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"EB-5 Program: It's Broken, When Will It Be Fixed?"

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EB-5 Program: It's Broken, When Will It Be Fixed?[i]

Introduction

"Mend it, don't end it!" One Senator after another emphatically declared at the Senate Judiciary Committee hearing held on February 2, 2016 in response to the question posed by Chairman Chuck Grassley (R-IA): "Should [the broken EB-5 Regional Center] Program be fixed or should it be nixed?"[ii] Senator Grassley chaired the hearing less than two months after S. 1501, the bipartisan reform bill he co-sponsored with Senator Patrick Leahy (D-VT), was unexpectedly killed by a few leading Senators who represent the interests of a small but powerful group of EB-5 stakeholders.[iii]

That bill sought to reform what had been for almost 20 years a sleepy immigration program that suddenly in the aftermath of the Financial Crisis was transformed into a mainstream source of capital to provide funding for the development of the largest real estate megaprojects in the United States. Yet, almost three years after the introduction of the initial reform bill, and a successive series of failed legislative reform efforts, the EB-5 Regional Center Program (the "Program") is in even greater need of repair today than when the reform process began in 2015.

In March 2018, the timing seemed ripe for the most recent reform effort, the March draft bill, to forge a compromise as the Omnibus Spending Bill could serve as a convenient vehicle to drive the bill to passage.[iv] However, once again, a small, select group of powerful stakeholders - a handful of megadevelopers and regional centers based in Gateway cities - stymied the EB-5 reform efforts, even though the draft reflected concessions that the Congressional reformers would not have entertained even one year earlier.

Projects sponsored and developed by these stakeholders continue to dominate the use of EB-5 capital. Their goal is to maintain the status quo. The strategy can be summed up in two words: "delay reform." We sometimes refer to them as the "Status Quo Group." On some issues, the Group is aligned with IIUSA, the trade association that represents the EB-5 industry. However, in the most recent round of negotiations, IIUSA demonstrated that, unlike the Status Quo Group, it is willing to compromise in exchange for a long-term extension of the Program.[v]

It should be painfully obvious to anyone who has followed the Program that the process of trying to pass EB-5 reform legislation during the past three

years follows a predictable pattern. First, reformers led by Senator Grassley and Representative Robert Goodlatte (R-VA), Chairman of the House Judiciary Committee, prepare a draft reform bill that is circulated to only a few key industry stakeholders shortly before the current reauthorization of the Program is due to expire. Industry stakeholders, not limited to the Status Quo Group, then express outrage about key terms of the first draft of the bill. Lobbyists, stakeholders and Congressional staff members negotiate earnestly, but in haste and behind closed doors. A deal seems close, but the Status Quo Group raises new objections even when IIUSA is prepared to compromise. One or two powerful Senators support the Status Quo Group's position and block the bill's passage.

No EB-5 reform bill has even reached a vote in Committee, let alone been voted upon on the floor of either chamber. Instead, after a reform bill fails as the reauthorization deadline nears, one unconditional, short-term extension of the Program is granted after another, with September 30, 2018, as the most recent extension.[vi] Once again, the can gets kicked down the road. The cycle would be humorous if it did not jeopardize the Program's continued existence, and its admirable goal of job creation through the use of foreign capital.

Inevitably, after the latest version of the reform bill fails, Senator Grassley expresses frustration with the delay tactics employed by, and the lack of genuineness evidenced by, the Status Quo Group.[vii] In some instances, he proposes legislation to terminate the Program even though he realizes there is no political will to terminate it, partly because the Program is supported by the powerful real estate lobby , and partly because the aim of the program – U.S. job creation with the use of foreign capital - is a worthy one, if implemented appropriately.[viii] A surge of EB-5 capital investments are made by immigrants, particularly from China, who rush to invest before the new rules might take effect. As the next reauthorization deadline approaches, the frustrating cycle repeats itself.

The negotiating strategy of the Status Quo Group has proven to be extremely effective. The Program continues without any reform under ground rules that clearly favor the members of this Group, and allows them and other megadevelopers in Gateway cities to continue to dominate the market for EB-5 capital. More importantly, the last bill with watered-down provisions from the previous version of a bill serves as the starting point for each successive round of reform bill consideration and negotiation.

In this article we will discuss:

I The current state of the EB-5 Program;
II The "TEA" incentives proposed in the March 2018 draft bill;
III The fund administration guidelines proposed in the draft bill;
IV An increase in the EB-5 visa quota; and
V Conclusion

I The Current State of the EB-5 Program

A review of the current state of the Program is necessary to understand the broken system that the Status Quo Group seeks to preserve. The Program established by Congress in 1992, continues without any major amendments even though the Program's use fundamentally changed in the aftermath of the Financial Crisis when USCIS adopted policy changes that facilitated EB-5 capital to become a mainstream source for funding real estate development projects.[ix]

A. Continued dominance of the use of EB-5 capital by large developers for the financing of real estate development projects located in affluent urban areas through TEA abuse

The March 2018 draft bill eliminated the term "Targeted Employment Area" ("TEA"), but it retained, at least in theory, the incentive for immigrants to invest in rural and economically distressed areas as a means to secure a visa under the EB-5 visa category. For simplicity and ease of reference, this article continues the use of the TEA label.

