weighted average unemployment rate that meets the high unemployment standard. This assemblage enables the Project Tract to qualify as a TEA.

The combination might be as simple as adding a single census tract with a high unemployment rate to the Project Tract (that does not meet the necessary unemployment rate) to qualify the combined area as a TEA. As an example, the project could be located towards the edge of a census tract with less than “high unemployment”. However, the bordering census tract meets the “high unemployment” standard. The combination of these two tracts might enable the Project Tract to qualify as a TEA.<sup>38</sup>

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<sup>36</sup> USCIS Policy Memorandum. Supra at note 6.

<sup>37</sup> See S.1501 <https://www.congress.gov/bill/114th-congress/senate-bill/1501/text>

<sup>38</sup> Unrelated to a TEA requirement, this activity might produce the ancillary benefit of spurring further economic development in both tracts.

Often, many more tracts must be combined with the Project Tract to qualify as a TEA in thriving, urban areas.<sup>39</sup> Although the rules vary from state to state as explained in the “USCIS’ Role in Fostering Gerrymandering” section below, the states generally follow a common approach. The combined area that will form the potential TEA starts with the Project Tract. The project developer identifies the closest tracts with high unemployment rates, which in thriving, urban areas are often in more remote locations from the project’s location.

The path of the potential TEA follows the shortest route in any direction from the Project Tract to reach the tracts with the highest unemployment rates. Tracts with low unemployment rates are sought to be bypassed because their inclusion would reduce the combined area’s unemployment rate. This could disqualify the combined area as a TEA if the state, such as California, sets a maximum limit on the number of tracts that may be combined.<sup>40</sup> In other states, such as Texas, significantly more tracts may be added until the high unemployment standard is met for the combined area.<sup>41</sup>

As a result, many TEAs take on unnatural, winding configurations, and the route’s direction from the Project Tract varies from TEA to TEA. A criticism lodged by some is that this type of census tract aggregation constitutes gerrymandering because the poor economic conditions (i.e., high unemployment) of distant, remote tracts enable a Project Tract (with low unemployment) to qualify as a TEA. This is perceived to be particularly egregious where the Project Tract and surrounding tracts are “luxury” areas.<sup>42</sup>

Our “TEAs under EB-5 2.0” paper discusses Senator Flake’s bill that would have tied the TEA definition to commuter traffic patterns relating to the project.<sup>43</sup> The proposal implicitly posits that the TEA should be expanded to encompass the geographic area within which the workers commute to the project site. Although this may be consistent with the job creation purpose of the EB-5 Program, it does not reflect the economic condition of the location where the immigrants’ capital investment is made, i.e., the Project Tract.<sup>44</sup> If Congress seeks to incentivize development in areas that encounter difficulty in attracting the investment capital needed for economic growth, this would not be an appropriate use.

More importantly, this type of standard would likely perpetuate the current practice, with the result that most large projects in luxury areas would continue to qualify for TEA status. Thus, if

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<sup>39</sup> See, for example, <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>

<sup>40</sup> The state of California imposes a maximum of 12 contiguous tracts that may be combined in a TEA. <http://business.ca.gov/International/EB5Program.aspx>

<sup>41</sup> See, for example, <http://www.law360.com/articles/726026/group-sues-over-alleged-gerrymandering-in-eb-5-program>

<sup>42</sup> See <http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781?tesla=y>

<sup>43</sup> See *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 3.

<sup>44</sup> Even if this commuter pattern approach were followed, the economic model upon which most job estimates are calculated does not indicate how many workers, if any, commute from residences in high unemployment areas.

Congress' intention is to narrow the locations that qualify as a TEA, this standard should not be incorporated. This would be consistent with the sentiments expressed by Senators Simon and Boschwitz in connection with enactment of the original legislation.

### *USCIS' Role in Fostering Gerrymandering*

The EB-5 provisions of the Immigration Act and the Immigrant Investor Pilot Program vest the Federal immigration agency - originally the Immigration and Naturalization Service ("INS") and now USCIS - with the responsibility to administer the EB-5 visa program. This implicitly includes the authority to designate the area that constitutes a high unemployment area for purposes of a TEA.

However, in regulations adopted in 1991, in a single paragraph, INS delegated its authority to make TEA designations to the individual states.<sup>45</sup> The agency granted blanket authority, without establishing any rules or guidelines, and did not reserve the right to review or audit each state's TEA determinations.<sup>46</sup> We believe that INS' delegation was appropriate in 1991 because as an immigration agency, with no existing investor program, it lacked experience and personnel with the expertise to make the required economic determinations.

