

## "The (New) New Colossus": Amending the Investor Visa Program to Comport with the Mandate of the United States' Immigration Policy and Benefit U.S. Workers

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**“THE (NEW) NEW COLOSSUS”: AMENDING  
THE INVESTOR VISA PROGRAM TO  
COMPORT WITH THE MANDATE OF THE  
UNITED STATES’ IMMIGRATION POLICY  
AND BENEFIT U.S. WORKERS**

BRENDAN LEE \*

I. INTRODUCTION

Give me your hired, your entrepreneur,

Your upper classes willing to pay a fee . . .

Taken as a whole, the United States’ relationship with immigration has been a paradox. On one hand, the United States has been a “melting pot”—the place where peoples from across the globe have converged to form our unique cultural heritage. Indeed, our nation owes its very existence to the millions of immigrants who have undertaken the voyage to our shores, drawn by the promise of a better life in the “land of opportunity.” On the other hand, the United States’ attitude toward immigration, for more of its history than we care to acknowledge, has been, and continues to be, inextricably linked to racist, nativist, economic and other social forces that have pervaded the nation since its birth.<sup>1</sup>

For the first one hundred years of its existence, the United States offered virtually unimpeded access to immigration.<sup>2</sup> The Act of March 3, 1875, known as “The Page Act of 1875,” represented Congress’ first foray into the restriction of immigration.<sup>3</sup> In effect, the Act, focusing on the exclusion of prostitutes, particularly Chinese prostitutes, systematically

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<sup>1</sup> Kevin R. Johnson, THE “HUDDLED MASSES” MYTH 16-17 (2004).

<sup>2</sup> See IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 3 (14th ed. 2014).

<sup>3</sup> *Id.*

barred all Chinese women from entering the United States.<sup>4</sup> The Chinese Exclusion Act of 1882 marked the first instance in which Congress imposed limitations on immigration explicitly based on race.<sup>5</sup> The Act barred virtually all immigrations of persons of Chinese ancestry and severely punished Chinese immigrants who violated its exclusionary provisions.<sup>6</sup> Although Equal Protection Clause jurisprudence demands strict scrutiny of racial classifications for citizens, the Supreme Court has repeatedly upheld the use of such racial discrimination as a basis for denying the admission of (noncitizen) immigrants into the United States.<sup>7</sup> Over the next fifty years, Congress continually introduced similar legislation aimed at other groups as well.

By 1924, the prevailing political and social forces<sup>8</sup> converged, culminating in the Immigration Act of 1924.<sup>9</sup> The Act established the national origins quota system (“quota system”), a formulaic device designed to ensure the stability of the ethnic composition of the United States.<sup>10</sup> A House report articulates the purpose of this act, stating, “[The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is also hoped to guarantee, as best we can at this late date, racial homogeneity.”<sup>11</sup> Although the quota system left a

<sup>4</sup> Johnson, *supra* note 1, at 126.

<sup>5</sup> Johnson, *supra* note 1, at 17.

<sup>6</sup> *Id.*

<sup>7</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (noting that “[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interest of the country require it, cannot be granted away or restrained on behalf of any one.”).

<sup>8</sup> By 1924, political forces such as isolationism in the wake of World War I and prevalent fears of communism and anarchism combined with social influences such as nativism, social Darwinism and eugenics, culminated in the National Origins Quota System of the Immigration Act of 1924.

<sup>9</sup> Johnson, *supra* note 1, at 23. “The racial hierarchy endorsed by proponents of the national origins quota system was entirely consistent with the academic literature of the day, which viewed the “races” of southern and eastern Europe as inferior to those of northern Europe.”

<sup>10</sup> *Id.* at 22.

<sup>11</sup> STAFF OF HOUSE COMM. ON IMMIGRATION AND NATURALIZATION, REPORT ON RESTRICTION OF IMMIGRATION, H.R. REP. NO. 68-350, pt. 1, at 13-14, 16 (1924).

blemish on the world's perception of the United States, it nonetheless remained intact until 1965.<sup>12</sup>

As the twentieth century wore on, popular opinion (most notably among U.S. Presidents), of the quota system began to shift. Over the veto of President Harry S. Truman, Congress maintained the system in the Immigration and Nationality Act of 1952.<sup>13</sup> By 1963, it was President John F. Kennedy who urged Congress to overhaul the United States' immigration policy, recommending legislation that concentrated attention primarily on revision of the "quota immigration system."<sup>14</sup> President Lyndon B. Johnson shared his predecessor's belief and sought the elimination of the quota system, stating, "The system violated the basic principles of American democracy—the principal that values and rewards each man on the basis of his merit as a man."<sup>15</sup>

On the heels of the Civil Rights Act of 1964, Congress passed the Immigration and Nationality Act of 1965 ("INA"). Seeking to eliminate the national origins quota system as a basis for the selection of immigrants for admission to the United States, the new system was designed to further a number of policy interests, with preference "based upon the existence of close family relationships to U.S. citizens and permanent residents," and "those professional people whose services are urgently needed in the United States."<sup>16</sup> To this end, the INA replaced the quotas with across-the-board annual numerical limits of immigrants from each nation.<sup>17</sup>

The INA also marked a colossal shift in the United States' immigration policy, mandating "a new system of selection for immigrants which is designed to be fair, rational, humane, and in the national interests."<sup>18</sup> It is against this mandate that the INA and subsequent immigration legislation ought to be measured.