Under current law, an immigrant who invests in a project located in a TEA can qualify for a visa by investing only $500,000, rather than $1,000,000. The $500,000 differential is known as the "TEA discount". Unlike conventional investors who seek to maximize their risk-adjusted rate of return, an EB-5 investor's goal is to secure a visa and thus the investor accepts a minimal interest return on his investment, often at ½ of 1% per annum or lower, typically structured as a loan. Consequently, the immigrant seeks to minimize the amount invested to qualify for the visa. In theory, this is a powerful incentive to invest in areas that do not attract conventional capital. [x]

However, the TEA incentive has been rendered meaningless as virtually all project locations in the United States qualify, even those located in the most

affluent areas, such as Beverly Hills and along Billionaire's Row in New York City.[xi] Thus, there is no incentive for immigrants to invest in the project areas that Congress intended to benefit. Given a choice between investing the same amount of money offering the same minimal investment returns in projects being built in the most affluent parts of New York City compared to those in rural Idaho or downtown Detroit, almost all investors select projects in New York City and other Gateway cities because they wisely perceive these investments to provide the quickest route to visa approval and recovery of their capital investment. [xii]

The lion's share of EB-5 capital investment flows to the largest real estate projects in affluent, urban areas, many of which are sponsored or developed by entities affiliated with the Status Quo Group.[xiii] However, they rely upon the TEA discount, enabled by a tortured, but legally permissible, use of TEA gerrymandering that is the core of the abuse the reformers seek to remedy.[xiv] As will be discussed, the March 2018 draft bill remedies TEA gerrymandering, but creates new loopholes.

This flow of capital deprives underserved areas of EB-5 capital and thus, jobs. The most obvious unintended consequence is that TEA abuse further incentivizes the dominant share of the EB-5 capital to flow to the most affluent urban areas in Gateway cities, rather than to the areas targeted by Congress to obtain the benefit. Thus, the TEA discount works exactly in the opposite manner than Congress originally intended – it benefits those areas and projects least in need of a special incentive.

Compounding this, most of that capital flows to large projects in affluent urban areas by well-capitalized developers that, in most cases, would have been funded and built without EB-5 capital and thus, the jobs would have been created in any event. This is contrary to the TEA incentive, but more importantly, contrary to the overall purpose of the EB-5 program – to promote the investment of foreign capital to create jobs that would not have been created in the absence of EB-5 capital. Without the injection of EB-5 capital, the projects in the underserved areas are deprived of the opportunity to be built, and thus to create jobs that would not otherwise be created. The experience of the Program demonstrates that EB-5 capital will naturally flow to the most affluent areas. Certainly, the EB-5 Program has benefitted the U.S. economy and created jobs for U.S. workers, but more jobs would be created if the TEA incentive operated as intended.

USCIS attempted to solve the problem by releasing Proposed Regulations on January 13, 2017 that, among things, would raise the minimum investment level from $500,000 to $1,300,000 for TEA projects and from $1,000,000 to

$1,800,000 for all other projects (the "TEA Proposed Regulations"). [xv] They would also effectively eliminate gerrymandering. The TEA Proposed Regulations have faced fierce opposition by industry and have been lingering for months at the Office of Management Budget. Many have suggested that if the Proposed Regulations were finalized that would prompt legislative compromise leading to reform because the proposed investment amounts far exceed those proposed in any of the major reform bills.

B. Increasing numbers of cases involving fraudulent misappropriation of investor funds are being filed, yet Congress has not enacted integrity reform legislation

Over the past few years, the Securities and Exchange Commission ("SEC") and Offices of the United States Attorney ("US Attorneys") have brought actions alleging the misappropriation of EB-5 investor funds and other fraudulent acts perpetrated by regional center operators, developers and other bad actors. At the time that the first major reform bill, S. 1501, was introduced in June 2015, the SEC had brought few enforcement actions against EB-5 operators for misappropriation of investor funds and other fraudulent acts. However, less than a year later, the Jay Peak enforcement action was filed, followed by a steady stream of government actions against other EB-5 operators. [xvi]

Two of the most recent actions brought by US Attorneys relate to bad acts committed by the California Immigrant Investment Fund ("CIIF") Regional Center and related parties, and by the developer of the "Palm House" hotel project in south Florida.[xvii] These two cases rank amongst the most egregious frauds allegedly perpetrated on EB-5 investors. The prosecutors in these actions alleged that most, if not all, of the investor funds, were illegally diverted, while virtually no funds reached the projects.[xviii]

