“What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data”

By Professor Jeanne Calderon and Scholar-in-Residence Gary Friedland
NYU Stern School of Business

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“What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data” 1

INTRODUCTION

New York City developers and regional centers are breathing a collective sigh of relief that Congress extended the EB-5 Regional Center Program (the “Program”) for “one year,” until September 30, 2016, without any change.2 Since June 2015, when Senate Judiciary Chairman Grassley and ranking Democratic Senator Leahy introduced the EB-5 reform bill, the development community had braced for the worst while Congress debated behind closed doors the controversial provisions of the proposed law.3 The battle between senators of rural and urban states reflected the voices of a select few, powerful constituents. Despite broad-based support for EB-5 reform, four senators were successful in preventing the enactment of this legislation. 4

Background

Under the EB-5 Program,5 enacted in 1990, an immigrant who invests at least $500,000 or $1,000,000 in a specific U.S. business project is eligible for permanent residency, if the investment creates at least 10 American jobs.6

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1 Professor Jeanne Calderon, Esq. and Gary Friedland, Esq. Scholar-in-Residence at NYU Stern School of Business.
2 The Consolidated Appropriations Act, 2016 includes a single sentence authorizing the EB-5 Regional Center program through September 30, 2016 (in Section 575 on PDF page 285). The Regional Center Program is the Immigrant Investor Program. http://www.uscis.gov/eb-5
3 S.1501. If enacted, the law’s title would have been “American Job Creation and Investment Promotion Reform Act of 2015.” https://www.congress.gov/bill/114th-congress/senate-bill/1501/text. The amended law, with Program changes, would likely have been referred to as “EB-5 2.0”, using the nomenclature that has been applied in recent year to other laws or programs that have been overhauled or reformed. See generally CMBS 2.0. Over the last year, five bills seeking to reform the EB-5 program have been introduced in both the House and the Senate, including S. 1501. The other four bills are: H.R. 616; H.R. 3370; S. 2122; and S. 2115.
5 INA 203(b)(5)(C). The Program that is subject to reauthorization relates only to the Regional Center Program, and not direct investments.
6 INA Sec. 203(b)(5). We assume that readers have a basic understanding of the Program. For background on some of the topics discussed in this paper, see “A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects” by Professor Jeanne Calderon, Esq. and Scholar-in-Residence Gary Friedland, Esq., NYU Stern School of Business, Center for Real Estate Finance Research (May 2015) (referred to as “Roadmap.”) http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf.
These invested funds became an inexpensive source of patient, flexible capital for real estate development projects after the Great Recession in 2008. More recently, EB-5 capital has blossomed into a mainstream source of capital for real estate development projects. The immigrants’ pooled equity capital is contributed to an entity (known under the EB-5 law as a “New Commercial Enterprise” or “NCE”) created by an affiliated government-approved regional center. The proceeds are most commonly deployed as a mezzanine loan to a real estate project development entity (known under the EB-5 law as a “Job Creating Entity” or “JCE”). The immigrant’s motivation to make the investment is to qualify for the visa, and thus, accept interest rates well below market.

The original purpose of the EB-5 law was to create investments and jobs in rural areas, as well as high unemployment areas, referred to as “Targeted Employment Areas” (“TEA”). To encourage investments in these areas, the minimum investment in a project located in a TEA was set at a discounted level of $500,000, compared to $1,000,000 for a project not located in a TEA. Developers strive to have the location of their projects qualify as a TEA because immigrants seeking the EB-5 visa strongly prefer to invest in areas where the lesser minimum investment level applies, especially if they believe the investment will result in their receipt of a visa and a return of their capital investment.

Congress and other critics had become outraged by the growing trend of projects qualifying as TEAs that are located in thriving urban areas and commanding the lion’s share of EB-5 investment dollars. With the approval delegated to individual states, each of which was authorized to set its own rules and motivated to retain economic development within its own borders, projects in even the most affluent parts of the country were able to routinely qualify for the discounted investment level by combining contiguous census tracts (starting with the project site and often extending in unnatural configurations to remote sites miles away) until the weighted average met or exceeded the high unemployment threshold required by the law. This census tract aggregation is referred to pejoratively as

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7 Although EB-5 investment is available to any US business that meets the law’s requirements, real estate development projects have become the most common recipient of deployed EB-5 proceeds. See Roadmap.
8 The definitions of NCE and JCE would have been amended by the Act. See INA Sec. 203(b)(5)(D)(viii) and (vi), respectively.
9 See Roadmap, footnote 6.
10 See Roadmap.
“gerrymandering.” Thus, gerrymandering rendered the two level investment threshold meaningless and immigrants flocked to invest in luxury projects by major developers in urban areas.