<sup>12</sup> Johnson, *supra* note 1, at 24.

<sup>13</sup> *Id.* at 22 (explaining "President Harry S. Truman vetoed the INA [of 1952] (a veto that Congress overrode) because it carried forward the discriminatory quota system.").

<sup>14</sup> H.R. REP. NO. 89-745 (1965).

<sup>15</sup> President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill, Liberty Island, New York, Oct. 3, 1965, *available at* <[www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/651003.asp](http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/651003.asp)>.

<sup>16</sup> 89 CONG. REC. 21, 571-72 (1965) (statement of Rep. Delaney).

<sup>17</sup> Johnson, *supra* note 1, at 26.

<sup>18</sup> 89 CONG. REC. 21 at 571 (1965) (statement of Rep. Delaney).

The United States' immigration law (including the INA) fails to fulfill the mandate of the INA. Although there are no longer explicitly race-based quotas, the existing 'per country levels' create a de facto barrier to immigrants from certain countries. This Note addresses our need to fulfill the mandate of the INA by enacting legislation that seeks to admit immigrants on a "fair, rational, [and] humane" basis that is "in the national interest."<sup>19</sup>

Part I of this Note will examine the failure of the INA, focusing on the de facto quota system implemented in place of the explicit national origins quota system. Further, it will show how the Immigration Act of 1990 failed to address this problem.

Part II of this Note will look specifically at the EB-5 Investor Visa Program created by the Immigration Act of 1990. This part will explore the practical usage and advantages conferred to those who participate in the program. In addition, this part will analyze how these advantages give rise to disparate effects among prospective immigrants of differing economic means and thus run afoul of the INA's mandate for admission based on "fair, rational, [and] humane" considerations.

Part III of this Note turns to the twin purpose of the EB-5 Investor Visa Program itself: first, to attract the investment of foreign capital in the United States, and second, to promote the creation of U.S. jobs. This part of the Note will examine the changes Congress made to the EB-5 Investor Visa Program through the legislation of the Investor Visa Pilot Program and how that program further favors the goal of attracting capital investment at the cost of actual job creation. Part IV of this Note examines how other provisions of the overall EB-5 program also favor the goal of attracting capital investment at the expense of actual job creation.

Part V of this note proposes a new immigrant visa preference category: the EB-7 Immigrant Job Creator Visa Program, which is designed to provide relief to immigrants subject to the more onerous de facto quotas imposed by the INA and carried through by the Immigration Act of 1990 while at the same time overhauling the EB-5 Investor Visa Program to comport with the overarching

<sup>19</sup> *Id.*

policy goals set forth in the INA as well as the policy goals of the program itself.

Finally, Part VI will illustrate how the proposed EB-7 Immigrant Job Creator Visa Program will harmonize the United States' immigration law with the overarching policy goals of the INA.

## II. FAILURE TO ELIMINATE QUOTAS: "PER COUNTRY" LEVELS

Despite the sweeping changes enacted by the INA, most notably the abolition of the quota system, it has failed to achieve its mandate.<sup>20</sup> Many aspects of the United States' immigration laws disparately impact immigrants from developing nations.<sup>21</sup> While not facially discriminatory, in operation, the INA created exceedingly long lines for immigrants from four countries in particular:<sup>22</sup> China (mainland-born), India, Mexico, and the Philippines.<sup>23</sup> For example, as of October 2014, the United States Citizenship and Immigration Services ("USCIS") is processing only those applications for fourth-preference family-based immigration visas (brothers and sisters of adult citizens) of Filipino foreign-nationals filed prior to April 8, 1991.<sup>24</sup> This twenty-three year waiting list for prospective Filipino immigrants with a U.S. citizen sibling is more than ten years longer than any other country other than Mexico.<sup>25</sup> Similarly, as of October 2014, USCIS is processing only those applications for third-preference employment-based visas (skilled workers or professionals possessing the equivalent of a Bachelor's degree) of Indian foreign-nationals filed prior to November 15, 2003.<sup>26</sup> This represents a

<sup>20</sup> Johnson, *supra* note 1, at 26.

<sup>21</sup> Bureau of Consular Affairs, U.S. Dep't of State, Immigrant Numbers for October 2014, No. 73, Vol. IX, 2-3 (2014).