In USCIS' May 30, 2013 comprehensive Policy Memorandum, it acknowledges that the TEA designation is to be limited to enterprises that are doing business, and creating jobs, in the areas of "greatest need."<sup>47</sup> Yet, more than 25 years after INS delegated TEA authority, USCIS continues to defer to state determinations of the appropriate boundaries that constitute TEAs.<sup>48</sup> We recognize that if S. 1501 had become law, TEA determinations would be made by USCIS rather than the individual states.

USCIS' continued delegation to the states of the TEA authority without guidelines results in the application of inconsistent rules by the various states. More importantly, each state has the obvious self-interest to promote economic development within its own borders. Delegation presents an opportunity for the states to establish lenient rules to enable project locations to qualify as a TEA. Compounding the problem, often the state agency that is charged with making the TEA determination is the same agency that promotes local economic development. As a consequence, virtually every EB-5 project location qualifies as a TEA.<sup>49</sup> Gerrymandering more easily developed because the self-interested individual states were granted the opportunity to establish their own rules without any guidelines or oversight by the Federal government.

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<sup>45</sup> 8 C.F.R. 204.6(i), effective November 29, 1991.

<sup>46</sup> Even today, USCIS reserves only the right to review the state's determination of the unemployment rate and to assess the method by which the state authority obtained the employment statistics. USCIS Policy Memorandum. Supra at note 4.

<sup>47</sup> USCIS Policy Memorandum. Supra at note 6.

<sup>48</sup> Id.

<sup>49</sup> Data is not readily available as to the percentage of TEA determination letter requests that are approved or denied by each state.

### *USCIS' Current Opportunity*

We assume that USCIS is preparing to take action to reform the TEA designation process, in recognition that Congressional action might not be imminent.<sup>50</sup> USCIS has two alternatives. USCIS could formulate uniform and objective TEA standards to be consistently applied by the various states. In addition, presumably USCIS would assume and exercise the powers of oversight, review and audit of state action.<sup>51</sup> Alternatively, USCIS could revoke the authority delegated to the states, and assume full responsibility for administering the TEA designation process from its national office in Washington, D.C.

We believe that USCIS should administer the entire process, consistent with S. 1501. Unless the revised TEA standards are clear, objective and easily applied, some state agencies that administer the TEA designation process might be tempted to stretch the rules to facilitate economic development within the state, particularly given that in many states the agency charged with TEA designation authority is the same agency that promotes economic development. The states are also susceptible to lobbying efforts on behalf of businesses that have a tremendous financial stake in the outcome. Extensive USCIS oversight would be required to monitor compliance.

USCIS is more independent and less likely to be influenced by these factors. Reportedly, the states have developed efficient procedures over the years to quickly process TEA requests. USCIS is currently facing record backlogs in processing petitions. However, if the TEA designation rules are objective and simple, USCIS should be able to streamline the process after a transitional period. According to USCIS, staffing of the Immigrant Investor Protection Office (“IPO”) will be dramatically increased this year. The rulemaking process will provide IPO with ample time to gear up for this. Furthermore, USCIS will be able to train its employees to make sure that the new rules are consistently applied. Finally, the cost to administer and process at the national office level might not be substantially higher than the cost of overseeing and coordinating designations being made by the various states.

### *California Approach to TEA Designation – Maximum of 12 Tracts*

It would not be surprising if USCIS formulates TEA standards tied to the California methodology that allows a maximum of 12 census tracts to be aggregated, given that it is hailed by some as a model.<sup>52</sup> The California approach certainly represents an improvement over the approach followed by many states. Limiting a TEA to 12 tracts is an improvement over the virtually unlimited aggregation that is currently permitted by some states.

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<sup>50</sup> At the Senate and House Judiciary Committee Hearings in February 2016, Chief Colucci was pressed to take action to reform the TEA designation process.

<sup>51</sup> Presumably, the individual states would be required to provide periodic reports to USCIS, including a report as to the number of applications or requests filed and the action taken by the state, as well as on a project basis the number of tracts that were aggregated for each project location.