While the use of EB-5 capital has exploded in recent years, reports of fraud and other abuses have injured the Program’s reputation. Fortune Magazine and ABC News have published exposes describing instances of Program abuses.\textsuperscript{13} Since 2013, when the SEC filed its first enforcement actions in the EB-5 arena, it has been vigorously pursuing and investigating abuses.\textsuperscript{14} Recently, a flurry of enforcement actions have been filed alleging fraud by regional centers and developers, as well as the illegal payment of brokers’ fees to immigration attorneys, in connection with EB-5 transactions.\textsuperscript{15} Pursuant to a request by the Senate Judiciary Committee, in August 2015 the Government Accounting Office ("GAO") filed a report to Congress addressing the additional actions needed to better assess the fraud risks in the EB-5 Program.\textsuperscript{16} In recent months, the Washington Post’s editorial board, California’s Senator Feinstein, as well as many other critics, have urged Congress to repeal the Program.\textsuperscript{17}

Summary of EB-5 2.0 failed legislative process

The Regional Center Program was scheduled to sunset on September 30, 2015, as it is a temporary program that has been extended multiple times since 1993, typically for successive 3 year terms.\textsuperscript{18} However, rather than simply extend the Program as Congress had done each time it came up for reauthorization in past years, Congress decided to seize the opportunity to address much needed reforms. The EB-5 community realized reform was necessary to improve the Program’s integrity and transparency, as well as to reduce the dominance by major real estate

\textsuperscript{13} http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/
\textsuperscript{14} http://abcnews.go.com/Nightline/fullpage/500000-green-card-eb-visa-program-28662457
\textsuperscript{15} Path America: https://www.sec.gov/litigation/complaints/2015/comp-pr2015-173.pdf
\textsuperscript{17} https://www.washingtonpost.com/opinions/its-time-for-the-corporate-visa-giveaway-to-go-away/2015/09/06/72b78ea0-50d3-11e5-9812-92d5948a40f8_story.html;
\textsuperscript{18} See for example, https://www.congress.gov/bill/112th-congress senate bill/3245
developers in New York City and other cities that have thrived in the aftermath of the Great Recession.

Accordingly, Senators Grassley and Leahy co-sponsored the original Senate bill, S. 1501, on June 4, 2015 (the “June Bill”). This bill contained many provisions that were controversial, such as a very restrictive TEA definition for projects in urban area, and job creation rules that would reduce the amount of EB-5 capital that could be raised. Other provisions, such as the integrity and transparency provisions were generally recognized as a necessary to improve the Program’s reputation and a condition to obtain reauthorization of the Program. One provision was surprisingly generous, the “grandfather” provision relating to TEA and minimum investment amounts.

Between the bill’s introduction and the September 30, 2015 sunset date, surprisingly little progress was made. The Senate did not solicit comments from stakeholders or the public. Little, if any, debate was evident. Apparently, no revised or discussion drafts of the June Bill were circulated. The September 30th deadline was extended through a temporary Federal government budget bill, a “Continuing Resolution,” until December 11, 2015, which was later extended to December 16, 2015.19

At least four discussion drafts were produced by the House and Senate Judiciary Committees and circulated among a limited group in the Senate and House. However, the first of these was not circulated until more than one month after the Continuing Resolution was adopted. Three of the discussion drafts were circulated in the final days leading up to the extended deadline of December 16, 2015. These drafts evidence the apparent deals that were made, unwound, resurrected in different forms, but which ultimately died.20

The discussion drafts were circulated on or about November 7, 2015 (the “November Draft”), on or about December 2, 2015 (the “December 2nd Draft”), on or about December 9, 2015 (the “December 9th Draft”) and on or about December 12, 2015 (the “December 12th Draft”). These drafts are collectively referred to as the “Drafts.” The December 2nd, 9th and 12th Draft are sometimes referred to as the “December Drafts.” These Drafts were not publicly released during the period that these Drafts were being negotiated by Congress. Public input was limited to a select few stakeholders.