<sup>22</sup> *Id.*

<sup>23</sup> These four countries, China (mainland-born), India, Mexico, and the Philippines will heretofore be known as "traditionally oversubscribed" nations, as they are subject to waiting periods that differ from the rest of the world.

<sup>24</sup> Bureau of Consular Affairs, U.S. Dep't of State, Immigrant Numbers for October 2014, No. 73, Vol. IX, at 2 (2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

waiting period of nearly eight years longer than any other country other than China.<sup>27</sup>

### III. THE EB-5 PROGRAM

In furtherance of its objectives embodied in the INA, Congress passed the Immigration Act of 1990 (“IMMACT”), the most comprehensive change to the immigration system since 1965.<sup>28</sup> IMMACT has four main policy goals.<sup>29</sup> First, it established overall limits on immigration through the adoption of a flexible cap on total numbers.<sup>30</sup> Second, it permitted the continued reunification of close family members.<sup>31</sup> Third, IMMACT sought to meet labor market needs by increasing the number of immigrants admitted for employment-based reasons and giving higher priority to the entry of professionals and highly skilled workers.<sup>32</sup> Fourth, it sought to provide greater diversity through new opportunities for migration from countries with relatively small numbers of immigrants to the United States.<sup>33</sup>

Despite these broad reforms, IMMACT still fails immigrants from traditionally oversubscribed nations. Immigrants from these nations are still subject to longer waiting periods for visa processing than immigrants from other chargeability areas.

Most significantly to this Note, IMMACT created a new visa category with the aim of attracting investment capital to the country and creating new jobs for U.S. workers: the EB-5 visa.<sup>34</sup> The EB-5 program is based on our nation’s twin interest in promoting the immigration of people who, first, invest their capital in new, restructured, or expanded businesses in the United States,

<sup>27</sup> *Id.*

<sup>28</sup> U.S. Commission on Immigration Reform, *1994 Executive Summary*, 33 (1994).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> ICF International, *Study of the United States Immigrant Investor Pilot Program (EB-5)*, 1 (2010) available at <<https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/EB-5/EB5-Report-2010.pdf>>.

and second, create much-needed jobs for U.S. workers.<sup>35</sup> Under the EB-5 program, foreign nationals are eligible for conditional permanent residency in the United States (a “green card”) for two years<sup>36</sup> by investing \$1 million<sup>37</sup> in a U.S. business that would directly create at least ten full-time jobs.<sup>38</sup> After two years, if the foreign national has satisfied the conditions of the EB-5 program and other criteria of eligibility, the conditions are removed and the immigrant investor may become an unconditional lawful permanent resident of the United States.<sup>39</sup>

#### A. *EB-5 Program Advantages to the Immigrant Investor*

The EB-5 Immigrant Investor Visa Program is advantageous to the immigrant investor in a multitude of ways. First, the EB-5 visa has always been “current.” This means that there is no waiting list for prospective immigrants; as soon as they submit their application, USCIS will begin processing their application. This makes the EB-5 program particularly appealing to those immigrants who, because of circumstance, are subject to relatively long waiting periods. Any prospective immigrant, who, for instance, premises his or her immigrant visa application on a familial relationship to a U.S. citizen sibling, must wait almost eleven years (at least) before USCIS will begin processing his or her application. However, the same individual immigrant may (if he or she has a minimum of \$500,000 to spare) file an EB-5 immigrant visa application, which USCIS will begin processing immediately upon receipt.

<sup>35</sup> U.S. Dep’t of Homeland Security, U.S. Citizenship and Immigration Services, *Policy Memorandum: EB-5 Adjudications Policy*, PM-602-0083 at 1 (May 30, 2013) available at <[https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Assessment%20of%20EB-5%20Final%203-30-13\).pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Assessment%20of%20EB-5%20Final%203-30-13).pdf)>.

<sup>36</sup> *Id.* at 1-2. Congress enacted this two-year conditional permanent residency status to ensure compliance with the statutory and regulatory requirements and to ensure that the investment of capital in fact created the requisite ten full-time jobs in the United States.

<sup>37</sup> Pursuant to 8 C.F.R. § 204.6(f)(2), an immigrant investor need only invest a minimum of \$500,000 in capital if he or she invests his or her capital in a new commercial enterprise that is principally doing business in, and creates jobs in, a rural area or a “targeted employment area,” defined as an area with a rate of unemployment at least 150% of the national average rate of unemployment.

<sup>38</sup> ICF International, *supra* note 34, at 1.

<sup>39</sup> U.S. Dep’t of Homeland Security, *supra* note 35, at 1.



*B. Disparate Impact of Investor Visa Program*

The EB-5 investor visa program is inherently discriminatory. The required initial investment of \$500,000 (and in many cases, \$1,000,000) in a new commercial enterprise represents a massive barrier to participation in the program for immigrants from developing nations or of lesser means. Even more burdensome, the investment must be placed “at risk” for the purpose of generating a return.<sup>40</sup> In other words, prospective immigrant investors are unable to satisfy the investment of capital requirement by merely financing debt as opposed to equity investments.<sup>41</sup> They must not only have \$500,000, but also be in a position to place such a vast sum of money at risk, with no guarantee of its return.