Furthermore, the number of government actions filed to date understates the actual number of EB-5 funded projects involving misappropriation of funds, fraudulent actions and other bad acts. First, investors are reluctant to bring a legal action against the regional center, developer and the EB-5 funding entity – the New Commercial Enterprise – due to the potentially adverse, if not devastating, impact this could have on their immigration petitions. For similar reasons, the investors are unlikely to register a complaint with USCIS. Nevertheless, a few private lawsuits have been filed by immigrant investors against the regional center, developer and related parties.[xix] Secondly, USCIS generally does not

scrutinize the actual flow of EB-5 investors' funds until after their I-829 petitions are filed, several years after the immigrants' funds have been invested. Thus, USCIS is unlikely to detect the misappropriation until late in the immigration process, long after the funds have been diverted. We note that USICS has recently initiated a program of audits and site visits, but it is premature to judge whether this new program will be effective.[xx] In addition, the SEC and other federal agencies, which investigate and bring civil and criminal actions, are understaffed as a result of continuing budget cutbacks. Moreover, the process from government investigation to commencement of a legal action often takes several years. For example, the US Attorney did not bring a legal action until 2017 in the CIIF Regional Center case even though the FBI investigation began in 2008.[xxi]

II The TEA incentives Proposed in the March 2018 Draft Bill

A. The March draft bill provision

After the March 2018 draft bill failed, Senator Grassley took to the Senate floor to urge Senate leaders to join him to take legislative action to terminate the Program.[xxii] Despite the Senator's plea, the balance of this article assumes that the Program will continue and legislative action to reform the Program will be revived.

The March 2018 draft bill contains many important provisions. However, we focus on only two of its most critical provisions: (1) the TEA incentives, and (2) the fund administration guidelines. We believe these provisions contain fatal flaws that merit further consideration by Congress as it formulates a revised reform bill. Several other provisions in the March 2018 draft bill should also be re-examined, some of which create, presumably unintended, loopholes. However, we limit this article to the two most critical provisions.

The first draft of the bill was circulated on March 8, 2018 to a select group of EB-5 stakeholders. Although the draft was a joint effort of Republican Senators Grassley and Cornyn (Senate Majority Whip), it was not formally introduced as a bill in the Senate. Thus, the text was not made publicly available, thereby depriving many stakeholders of the opportunity to comment and propose revisions. Numerous revisions were reflected in a revised draft dated March 14, 2018, based on input from a limited number of influential stakeholders. Our comments are based on the provisions in this revised March 2018 draft bill.

As with the previous rounds of reform bills, the TEA incentive continues to be the most controversial provision in the March 2018 draft bill. The draft bill continued the TEA concept, at least in theory.

Since the bill was not passed, and when a new bill is considered it will likely reflect changes, we provide only a conceptual discussion, rather than a careful, detailed analysis of the March 2018 draft bill provisions. Also, rather than follow the nomenclature in the draft bill, for ease of reference we sometimes use the TEA reference, but where necessary to assist the reader's understanding, we include the bill's proposed definitions.

Simply stated, the bill creates a dual incentive to invest in certain locations or projects – a financial incentive and a visa priority incentive.

The financial incentive sets the minimum investment level at $925,000 for projects not located in a TEA and at $1,025,000 for projects located in a TEA. Thus, the TEA discount would be reduced to $100,000, the smallest differential in any EB-5 reform bill to date.[xxiii]

Locations qualifying for the TEA discount include rural areas and economically distressed areas (the latter is referred to in the bill as a "priority urban investment area").[xxiv] We focus on rural and priority urban (as both terms are defined in the draft bill) because the bulk of the dual incentives would be allocated to immigrants who invest in projects located in these areas.[xxv]

The bill would effectively eliminate the practice of TEA gerrymandering. The rural area TEA and priority urban TEA would be based on the census tract in which the project is physically located or adjacent tracts, provided that in the case of priority urban each tract meets prescribed economic criteria.[xxvi]

The bill also creates a visa incentive. The visa would set aside 3,100 visas per year for immigrants who invest in qualifying rural, priority urban and infrastructure projects.[xxvii] New investors in these projects would obtain a visa priority to move towards the head of the long visa waiting line. These new investors and their qualifying family members would jump ahead of the immigrants currently on line. This priority is especially important for new investors from mainland China, as well as to a lesser extent, immigrants from other nations facing a per country limitation that results in a visa backlog. On the other hand, it would adversely affect investors already on the line.

B. Analysis of the "TEA" incentives

Since early 2016, we have encouraged Congress to consider the use of visa reserves in tandem with the financial incentive to create a meaningful TEA incentive.[xxviii] However, on reflection and in light of the current political environment, we believe that following this approach would be a mistake, unless the bill retains a substantial TEA discount – a wide differential between the minimum investment amount in a TEA location compared to a non-TEA location.

A dual TEA incentive does not mean that it doubles the incentive or even increases the likelihood that it would serve as an effective incentive to attract new immigrant investment to projects in the targeted areas. In fact, we firmly believe that at best it will serve as a short-term solution and, in the not too distant future, will likely result in the total elimination of the TEA incentive.

The bill shifts the main focus of the TEA incentive to the visa incentive. On the surface, this makes sense as the immigrant's sole reason for making an EB-5 investment is to secure the visa and to do so as quickly as possible.

However, as explained below, the dual incentive might unintentionally serve as a two-step strategy to eliminate the TEA – unintentionally, at least from the perspective of Senator Grassley and the other Congressional reformers. But this would be consistent with the goal of the Status Quo Group who have pursued various paths to the same destination - to make TEA status meaningless and remove any incentive for investors to select projects in the priority areas.

The first step is to render the TEA financial incentive meaningless. The second step is to render the TEA visa incentive meaningless.