20 We were not personally involved with negotiations surrounding the proposed legislation. https://iiusa.org/blog/wp-content/uploads/2015/12/EB-5-recap-article-12-15-15.pdf
The Federal budget bill was further extended until December 16, 2015. Apparently, key Congressional leaders were close to reaching a deal on the EB-5 reforms. However, on December 15, 2015, one day prior to the expiration of the EB-5 program, House and Senate leadership recommended that the EB-5 program be extended until September 30, 2016. The extension was included as part of the omnibus appropriations bill that was passed by Congress and signed by the President on December 18, 2015. This simple and clean extension means that the Program will not change in any respect.

On December 17th, the day after the bill for a clean extension was filed, Senator Grassley appeared on the floor of Senate to express his deep disappointment and frustration that a powerful lobby representing a select few prevented the bill’s passage. He vowed that he will spend the next 10 months “exposing the realities of this program” and exercising more oversight of the Program than ever before. He complained that TEA designations “have been gerrymandered to include the most lavish of developments in the richest neighborhoods.” He railed against the abuses of gerrymandering: “How many more media reports will it take to understand the extent of EB-5 gerrymandering? Have the senators who helped table our reforms ever read those reports in the Wall Street Journal? I can say with certainty that the status quo will not benefit Middle America. It benefits New York City and other affluent areas at the expense of areas in Iowa, Kentucky, Wisconsin, and Vermont.”

We assume that the December 9th Draft and December 12th Draft will serve as the starting point for the negotiations when resumed in early 2016, as presumably these reflected the legislative representatives’ refinements from prior Drafts. Undoubtedly, the TEA definitions for urban area projects will be at the center of the debate.

Paper’s focus

In the interest of releasing this working draft paper as soon as possible, the paper’s immediate focus will relate to the proposed changes to the TEA definition and minimum investment amounts. We intend to prepare a second paper to focus on the other key provisions addressed in the various Drafts.

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21 The Consolidated Appropriations Act, 2016, includes a single sentence authorizing the EB-5 Regional Center program through September 30, 2016 (in Section 575 on PDF page 285).
23 We recognize that, given Senator Grassley’s recent statements, the starting point for defining a TEA in an urban area might differ from those considered in the December Drafts.
This paper reviews and explains the evolution of the key provisions in the Drafts pertaining to TEA status and related changes. The paper also describes how these provisions would have applied if EB-5 2.0 were enacted. Then, we consider the potential impact of these provisions on New York City (“NYC”) projects – existing, those in the pipeline and future. Maps and support data illustrate the applicability of the proposed TEA definitions to NYC census tracts, including projects. In addition, we analyze and illustrate how the proposed TEA changes might have applied to the two major EB-5 projects in Manhattan - Hudson Yards and 1 Park Lane - that were the subject of front page articles in the Wall Street Journal. These articles criticized the controversial practice of luxury projects in thriving areas qualifying for TEA status by gerrymandering census tracts.  

Based on the relevant data, it appears that fewer projects in Manhattan (and other parts of NYC) would have been able to qualify under the new TEA definitions available to projects in urban areas under the Drafts.

As explained below, whether a project location in an urban area would qualify as a TEA under the definitions introduced in the December Drafts (Modified Gerrymandering, Cluster and Extend, and Good Neighbor described below) depend upon the project’s census tract or permitted combined area of tracts meeting applicable thresholds (high unemployment, high poverty or area median income (“AMI”).

The more restrictive TEA definition in urban areas would relate to poverty rate or AMI level. One new definition that incorporates the high unemployment threshold would limit the number of census tracts which could be combined to 12. However, a review of the data relating to these thresholds reveals that few tracts in prime Manhattan locations (i.e., below 96th Street) meet these thresholds. Thus, few projects would qualify under the urban area TEA definitions in the December Drafts, even under the broadest of the definitions contained in these Drafts.

We are unable to construct an alternative definition based on the existing data that would permit a significant number of additional projects to qualify. We realize that is extremely unlikely that Congress would permit many more tracts to be combined because this would start to resemble the gerrymandering, which is the abuse that Congress is seeking to eliminate.

25 Census tracts are small statistical subdivisions of counties used by the US Census Bureau. In New York City, there are 2,168 census tracts, which typically have a population of about 3,000-4,000 each, and an average land area of about 90 acres. Each decade, the Census Bureau updates this geography, attempting to keep changes to a minimum. http://www.nyc.gov/html/dcp/html/census/nyc_cff_faqs.shtml
We assume if Congress considers other factors to define a TEA in an urban area, it will test the potential effectiveness of this new definition by applying it to existing EB-5 projects that qualified for TEA status under the gerrymandering rules. If the same projects would continue to qualify under the new standards, then obviously Congress would not succeed in eliminating the abuse and directing investment and job creation to rural and distressed areas that Congress apparently believes is appropriate.