This economically discriminatory policy gives rise to disparate results among prospective immigrants from different countries. According to a 2005 report of the United States Government Accountability Office,<sup>42</sup> eighty-three percent of the EB-5 visas issued from 1992 to 2004 have been issued to immigrant investors from Asia.<sup>43</sup> More specifically, Taiwan alone accounted for thirty-nine percent of the EB-5 visas issued.<sup>44</sup> During the same timeframe, South America and Africa have each only accounted for two percent of the EB-5 visas issued, or 143 and 122 visas respectively.

A 2010 study by ICF International yielded similar results.<sup>45</sup> Based on a sample of 295 immigrant investors, ICF found that seventy-eight percent of immigrant investors are from Asia.<sup>46</sup> Furthermore, Europe was the second-most represented continent, accounting for just over fifteen percent of the total number of issued EB-5 visas.<sup>47</sup> Meanwhile, North America, South America

<sup>40</sup> 8 C.F.R. § 204.6(j)(2).

<sup>41</sup> U.S. GAO, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors*, GAO 05-256, 12 (2005) available at <<http://www.gao.gov/new.items/d05256.pdf>>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> See ICF International, *supra* note 34.

<sup>46</sup> *Id.* at 9.

<sup>47</sup> *Id.*

and Africa accounted for less than seven percent of the issued EB-5 visas combined.<sup>48</sup> Even more striking are the statistics pertaining to EB-5 investors from the traditionally oversubscribed nations: Mexico, India, the Philippines, and China (mainland).

### 1. Mexico

In the fiscal year 2013, Mexican immigrant investors accounted for sixty-three of the 7,312 total EB-5 visas issued—less than one percent.<sup>49</sup> Indeed, 2013 actually marked a significant uptick in EB-5 visa subscription among prospective Mexican immigrants. Over the four prior fiscal years, from 2009 to 2012, there had only been thirty-seven total EB-5 visas issued to Mexican immigrant investors.<sup>50</sup>

### 2. India

In the fiscal year 2013, Indian immigrant investors accounted for thirty-five of the 7,312 total EB-5 visas issued—less than half of one percent.<sup>51</sup> Over the four prior fiscal years, from 2009 to 2012, there had only been eighty-nine total EB-5 visas issued to Indian immigrant investors.<sup>52</sup>

### 3. Philippines

In the fiscal year 2013, Filipino immigrant investors accounted for only five of the 7,312 total EB-5 visas issued—a statistically irrelevant figure.<sup>53</sup> Even more bleak, over the four prior fiscal years, from 2009 to 2012, there had only been two total EB-5 visas issued to Filipino immigrant investors.<sup>54</sup>

<sup>48</sup> *Id.*

<sup>49</sup> Bureau of Consular Affairs, U.S. Dep't of State, Report of the Visa Office 2013, VI. Preference Immigrant Visas Issued (by Foreign State of Chargeability): Fiscal Year 2013, Part 4 (Employment 5th, Schedule A, Grand Total) (2009-2013).

<sup>50</sup> Bureau of Consular Affairs, U.S. Dep't of State, Report of the Visa Office 2013, VI. Preference Immigrant Visas Issued (by Foreign State of Chargeability): Fiscal Year 2013, Part 4 (Employment 5th, Schedule A, Grand Total) (2009-2013).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

#### 4. China (mainland)

China stands in stark contrast against the other traditionally oversubscribed nations. Over the four prior fiscal years, from 2009 to 2012, Chinese immigrant investors accounted for over seventy-four percent of all issued EB-5 visas.<sup>55</sup> According to the most recently available data, this pattern is only trending upward. In the fiscal year 2013, Chinese immigrant investors accounted for 6,250 of the 7,312 total EB-5 visas issued—over eighty-five percent.<sup>56</sup> For the first time ever, in the fiscal year 2014, the EB-5 visa category was made unavailable to Chinese immigrant investors, as demand exceeded the statutory allocation.<sup>57</sup>

### IV. THE IMMIGRANT INVESTOR PILOT PROGRAM

The EB-5 program provisions of IMMACT were originally contemplated to confer lawful permanent resident status to immigrant investors who not only invested, but also engaged in the management of employment-creating commercial enterprises.<sup>58</sup> The program requires the immigrant investor to be so engaged, either through the exercise of day-to-day managerial responsibility or through policy formulation.<sup>59</sup> It is not enough that the immigrant investor maintain a purely passive role in regard to his or her investment.<sup>60</sup> USCIS requires extensive documentation of the immigrant investor's active involvement.<sup>61</sup>

<sup>55</sup> *Id.*

<sup>56</sup> Bureau of Consular Affairs, U.S. Dep't of State, Report of the Visa Office 2013, VI. Preference Immigrant Visas Issued (by Foreign State of Chargeability): Fiscal Year 2013, Part 4 (Employment 5th, Schedule A, Grand Total) (2009-2013).