The bill would accomplish the first step. Even though the bill solves the gerrymandering abuse, it renders the TEA financial incentive meaningless. A TEA discount of $100,000 on a $1,000,000 investment is unlikely to motivate many immigrants to invest in a TEA project location. The investor will be mindful that the investment is merely a loan that will presumably be repaid soon after the visa is obtained, and not a purchase. With such an insignificant discount, the immigrant is likely to choose a project that is being developed by a well-capitalized developer in an affluent area that the investor recognizes.

As previously explained, TEA status has been rendered meaningless in practice as a result of the regulation that delegated the TEA designation to the individual states. Even worse, the draft bill would render TEA status meaningless by statute, a permanent fate.

The second step - to render the TEA visa incentive meaningless – is not so obvious. As explained below, we believe it is likely that the EB-5 visa quota will be increased by either Congressional action or successful litigation. If the quota is increased, the significance of the visa incentive will diminish – possibly to the point of becoming meaningless.

The EB-5 industry's highest priority is to increase the EB-5 visa quota of approximately 10,000 per year.[xxix] The soaring popularity of the Program has created long visa waiting lines that particularly impacts investors from mainland China who in recent years represent approximately 85% of the investors, but whose interest in the Program has declined over the past year partly as a result of the long wait.[xxx] The USCIS Ombudsman recently estimated that the wait time for a Chinese national making an investment today could be 10 years or even longer.[xxxi] Increasing the EB-5 quota would shorten the waiting line, and possibly revive Chinese interest in the Program, as well as promote the interest of potential immigrant investors from other nations.

Congressional reformers have repeatedly rejected the EB-5 industry's request to include an increase in the quota as part of any reform bill. They insist it would be considered only in the context of comprehensive immigration reform.

Nevertheless, we believe the likelihood of an increase in the EB-5 visa quota has never been greater. The many paths to an increase in the EB-5 visa quota have expanded in the past year.

Under any of these paths, the most likely mechanism to increase the quota would be to count only the investor against the annual visa limit, and not to count family members (technically, "derivatives"), even though they would continue to qualify for the visa. This exclusion would have the effect of increasing the number of visas from approximately 10,000 per year to 30,000 or more per year, based on the historical average of three visas issued for each EB-5 investor. [xxxii]

This increase would quickly result in the visa waiting line shrinking to the levels of several years ago that motivated investors to seek the EB-5 visa as a quick path to permanent residency. Thus, a visa priority would not be nearly as important to a potential EB-5 investor because the visa waiting line would be substantially shortened. In that event, visa priority would not influence many immigrant investment decisions and thus, not be meaningful.

Senator Cornyn's role in the EB-5 reform efforts has been recently elevated as evidenced by the co-lead role he played with Senator Grassley in connection with the March 2018 draft bill. He circulated a draft EB-5 reform bill to major EB-5 stakeholders in April 2017. His draft bill proposed not to count derivatives. It

was embraced by industry, including IIUSA and the Status Quo Group. [xxxiii] The bill also proposed to reduce the TEA discount to $125,000 ($925,000 vs. $800,000 in a TEA), the lowest level in any of the major reform bills to that point. If that bill had passed, the TEA incentive would have been effectively eliminated because virtually no financial or visa incentive would remain.

Despite the contentious nature of comprehensive immigration reform, it appears that some visa categories will be eliminated or substantially reduced in the near future, particularly if a DACA solution is reached. Although reform is not likely in 2018, a mid-term election year, a distinct possibility of reform exists for 2019. The Trump administration has supported immigration legislation proposed by Senator Cotton and others to eliminate the Diversity Visa Lottery as well as certain other visa categories.[xxxiv] This would create the opportunity to reallocate at least some of the visas to employment-based categories, including EB-5. Presumably, the administration and many in Congress will find EB-5 investors to be attractive alternatives to other immigrants seeking visas. The Program creates jobs. The investors are wealthy and thus would not impose an economic burden on the government. Moreover, once the investors secure their visas, they are likely to invest additional capital, pay U.S. income taxes based on their worldwide income, and provide other benefits to the local and national economy.

The American Immigration Lawyers Association ("AILA") recently released a white paper that makes a compelling case in support of the position that derivatives should not count towards the quota.[xxxv] As with the Congressional reformers who have relied upon the legislative history of the Immigration Act of 1990 to support their interpretation of the law's TEA incentive, the white paper relies upon the legislative history to support the position that the statute should not be applied to count derivatives against the EB-5 visa limit. Some immigration attorneys have indicated that they intend to commence litigation during 2018 on behalf of EB-5 investors. We would not be surprised if a court were persuaded by the AILA's position.

Thus, a Congressional or judicial solution to grant visa relief is a real possibility. For the moment, assume that the reform bill passes with a small visa discount ($100,000) and a visa reserve that resembles the priority proposed in the March 2018 bill. If the increase in quota occurs pursuant to a judicial decision, then the visa incentive would be diminished as a result of the decision, without the opportunity for Congress to demand that the TEA discount be increased in exchange for the quota increase. Similarly, if the EB-5 visa quota is increased by Congressional action that excludes derivatives from several visa categories,

including but not limited to EB-5, it is very likely that the increase would occur without an increase in the TEA discount.