2016 suggested legislative approach

If Congress expects to pass major substantive changes to the law during the 2016 legislative session, it will have to resume the negotiation process as early as possible after the holiday recess because the program will expire in less than 9 months. The 2016 Presidential election year adds a layer of complexity to resolving the controversial deal points that prevented the bill from being passed in the 2015 session. Any substantive bill would face that challenge in 2016. Furthermore, a bill that relates to the nation’s controversial immigration program faces an even higher hurdle.

The reform measures contained in the June Bill are laudable from trying to stimulate EB-5 investment and job creation in rural and economically distressed areas by improving the integrity and transparency aspects of the Program. However, certain provisions of the June Bill created divisiveness within the EB-5 community. It limited urban area TEAs to a single census tract, a standard that many in the EB-5 community perceived as an extreme overreaction to gerrymandering. The generous “grandfather” provisions in the June Bill invited a flood of exemplar (project preapprovals) applications to be filed with USCIS, the Federal government agency that administers the Program, by developers and individual immigration petitions (Form I-526) to be filed by investors. 26

Furthermore, Congress did not provide a process or forum by which stakeholders could comment. Not until five months after the June Bill’s introduction, approximately one month before the Program’s scheduled sunset, did Congress circulate a revised draft – the November Draft - to the June Bill. Apparently in response to the flood of applications and petitions filed with USCIS between June and October, the November Draft essentially reversed the June Bill’s grandfather clause. As the EB-5 extension deadline neared, over a 10 day period in December, from December 2 to December 12, three more Drafts were considered by a select group of Congress members.

26 See the discussion in the “Other TEA Considerations” section of this paper.
We hope that when Congress reconsiders EB-5 reform legislation in early 2016 that it will provide a more open process, with a greater opportunity for stakeholders to voice their view and participate in the process, and that any drafts modifying the bill be circulated publicly and well in advance of the September 30th deadline.27

I TEA CHANGES UNDER PROPOSED 2015 SENATE BILL (“EB-5 2.0”)

Minimum Investment Amount

The June Bill and each of the 4 Drafts would have raised the minimum investment for projects located in a TEA from $500,000 to $800,000. This was not controversial because the dollar amount has not been raised since the law was enacted in 1990.28 However, for projects not located in a TEA, the minimum amount would have remained at $1,000,000 under the December Drafts.

Thus, the spread between the minimum investment level that would have been required for a project located in a TEA compared to one not located in a TEA would have been only $200,000 (or a 25% differential). This new spread would have been relatively insignificant compared to the $500,000 spread (a 100% investment differential) provided under the existing law.29

If the spread were reduced to merely $200,000, the December Drafts would have reduced the importance of a project being located in a TEA. This would have significantly softened the consequences for those new projects that would not have qualified under the new TEA definitions. Especially with the narrowed dollar differential, we would have expected that, in some cases, the high net worth immigrant investor who is attracted to the Program would nevertheless invest in major projects in prime, non-TEA locations with major developers that demonstrate an impressive track record. Immigrant investors believe these developers are more likely to successfully complete the project, create the jobs needed to support the investor’s visa petition and repay the investor’s capital contribution.

Recent SEC enforcement actions against small or inexperienced developers might result in even more investors leaning towards investment in major projects by major developers, even if located in a non-TEA so long as the investment

28 INA Sec. 203(b)(5)(C)(i).
29 $200,000 spread/$800,000 minimum = 25%, compared with $500,000 spread/$500,000 minimum = 100%
involves only a small premium, such as $200,000. Those SEC actions involve blatant
fraud perpetrated by regional centers, NCEs and developers (JCEs) under the
common control of one or two individuals with little or no experience in real estate
development. These individuals have allegedly diverted EB-5 funds to
unauthorized projects and for personal gain, thereby jeopardizing the investors’
visa eligibility and return of capital.30

The June Bill and November Draft would have increased the minimum
investment amount to $1,200,000.31 The resulting $400,000 differential would
have likely motivated more investors to select a project located in a TEA, such as in
a rural area which automatically would have qualified, but it is difficult to assess
the importance that a particular immigrant investor would place on the $200,000
versus $400,000 differential in the minimum amount. Since virtually all projects
qualify as a TEA based on the favorable interpretations made by state officials, no
benchmark exists to make a comparison32. It is obvious that the wider the
differential, the greater the likelihood that investors would be attracted to projects
that qualify for the lower threshold.