<sup>52</sup> <http://business.ca.gov/International/EB5Program.aspx>

However, we believe that USCIS should not rush to apply the California approach or any other approach. We have been unable to ascertain California's rationale to set 12 as the appropriate limitation. More importantly, we are not aware of any evidence that, if this methodology were implemented nationwide, especially in Gateway cities, it would result in a meaningful reduction in the number of project locations qualifying as a TEA.

### *USCIS Should Test its Proposed New TEA Definition to Determine its Effectiveness*

Similar to the approach we recommend that Congress pursue, once USCIS determines the approach it intends to follow, it should test whether that approach is likely to be effective to significantly reduce the number of project locations that qualify as a TEA. See the earlier discussion on pages 8 and 9.

Application of the California 12 tract approach has led to some surprising results. For example, the Beverly Hills Waldorf Astoria Hotel project located in Beverly Hills 90210, one of the projects included in our database, recently qualified as a TEA location.<sup>53</sup> This suggests that the California approach should be further scrutinized before USCIS adopts the 12 census tract model. Alternatively, USCIS might choose to consider one or more of the urban area TEA definitions set forth in the Discussion Drafts.<sup>54</sup>

USCIS might not have the authority to apply the TEA investment amount to certain project types (such as infrastructure, manufacturing and closed military bases) without regard to location, because the statute defines a TEA by reference to a location, rather than a project type. We also point out that the statute provides for the minimum investment amount for a TEA and a non-TEA project to be increased without Congressional action.<sup>55</sup> This is beyond the scope of my testimony.

### *Why Visa Reserves Might Be As or More Important Than TEA Project Qualification*

A project's qualification for visa reserves might become as important, or even more important, as a determining factor in the immigrant's decision to invest in a particular project. This is explained on pages 50 through 54 of our paper, "*What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data.*"

Visa reserves are an alternative method for Congress to stimulate investment in those locations or project types that Congress may wish to incentivize.<sup>56</sup> As the visa waiting periods extend to at least 6 years, the right to move towards the front of the visa line may become more important

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<sup>53</sup> See page 2 of this article that describes the capital raise of \$150M from 300 immigrant investors.

<http://eb5social.com/wp-content/uploads/2013/04/Waldorf-Astoria-Beverly-Hills-CaRE-EB-5-Steve-Shpilsky-Los-Angeles-Business-Journal-small-file.pdf#page=2>

<sup>54</sup> For a discussion of the different approaches, see *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 3. If the 12 tract model is pursued by USCIS, the exclusions for "parks" and "bodies of waters" contained in the Discussion Drafts should be incorporated.

<sup>55</sup> INA § 203(b)(5)(C); 8 C.F.R. § 204.6(f).

<sup>56</sup> *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 3.

than qualifying for an investment at a lesser amount.<sup>57</sup> Many wealthy investors will be motivated by the quickest path to securing a visa, than merely qualifying for a lesser investment amount.

The Discussion Drafts would have increased the minimum investment amount to \$800,000 for projects located in a TEA, while retaining the minimum amount at \$1,000,000 for projects not located in a TEA.<sup>58</sup> This \$200,000 differential would reflect a narrower spread than the \$500,000 provided under existing law.

However, if the TEA definitions are tightened and strictly enforced, the \$200,000 would represent an increase in the “real world” spread.<sup>59</sup> Presumably, this would stimulate some investors to select TEA projects, but undoubtedly some of the wealthy investors who utilize this Program will still be attracted to large projects by major developers that the investors perceive to be safer and more likely to be completed. Thus, the narrower spread increases the importance of the visa reserve.

Although visa reserves are likely to be an effective tool to stimulate investments in projects that entitle the investors to a visa reserve, Congress should carefully consider the potential impact that the visa reserve may have on those projects that do not qualify. The considerations are similar to those that apply to determining which projects qualify for TEA treatment.

Finally, the visa reserves should be carefully coordinated with the new TEA rules to make sure that the reserves do not undermine the TEA incentives. It is important that the two incentives work in tandem to achieve the desired results.

Thank you again for the opportunity to appear before this Committee. I would be happy to respond to your questions.

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<sup>57</sup> The extended waiting period applies particularly to immigrant investors from Mainland China. Also see [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performance\\_data\\_fy2016\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performance_data_fy2016_qtr1.pdf)

<sup>58</sup> S. 1501 proposed a minimum investment amount of \$1,200,000 for a project not located in a TEA.

<sup>59</sup> As stated above, the current spread between the minimum investment in TEA and non-TEA projects is \$0 because virtually all project locations qualify as a TEA.