<sup>57</sup> Visa Services, U.S. Dep't of State, *Effective immediately Saturday, August 23, 2014 the China Employment Fifth (EB-5) preference category has become "Unavailable" for the remainder of FY-2014*, (Aug. 23, 2014). "This action is necessary because the maximum level of numbers which may be made available for use by China EB-5 applicants during FY-2014 have been reached."

<sup>58</sup> U.S. Dep't of Homeland Security, *supra* note 35, at 2.

<sup>59</sup> 8 C.F.R. § 204.6(j)(5).

<sup>60</sup> *Id.*

<sup>61</sup> 8 C.F.R. § 204.6(j)(5)(i)-(iii). The petition must be accompanied by: "(i) A statement of the position title that the [immigrant investor] has or will have in the new enterprise and a complete description of the position's duties; or, (ii) Evidence that the [immigrant investor] is a corporate officer or a member of the corporate board or directors; or, (iii) If the

In 1992, Congress relaxed the requirements of the EB-5 program, creating the Immigrant Investor Pilot Program (“Pilot Program”) in order to attract a larger number of applicants.<sup>62</sup> The Pilot Program did not replace the EB-5 program; it merely created a distinct set of statutory requirements for participation in the EB-5 program.<sup>63</sup> Of the 10,000 EB-5 visas available annually, 3,000 are specifically reserved for immigrant investors who participate in the Pilot Program.<sup>64</sup>

The Pilot Program<sup>65</sup> is advantageous to immigrant investors in two major ways. First, immigrant investors can invest in designated “regional centers” that place and manage investments on behalf of the investors.<sup>66</sup> Second, this newer program provides that the full-time positions can be created either *directly* or *indirectly* by the commercial enterprise in which the investment is placed.<sup>67</sup>

#### A. *The Regional Centers*

A regional center is “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”<sup>68</sup> This may include entities ranging from a state government agency to a consortium of exporters, specifically any entity benefiting a particular geographic of the United States.<sup>69</sup> These entities formulate a business plan and successfully operate almost all business types.<sup>70</sup>

new enterprise is a partnership, either limited or general, evidence that the [immigrant investor] is engaged in either direct managerial or policy making activities. . . .”

<sup>62</sup> ICF International, *supra* note 34, at 1.

<sup>63</sup> Because of the relaxed statutory standards, EB-5 immigrant investors participating in the program overwhelming utilized the Pilot Program.

<sup>64</sup> *Id.*

<sup>65</sup> PL 112-176 §1, 126 Stat 1325 (Sept. 28, 2012). The so-called “pilot” program has been repeatedly extended, most recently to Sept. 30, 2015. Congress affirmed its commitment to this program by removing the word “pilot” from its reauthorization of the program, indicating its permanence. Still, it remains known as the “Pilot Program.”

<sup>66</sup> ICF International, *supra* note 34, at 1.

<sup>67</sup> 8 C.F.R. § 204.6(j)(4)(iii).

<sup>68</sup> 8 C.F.R. § 204.6(e).

<sup>69</sup> 9 FAM 42.32(E) N8, “*Regional Center*” *Defined*.

<sup>70</sup> *Id.*

The regional center model within the Pilot Program can offer an immigrant investor already-defined investment opportunities, thereby reducing the immigrant investor's responsibility to identify acceptable investment vehicles.<sup>71</sup> Most importantly, the Pilot Program permits immigrant investors to place passive investments with the regional center.<sup>72</sup> This dramatically reduces the burden placed upon prospective immigrant investors: they are no longer required to be engaged in the management of employment-creating commercial enterprises, either through the exercise of day-to-day managerial responsibility or through policy formulation.

To date, USCIS has approved approximately six hundred regional centers.<sup>73</sup> This represents a massive increase in the number of approved regional centers nationwide.<sup>74</sup> In recent years, developers seeking to raise capital have increasingly taken interest in the EB-5 program, specifically the Pilot Program.<sup>75</sup> Utilizing the program, developers enjoy relatively inexpensive borrowing costs, ranging from three to five percent.<sup>76</sup> Furthermore, developers are under no pressure to produce high rates of return, as immigrant investors are primarily concerned with obtaining permanent residency.<sup>77</sup>

### *B. Direct vs. Indirect Jobs*

The Investor Pilot program provides that the statutorily mandated ten full-time positions can be created either *directly* or

<sup>71</sup> U.S. Dep't of Homeland Security, *supra* note 35, at 14.