More importantly, given the historic battle that the TEA discount has faced, it is unrealistic to assume that when quota relief is granted, Congress will revisit the TEA discount and choose to increase it to encourage investment in priority areas. Senator Cornyn's draft bill evidences a realistic possibility that an EB-5 quota increase will be coupled with a minimal TEA discount. Undoubtedly, powerful lobbyists representing similar interests to those that have been opposed to TEA reform will fight to resist any proposed increase in the financial incentive. Again, when quota relief occurs, there will be no meaningful TEA discount to incentivize investment in priority areas.

C. Our alternative approach – simpler and possibly more effective

The approach of the March 2018 draft bill is flawed; however, we realize there is no perfect solution. We believe a simpler approach might produce a more effective and more equitable result.

Why "reinvent the wheel" as proposed in the March 2018 draft bill, when the original wheel has not been tested, especially since real estate development became the dominant user of EB-5 capital several years ago? The most obvious starting point is the EB-5 law as carefully designed in 1990 when the immigration law, including the EB-5 visa category, was enacted.

Why not simply provide an opportunity for the minimum investment and TEA provisions to operate as enacted to serve as the TEA incentive?

As explained in our previous papers and Congressional testimony, the TEA incentive created by statute has not operated as intended because immediately after its enactment, USCIS's predecessor immigration agency delegated the authority to make the TEA designation to the state in which a project is located, and did so, without establishing any guidelines. 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. [xxxvi]

It is well recognized that the delegation no longer serves any purpose as USCIS has developed the expertise to make the TEA designation, without the bias inherent in state designation. Either the March draft bill or the TEA Proposed Regulations would restore USCIS's sole authority to designate TEA locations and effectively eliminate the potential for TEA gerrymandering by a state. However,

as explained above, the March draft bill creates a potential loophole that in the near future would likely result in the elimination of the TEA incentive. The Proposed Regulations would raise the minimum investment amounts to a level that might cause the Office of Management and Budget to keep the proposal in regulatory limbo and never permit it to be finalized. Of course, if the TEA Proposed Regulations are finalized in substantially the current form, then our alternative would not be necessary.

Under our alternative approach, USCIS could simply revoke delegation of TEA designation to the individual states. Then, TEA designation authority would be vested solely in USCIS, as the statute prescribes. USCIS would be able to apply the high unemployment standard to determine TEA eligibility based on a single census tract.[xxxvii] This would eliminate gerrymandering, the heart of TEA abuse.

Under this simple approach, most project locations would not qualify as a TEA. Consequently, the statutory and regulatory scheme would be triggered, thereby causing the $1,000,000 level to apply to most projects. The $500,000 TEA discounted amount would apply only to a very limited number of qualified projects. Thus, TEA status would finally be meaningful. The discount would be $500,000, presumably enough to incentivize investment in projects located in truly deserving areas of the country. This would result in a substantially greater discount than that proposed in the March bill, and even greater than in the Proposed Regulations, but with no increase in the minimum investment levels. Under this approach, a visa incentive would likely not be required to incentivize the investment in priority areas.

A more complicated legislative proposal, such as the March draft bill, presents the opportunity for the Status Quo Group to raise more issues to challenge and thus, an excuse to further delay the legislative process. Our simple alternative would allow an EB-5 bill to focus on integrity reform and other less controversial, but important, reforms, to be swiftly enacted. For example, one integrity reform would permit a defrauded investor to transfer an investment from a project plagued with fraud to another healthy project, while retaining the visa priority, a policy that the industry strongly supports. Although the investor might suffer a financial loss, his immigration rights would be preserved.

The March 2018 draft bill proposed a mere increase from $1,000,000 to $1,025,000. This is a token increase, perhaps proposed for no reason other than being able to cite that the minimum investment level was raised. This represents an increase of less than $1,000 per year for each year since the minimum investment amount was established by statute in 1990, despite the authority

vested in USCIS to raise the dollar amount. Alternatively, an increase merely to keep pace with inflation would result in an increase to more than $1,800,000, the amount reflected in the TEA Proposed Regulations. We realize that the investment levels in these Proposed Regulations are not politically viable and we accept, for the moment, industry's assertions that their implementation might destroy the market. However, it should be noted that then Senator Jeffrey Sessions (R-AL) at the Senate Judiciary Committee hearing on February 2, 2016 recommended to USCIS that it should raise the $1,000,000 minimum investment level by regulation to reflect inflation since 1990, rather than rely on Congressional reform. [xxxviii]

We have recommended this simple approach since 2015 and reiterated this point in our public comment to USCIS in response to the TEA Proposed Regulations.[xxxix] In contrast to the TEA incentive proposed in the March 2018 draft bill, this approach would be effective even if EB-5 quota relief were subsequently granted by Congress. We anticipate that the main objection to this approach would be that it permits an inexpensive path to residency and ultimately citizenship. But if Congress is prepared to accept the same $1,000,000 for non-TEA project locations as it did in 1990, arguably it is would be fair to retain $500,000 for areas where jobs are more likely to be created. Furthermore, it is anticipated that most immigrants will continue to prefer to invest in projects in Gateway cities for the reasons cited in our previous papers.