<sup>72</sup> Dennis J. Olle and Julie C. Ferguson, *EB-5: Project Finance for U.S. Developers and Businesses*, LEXOLOGY, Jan. 29, 2013, <http://www.lexology.com/library/detail.aspx?g=4422a94d-22d3-45d9-9ee5-41e5d20428ff>.

<sup>73</sup> U.S. Citizenship and Immigration Services, Immigrant Investor Regional Centers, 2014, *available* at <<http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>>.

<sup>74</sup> ICF International, *supra* note 34, at 78.. "As of June 24, 2010, there were 92 USCIS-approved Regional Centers across the U.S. inclusive of the Territory of Guam." Therefore, in the last four and a half years, USCIS has approved more than five hundred regional centers.

<sup>75</sup> *See* Olle and Ferguson, *supra* note 72.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

*indirectly* by the new commercial enterprise.<sup>78</sup> Direct positions are those that provide services or labor for the new commercial enterprise and receive wages or other remuneration directly from the new commercial enterprise.<sup>79</sup> Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise.<sup>80</sup> For example, indirect jobs can include, but are not limited to, those held by employees of the producers of materials, equipment, or services used by the new commercial enterprise.<sup>81</sup> Further, the indirect jobs qualify and count towards the immigrant investor's statutory requirement even if they are located outside of the geographic boundaries of the regional center.<sup>82</sup> The ability to rely upon indirect job creation substantially lowers the burden placed upon immigrant investors in meeting the requirements of the EB-5 visa program.

Taken together, these two major changes implemented by the Pilot Program illustrates not only Congress' desire to make the EB-5 program more appealing to prospective immigrant investors, but also a broader shift in policy: favoring the goal of capital investment at the cost of employment creation.<sup>83</sup> Initially, the EB-5 program was criticized for permitting foreign nationals to "buy" a visa.<sup>84</sup> With the passage of the Pilot Program, it appeared as though Congress "green lit" the sale of visas. By permitting immigrant investors to make passive qualifying investments in a regional center, it eliminated the requirement that immigrant investors actually create an employment-creating commercial enterprise. Immigrant investors now need only cut a check. Moreover, the ability to rely on indirect job creation to fulfill the requirements of the Pilot Program attenuates the connection between the immigrant investor's investment and actual

<sup>78</sup> 8 C.F.R. § 204.6(j)(4)(iii).

<sup>79</sup> 8 C.F.R. § 204.6(e).

<sup>80</sup> U.S. Dep't of Homeland Security, *supra* note 35, at 18.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> This shift in policy is further demonstrated by change in statute. On November 2, 2002, 8 U.S.C. § 1153(b)(5)(A)(i) was removed from the statute, which had required that the new commercial enterprise be one that the immigrant investor "has established," him or herself.

<sup>84</sup> 101 CONG. REC. 14,286 (1989) (statement of Sen. Bumpers). "But the rich ought not to be able to buy their way into the country."

employment creation. An immigrant investor may use complex economic reports such as multiplier tables and feasibility studies as evidence of the number of jobs created.<sup>85</sup>

## V. OTHER SHORTCOMINGS OF THE EB-5 PROGRAM'S ABILITY TO CREATE JOBS

### A. *Accounting for Jobs Created*

A shortcoming of the EB-5 program, and particularly of the Pilot Program, is the manner by which USCIS credits the number of jobs created as a result of an immigrant investor's capital infusion. According to a 2005 report by the United States Government Accountability Office, it is impossible to determine how many jobs immigrant investors have in fact established because of USCIS's accounting methods.<sup>86</sup> During the adjudication process, USCIS adjudicators ensure that each business creates the minimum requirements of ten full-time jobs.<sup>87</sup> However, if there are non-EB-5 investors involved or the investment is part of a greater overall business expansion, USCIS credits the single EB-5 investor with the total of all jobs created even though many of the jobs are not the result of his portion of the investment.<sup>88</sup> In one particular case, USCIS credited a single immigrant investor with creating 1,143 jobs based on a \$1.5 million investment.<sup>89</sup> Although this single investment could not have possibly created all 1,143 jobs, for adjudicative purposes, when the immigrant investor is the only one seeking the immigration benefit of conditional permanent residency, all jobs are attributed to that investor.<sup>90</sup> This is true even if it is the capital of others that is in fact fueling the

<sup>85</sup> 9 FAM 42.32(E) N10, Meeting the Job Creation Requirement.

<sup>86</sup> U.S. GAO, GAO 05-256, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors (2005), 19, *available at* <http://www.gao.gov/new.items/d05256.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

enterprise.<sup>91</sup> In this case, the immigrant investor's capital contribution represented a small fraction of a multimillion-dollar expansion of an existing business that involved multiple franchises and other non-EB-5 investors.<sup>92</sup>

The problem with USCIS's accounting system is that it "credits" an immigrant investor with the creation of a job rather than insisting that the immigrant investor actually create one. It is easy to imagine a scenario in which a large real estate developer would utilize the EB-5 program in order to finance an already-existing project at low interest rates. In such a scenario, the project's feasibility would not be contingent upon securing EB-5 capital—the project (and the jobs it creates) would come into existence irrespective of an immigrant investor's capital infusion. However, the real estate developer augments his or her bottom line by financing the project at favorable interest rates offered by EB-5 capital investments.

The scenario described above is easy to imagine because it has been an on-going reality. In recent years, businesses, particularly real estate and project developers, seeking to raise capital have increasingly utilized the EB-5 Program.<sup>93</sup> Today, real estate developers often use EB-5 capital in lieu of traditional mezzanine loans.<sup>94</sup> Unlike a traditional mortgage, real estate mezzanine loans are collateralized by equity in the real estate developer itself rather than the property.<sup>95</sup> Because of the higher risk associated with mezzanine loans, lenders typically charge exorbitant interest rates and fees, ranging from twelve to twenty percent.<sup>96</sup> As a result, EB-5 investments are tremendously attractive to real estate and project developers. A number of high-profile real estate

<sup>91</sup> *Id.*

<sup>92</sup> U.S. GAO, GAO 05-256, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors* (2005), 19, available at <http://www.gao.gov/new.items/d05256.pdf>.

<sup>93</sup> Julie C. Ferguson, *EB-5 Options for Developers*, CFJBLAW.COM, (Feb. 11, 2013), <http://www.cfjblaw.com/eb-5-options-for-developers-02-11-2013/>.

<sup>94</sup> Wessem Amin, *EB-5 Regional Centers in Project Finance: Using EB-5 Capital in lieu of Mezzanine Financing*, DHARLAWLLP.COM, (Nov. 25, 2013) available at <http://dharlawllp.wordpress.com/2013/11/25/wassem-amin-eb-5-project-finance/> (noting "[i]n the context of real estate finance, mezzanine loans are typically used as a source of supplementary financing for development projects.").

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*



developers have established regional centers in order to attract EB-5 investments to finance their many projects.<sup>97</sup>

### *B. Bridge Financing*

In order to comport with business realities, USCIS has adopted a stance permitting the use of “bridge financing” in EB-5 investment projects.<sup>98</sup> The developer or the principal of the new commercial enterprise, either directly or through a separate job-creating entity, may utilize interim or “bridge” financing, in the form of debt or equity, prior to the receipt of EB-5 capital.<sup>99</sup> In a 2013 policy memorandum issued by USCIS clarifying the adjudication policy of EB-5 immigrant investor visa applications, it stated, “. . . even if the EB-5 financing was not contemplated prior to acquiring the temporary or ‘bridge’ financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would subsequently be replaced, the infusion of EB-5 financing could still result in the creation of, and *credit* for, new jobs.”<sup>100</sup> According to USCIS, developers should not be precluded from using EB-5 capital as an alternative source to replace temporary financing simply because it was not contemplated prior to obtaining the bridge or temporary financing.<sup>101</sup> This policy pronouncement further illustrates the inherent problem with the EB-5 program: it does not create jobs; it merely allocates or “credits” the creation of jobs to prospective immigrants that would have been created regardless of their investment.

The strength of capital markets is undoubtedly crucial to the development of the nation’s economy. Indeed, the availability of credit is critical to a sustained and healthy economy. However, the evaluation of the EB-5 program is incomplete unless we are equally critical of the program’s ability to deliver on its other goal: the creation of jobs.

<sup>97</sup> Related Companies and Silverstein Properties, developers of the Hudson Yards Redevelopment and World Trade Center respectively, have each established regional centers in recent years.

<sup>98</sup> U.S. Dep’t of Homeland Security, *supra* note 35, at 15.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 16 (emphasis added).

<sup>101</sup> *Id.*

## VI. THE EB-7 IMMIGRANT JOB CREATOR VISA

This Note proposes a solution: The EB-7 Immigrant Job Creator Visa. The EB-7 Immigrant Job Creator Visa would read as follows:

Congress, recognizing the essential role of immigrants in building our nation and the need for domestic job creation, does hereby establish the Seventh Preference Category for Employment-based Immigrant Visas.

### 8 U.S.C. § 1153(b)(7) Job-Creator Visa

(A) In general.

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level to qualified immigrants seeking to enter the United States less the number of visas issued pursuant to § 1153(b)(5) of this title in the prior fiscal year, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including limited partnership) —

(i) in which such alien has invested or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Target employment areas defined.

In this paragraph, the term “targeted employment area” means, at the time of the investment, a rural area or an area, which has experienced high unemployment (of at least 150 percent of the national average rate).

(C) Amount of capital required.

(i) In general

Except as otherwise provided in this subparagraph the amount, of capital required under subparagraph (A) shall be the greater of either--

- (I) \$200,000; or
- (II) 20% of the immigrant job-creator's net worth, to be calculated by reasonable economic or accounting methodologies.