Accordingly, USCIS should revoke the regulation that delegates to the individual states the authority to designate a TEA project location. Consideration should be given as to whether the regulation can be quickly revoked without compliance with a notice and comment procedure.[xl] Certainly, the delegation has outlived its usefulness. If, however, notice and comment is required, USCIS should be able to quickly draft the proposed regulation because the rationale for the revocation would utilize the same analysis as contained in the section of the TEA Proposed Regulations that addresses the revocation of the TEA delegation. Furthermore, the revocation would be within the spirit of the Administration's two-for-one policy in which two regulations are to be revoked for each new regulation issued. [xli]

Some have suggested that the TEA Proposed Regulations would be challenged in the courts. In contrast, it is unlikely that the revocation of the existing regulation regarding TEA designation would be challenged as it would simply restore the original statutory framework. Moreover, the delegation was not even contemplated by the original statute.

Alternatively, in the unlikely event that compromise reform legislation is agreed upon sooner than anticipated, the legislation could effectively revoke the delegation. As discussed in the "Increase in EB-5 Quota" section below, our alternative approach would strengthen industry's effort to increase the quota.

Again, while we recommend this simple TEA financial incentive, we recognize that Senator Grassley might prefer to utilize the dual incentive. To clarify, we prefer the dual approach to a single approach. However, the financial incentive must be crafted so that it will continue to be meaningful even if the visa incentive is effectively eliminated.

In summary, our approach offers the following advantages: easy for all stakeholders to understand; quick and easy for USCIS to implement; provides a meaningful financial incentive; will be effective even if the EB-5 quota is increased; does not disrupt the visa waiting line; and is entirely consistent with the original statutory framework. Most importantly, our approach does not require legislative action.

It is common sense that the greater the TEA discount, the greater the incentive for immigrants to invest in a project located in a TEA. Yet, as the legislative process has dragged on, the Status Quo Group has negotiated a steady reduction in the amount of the TEA discount. The proposed administrative solution represents the only interruption in this process. The watering down of the EB-5 reforms as the legislative process drags on is best exemplified by the steady reduction in the TEA discount.

	Summary Comparison: Minimum Investment Amount and TEA Spread					
	Existing Statute (Unchanged since enactment in 1990)	S.1501 (introduced June 2015); H.R. 5992 (introduced Sept. 2016)	March 2017 Staff drafts of S.1501 and H.R. 5992	Proposed USCIS Regulations January 13, 2017	Senator Cornyn Draft Bill April 2017	Senators Grassley and Cornyn March 2018 Draft Bill
Non-TEA (standard)	1,000,000	1,200,000	1,000,000	1,800,000	925,000	1,025,000
TEA	500,000	800,000	800,000	1,350,000	800,000	925,000
TEA Discount	**500,000**	**400,000**	**200,000**	**450,000**	**125,000**	**100,000**

III Account Transparency and Fund Administration

We applauded Representative Goodlatte for boldly adding the Account Transparency section to the reform bill he introduced in September 2016 as HR 5992. [xlii] **These measures were proposed in response to a series of recent cases involving the misappropriation of EB-5 investors' funds by operators of certain regional centers and project developers. The provisions were aimed to control the flow of investors' funds from initial receipt of the funds by the regional center in escrow through the deployment of the funds to the project. We believe this is the best method to prevent immigrants' funds from being illegally diverted to personal and other uses by the operator of the regional center or related entities. This will deter misappropriation, promote early detection of any diversions, and enhance recovery of misappropriated funds.**

The Account Transparency section represented the first legislative attempt to address the misappropriation of funds and other fraudulent actions that have infected the Program. It would be a misnomer to refer to the reform bill as tackling integrity if this type of provision were omitted. A later version of the reform bill released in March 2017 drafted by the Senate Legislative Counsel revised the provision to also impose independent fund administration guidelines based on similar principles.

Thus, it was disturbing that the first draft of the March 2018 draft bill glaringly omitted account transparency and fund administration provisions. Fortunately, the revised March 2018 draft inserted "Fund Administration Guidelines." This one paragraph provision was apparently drafted in haste as no similar provision had appeared in previous reform bills or drafts.

Below is the text of the provision that appeared on page 38 of the revised March 2018 draft:

> ***"(F) FUND ADMINISTRATION GUIDELINES. The Securities and Exchange Commission, shall. within 120 days of enactment, promulgate regulations to establish transparency and fund administration compliance guidelines in transactions involving employment creation visa capital investment for entities that are not registered with the***

Securities and Exchange Commission. In promulgating the regulations, the Secretary shall be guided by best practices for capital controls, transparency and administration in the commercial fund administration marketplace. Nothing in this section shall be interpreted as creating a binding requirement for any entity involving employment creation visa capital investment."

We assume the drafters intended that this provision address the key points contained in the Account Transparency provision and the Fund Administration provision. These include: tracking the flow of funds from the initial investment by the immigrant to the escrow - to the EB-5 investment entity - to the job creating entity- to deployment in the project; requiring independent third party approval of the transfer of investor funds; prohibiting the commingling of funds with non-EB-5 funds; maintaining separate accounts; furnishing the investors with periodic reports as well as the status, location and amount of their accounts; and inspecting by a construction consultant of the deployment of the funds into the project.

The language of the Fund Administration Guidelines raises some questions that we hope will be considered before the issuance of the next reform proposal. The second sentence states that "the Secretary shall be guided by best practices … in the commercial fund administration marketplace." We assume this includes the best practices in the EB-5 capital marketplace. We also assume this applies to the best practices relating to the escrow of EB-5 investor funds.

Most importantly, we are uncertain as to the meaning of the final sentence of the Fund Administration Guidelines: "Nothing in this section shall be interpreted as creating a binding requirement for any entity involving employment creation visa capital investment." We hope that the regulatory guidelines will be required to be implemented despite this language. Otherwise, the Guidelines would be purely aspirational, and unlikely to have any meaningful impact on remedying a serious abuse that is becoming more prevalent.

Consistent with our previous paper on account transparency, the Fund Administration Guidelines exempt SEC registered broker-dealers and investment advisers. Perhaps, the exemption should be expanded to also include those independent professionals who provide comparable protections afforded by the guidelines, as determined by the Secretary.

We suggest that if the Fund Administration Guidelines of the March 2018 revised draft bill are inserted in the final reform bill that these points be clarified.

IV Increase in EB-5 Quota

EB-5 quota relief is warranted, particularly if it can be demonstrated that a real TEA incentive exists to create jobs in underserved areas that cannot attract conventional capital. Presumably, industry's request for an increase in the quota would be materially enhanced if in fact a real TEA incentive is implemented that demonstrates a commitment to incentivizing at least a reasonable amount of EB-5 investment to reach projects in underserved areas where jobs will finally be created. By extending EB-5 capital to these areas, an increase in the quota is more likely to attract widespread Congressional support, especially from Congressional members representing rural and economically distressed urban areas.

V Conclusion

We do not see any reason to be optimistic about the prospects for EB-5 reform legislation to be passed in the foreseeable future. The rapidly approaching midterm elections accentuates the problem. The current political environment allows the Status Quo Group to unilaterally create a stalemate, and continue the status quo, which for the Group is preferable to any reform.

In the interim, the Status Quo Group continues to accomplish its objective. Delay proves to be a successful strategy, while Congress and USCIS allow a broken Program to operate without a fix. Rather than wait until September 30, 2018, the bill revision process should start promptly, and a revised reform bill should be formally introduced in the Senate so that it can be viewed by all with input provided by a wider range of voices than those who seek to weaken reform.

Just as legislation inevitably produces winners and losers, the lack of EB-5 reform produces winners and losers - but certainly the winners are clearly not those intended by the reformers. Maintaining the status quo provides another six months of opportunity to raise low cost EB-5 capital under the old rules. Unless the TEA Proposed Regulations are implemented or the regulation that delegates TEA designation is revoked, we do not know what might prompt reform to take effect. Nevertheless, we are hopeful that the sentiments expressed by the Senate Judiciary Committee members in February 2015 will at long last be realized, even if USCIS by default comes to the rescue.

[i] Gary Friedland, Scholar-in-Residence at NYU Stern School of Business and Jeanne Calderon, Professor at NYU Stern School of Business

[ii] Pages 1, 15, 17 and 23 of https://www.thisweekinimmigration.com/uploads/6/9/2/2/69228175/hearingtranscript_senatejudiciarycommitteeeb52016-02-02.pdf; https://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed

[iii] http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20TEA%20Reform%204.24.2016.pdf

[iv] The bill was signed into law on March 23, 2018 as H.R. 1625, the "Consolidated Appropriations Act, 2018." https://www.congress.gov/bill/115th-congress/house-bill/1625

[v] https://iiusa.org/blog/iiusa-statement-missed-opportunity/

[vi] The Consolidated Appropriations Act extended the regional center program authorization to 9/30/2018. See Sec. 204, Section 610(b) of the Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153) shall be applied by substituting "September 30, 2018" for "September 30, 2015."

[vii] https://www.youtube.com/watch?v=HifNiOW9_oo; https://www.grassley.senate.gov/news/news-releases/grassley-big-money-interests-again-block-reforms-corrupt-eb-5-visa-program

[viii] See, for example, S. 232: https://www.grassley.senate.gov/news/news-releases/feinstein-grassley-introduce-legislation-eliminate-troubled-eb-5-investor-visa; https://www.congress.gov/bill/115th-congress/senate-bill/232/text

[ix] See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations entitled "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and form I-829 Petitions; Adjudicator's Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)" dated December 11, 2009 and Memorandum from Neufeld entitled "EB-5 Alien Entrepreneurs – Job Creation and Full Time Positions" dated June 17, 2009."

[x] See pages 10-12 of http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20roadmap.pdf.

[xi] See page 14 of https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Friedland%20Testimony.pdf

[xii] Pages 2-6 of www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20TEA%20Reform%204.24.2016.pdf

[xiii] http://www.stern.nyu.edu/sites/default/files/assets/documents/2017%20EB-5%20Project%20Database%20with%20Trends%208.16.2017.pdf

[xiv] Pages 10-12 of https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Friedland%20Testimony.pdf; 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

[xv] https://www.federalregister.gov/documents/2017/01/13/2017-00447/eb-5-immigrant-investor-programmodernization. These Proposed Regulations are not limited in scope to the TEA definition and the minimum investment levels, but we refer to them as the TEA Proposed Regulations.