(ii) Adjustment for target employment areas defined

In the case of investment made in a target employment area, the immigrant investor may reduce his or her required investment under this subparagraph by 25%.

(iii) Limitations

Under this subparagraph, an immigrant job-creator shall not be required to invest capital in excess of \$400,000.

(D) Full-time employment defined.

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(E) Job creation requirements.

An immigrant job-creator seeking an immigrant visa under this subparagraph must demonstrate that his or her qualifying investment is in a commercial enterprise--

- (i) that is controlled by the immigrant job creator through the exercise of day-to-day managerial responsibility; and
- (ii) that *directly* creates ten full-time jobs.

(F) "But for" causation requirement.

In order to demonstrate compliance with subparagraph (E)(ii) of this subsection, a immigrant job creator must show by a preponderance of the evidence that each of the 10 jobs required under subparagraph (A)(ii) would not have been created *but for* the immigrant job creator's qualifying investment.

USCIS shall promulgate rules in accordance with this subparagraph to adjudicate compliance with the "but for" causation requirement on a case-by-case basis.

(G) Eligibility.

Only immigrant job creators from nations that, pursuant to 8 U.S.C. 1153(e), are subject to visa cut-off dates that differ from all chargeability areas, may apply for the EB-7 Immigrant Job Creator Visa Program. On the date of the enactment of this provision, only immigrant job creator from the following nations may apply:

- (i) China (mainland born);
- (ii) India;
- (iii) Mexico; and
- (iv) The Philippines.

#### VII. THE BENEFITS OF THE EB-7 IMMIGRANT JOB CREATOR VISA PROGRAM

The EB-7 Immigrant Job Creator Program addresses many issues with our current body of immigration law with a relatively small amendment. First, the EB-7 Immigrant Job Creator Visa Program will only be made available to immigrants from traditionally oversubscribed nations. This provision has two purposes. First, it will have the ameliorative effect of granting admission to immigrants who are otherwise subject to substantially longer waiting periods than all other immigrants. This comports with the mandate of the INA. Second, it will substantially limit the applicability of this relatively small ameliorative legislation to those immigrants most in need of relief.

Second, the proposed EB-7 Immigrant Job Creator Visa Program does not affect the overall annual limit on immigration. By only issuing visas equal to the difference between the total allocation of EB-5 visas and the number of EB-5 visas actually issued, the EB-7 visa only seeks to make-up this gap in enrollment.<sup>102</sup> It will be for Congress to determine whether it be prudent to increase the overall level of immigration in order to issue a higher number of EB-7 immigrant job creator visas.

Next, the capital investment requirement is significantly reduced. The EB-7 immigrant job creator's contribution to the

<sup>102</sup> In order to calculate the number of EB-7 Immigrant Job Creator Visas to be issued in a fiscal year, the program uses the number of EB-5 visas issued in the prior fiscal year as a rough estimate for the number of EB-5 visas that will likely be issued in the current fiscal year.

United States will be the creation of new jobs for U.S. workers, not the infusion of capital. Acknowledging that some investment of capital is necessary for the creation of a new job creating, commercial enterprise, a minimum investment of \$150,000 (not to exceed \$400,000) is required. The immigrant job creator is incentivized to establish a job-creating commercial enterprise in a target employment area, where the unemployment rate is 150% of the national average employment rate. The EB-7 immigrant job creator's primary investment will be of his or her labor, skills, and entrepreneurial talents in creating an employment sustaining commercial enterprise.

In addition, the EB-7 Immigrant Job Creator Visa Program requires that the immigrant job creator's investment is made in a commercial enterprise that is controlled by the immigrant job creator through the exercise of day-to-day managerial responsibility and that *directly* creates ten full-time jobs. This provision of the proposed EB-7 Immigrant Job Creator Visa Program is to advance its purpose: the actual creation of jobs for U.S. workers, not merely awarding "credit" for the creation of jobs.

Lastly, in furtherance of the EB-7 Immigrant Job Creator Visa Program's purpose, the proposal introduces a causation requirement. In order to ensure that the prospective immigrant job creator did in fact create the statutorily mandated ten jobs, he or she must be able to demonstrate, by a preponderance of the evidence, that each of the positions would not have been created *but for* the immigrant job creator's qualifying investment. Again, this provision is included in the proposal in order to ensure the actual creation of jobs for U.S. workers.

### VIII. CONCLUSION

In order to better serve the immigration policy mandate of the INA by admitting immigrants on a "fair, rational, [and] humane" basis that is "in the national interest," we must be critical of our current immigration laws. The EB-7 Immigrant Job Creator Visa Program advances this overarching policy, while fulfilling the promise of the EB-5 Immigrant Investor Visa Program: encouraging foreign investment in the United States *and*, more importantly, creating jobs for U.S. workers.