[xvi] http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf
[xvii] CIIF Regional Center: https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa; Palm House Hotel: https://www.justice.gov/usao-ct/pr/indictment-alleges-florida-developer-and-real-estate-attorney-scammed-foreign-investors
[xviii] CIIF Regional Center: https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa; and https://www.justice.gov/usao-cdca/pr/us-files-9-lawsuits-seeking-forfeiture-properties-worth-over-30-million-allegedly; Palm House: https://www.justice.gov/usao-ct/pr/indictment-alleges-florida-developer-and-real-estate-attorney-scammed-foreign-investors
[xix] http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf
[xx] http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf
[xxi] http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf
[xxii] https://www.youtube.com/watch?v=HifNiOW9_oo; https://www.grassley.senate.gov/news/news-releases/grassley-big-money-interests-again-block-reforms-corrupt-eb-5-visa-program
[xxiii] Section 3(c) of the March 2018 draft bill.
[xxiv] Sections 3(b) and (c) of the March 2018 draft bill.
[xxv] Sections 3(b) and (c) of the March 2018 draft bill.
[xxvi] We prefer the use of a three-pronged economic criteria to identify urban areas that are unable to attract conventional capital that was included in the March 2018 draft bill [Sections 3(h)(11)], following the approach of each of the major predecessor reform bills. This represents a more accurate method than the use of high unemployment as the sole economic criteria. See pages 7 to 9 of http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20TEA%20Reform%204.24.2016.pdf
[xxvii] Unlike an investment in a project located in a rural or priority urban location, the financial incentive would be available only if the investor receives the visa reserve, which will be allocated annually to no more than 200 investors in qualifying infrastructure projects and their derivative family members. We do not understand why the financial incentive would not be available to any investment in a qualifying infrastructure project, even if the number of investors and their derivatives exceeds the allocable visa reserve. Presumably, the bill seeks to encourages these types of investments. See section 3(b) and (c) of the March 2018 revised draft bill.
[xxviii] Pages 12-13 of https://judiciary.house.gov/wp-content/uploads/2016/02/02.11.16-calderon-testimony.pdf

[xxix] See, for example, https://iiusa.org/wp-content/uploads/2017/07/IIUSA-Policy-Platform-2017.pdf. In contrast to the annual quota on the issuance of EB-5 visas, there is no legal limit, annual or otherwise, on the number of immigrants who may invest in projects that utilize EB-5 capital.)

[xxx] thttp://money.cnn.com/2017/09/29/news/economy/china-us-eb5-visa-immigration/index.html

[xxxi] See page 7 of https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf

[xxxii] This exclusion would potentially allow an greater number of family members, especially as the Program becomes more popular with investors from countries with larger families than the typical family from mainland China.

[xxxiii] https://therealdeal.com/miami/2017/06/12/real-estate-experts-rally-behind-proposed-eb-5-legislation-increasing-number-of-qualified-investors/; See also https://iiusa.org/blog/wp-content/uploads/2017/06/IIUSA-ltr-to-Cornyn-re-April-2017-leg-draft.pdf

[xxxiv] See http://thehill.com/homenews/senate/358324-senators-back-trumps-call-to-end-visa-program-after-terror-attack; https://www.reuters.com/article/us-usa-trump-immigration-senate/two-republican-senators-seek-to-slash-legal-u-s-immigration-idUSKBN15M1VB

[xxxv] www.aila.org/File/DownloadEmbeddedFile/74744; http://discuss.ilw.com/content.php?8485-Article-Solutions-to-the-Chinese-EB-5-Visa-Backlog-By-Bernard-Wolfsdorf-Esq

[xxxvi] Page 12 of https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Friedland%20Testimony.pdf

[xxxvii] As explained in an earlier footnote, we prefer the use of a three-pronged economic criteria to identify urban areas that are unable to attract conventional capital that was included in the March 2018 draft bill [Sections 3(h)(11)], following the approach of each of the major predecessor reform bills. However, the statute is limited to one economic criteria, the high unemployment standard.

[xxxviii] See pages 26 and 27 of https://www.thisweekinimmigration.com/uploads/6/9/2/2/69228175/hearingtranscript_senatejudiciarycommitteeeb52016-02-02.pdf

[xxxix] https://www.regulations.gov/document?D=USCIS-2016-0006-0254; see page 12 of http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Proposed%20Regulations-A%20Missed%20Opportunity%2C%20Next%20Steps%20Rev%202.14.2017%20.pdf

[xl] See 5 U.S.C. section 553(b). The Negotiated Rulemaking Act of 1990 (5 U.S.C. sections 561-570) provides an alternative approach that might expedite the process. This is also known as "reg neg." See http://www.ilw.com/articles/2003,0717-endelman.shtm

[xli] https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs

[xlii] http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20%20Can%20Account%20Transparency%20Save%20the%20Program.pdf