**Targeted Employment Area (‘TEA’)**

Each of the December Drafts proposed 5 TEA definitions. If the immigrant
invests in a project that is physically located in one of these TEAs, then the
investment would have qualified for the $800,000 amount.

**Background**

The June Bill proposed a simple solution. It focused solely on the census tract
in which the project is located.

An urban area project would have been able to qualify as a TEA only if the
project were located in a census tract with an unemployment rate equal to at least
150% of the national average unemployment rate.33 This high unemployment
threshold is the same as the applicable level under the existing law.

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31 H.R. 3370 proposed the minimum investment at $1,000,000 for a TEA project and $2,000,000 for a non-TEA
project. This proposal received no meaningful support. Among other reasons, it would have rendered the
Program non-competitive with visa for investment programs offered by countries.
32 Under the Drafts, the national office of USCIS would make all determinations with respect to TEA status, rather
than the individual states.
33 S.150, PDF page 62 of 79.
This proposal met immediate and stiff opposition from developers and regional centers. They argued that the single census tract approach was not appropriate because a project location that borders an obvious high unemployment area would not qualify; and it did not take into account the job creation based on workers who commute to a project from more distant areas. As a result, this would have eliminated TEA qualification for virtually all project locations in thriving urban areas.

The subsequent Drafts substantially broadened the TEA definition for urban area projects. Two alternative urban area TEA definitions were introduced. These TEA definitions were labeled in the Drafts as a “Special Investment Zone” and a “Priority Urban Investment Area”. We sometimes will refer to both of these definitions together as “Urban Area TEA Definitions”. For purposes of all of the Urban Area TEA Definitions discussed in this paper, we refer to the census tract in which the project is located as the “Project Tract.”

**TEA - Special Investment Zone ("SIZ")**

The “Special Investment Zone” TEA definition used one of two approaches that differed considerably. The approach selected varied from draft to draft. Either approach would have tightened the TEA definition in urban areas, but still would have allowed modified forms of gerrymandering – combining the project tract with multiple contiguous tracts to reach the high unemployment threshold. ([For purposes of all of the Urban Area TEA Definitions, the unemployment rate for the Project Tract or combined area must be at least 150% of the national average unemployment rate ("High Unemployment Threshold").]

We explain the two different approaches, as the methodology might not be obvious from a quick reading of the proposed statutory language. We label one as “Modified Gerrymandering” and the other as “Cluster and Extend.” We believe these labels are more descriptive and reader friendly than the acronym “SIZ,” and make it easier to distinguish between the approaches used in the various Drafts.

As explained below, the main difference between the two approaches is that Cluster and Extend requires that all tracts bordering the Project Tract be included in the combined area. This increases the likelihood that low unemployment tracts

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35 See Appendix A for the proposed statutory language contained in the December 12th Draft. INA Sec. 203(b)(5)(D)(xi). The statutory references in the balance of the footnotes of this paper generally refer to the new sections of the Immigration and Nationality Act ("INA") that would have been added by the December 12th Draft if it had passed and been enacted.

36 See Appendix A. INA Sec. 203(b)(5)(D)(ix).
must be included to determine whether the combined area meets the High Unemployment Threshold. Thus, Cluster and Extend is likely to reduce the chance that a project location will qualify as a SIZ TEA, under this TEA definition.

This conclusion assumes that the other terms of the definition are the same. As pointed out below, the December 12th draft regarding Cluster and Extend broadened exclusions from the December 9th definition regarding Modified Gerrymandering. This change would have created opportunities that might not have been intended by Congress. If Congress were to revisit Modified Gerrymandering, we assume it would apply the December 12th Draft exclusions because this reflects the latest version of the proposed bill, before the legislative effort failed.

**SIZ – “Modified Gerrymandering”**

The December 9th Draft introduced this approach, which we refer to as “Modified Gerrymandering.” This new approach would have replaced the SIZ – Cluster and Extend that was introduced in the December 4th Draft, which is discussed further below.

Modified Gerrymandering would allow tracts to be combined with the Project Tract. The maximum number of tracts that may be combined is 12. The weighted average of the unemployment rate of the tracts must meet the High Unemployment Threshold. Only one of the tracts in the combined area must border the Project Tract. The December 9th Draft did not limit the location of the tracts in the combined area to the same county.

Under the December 9th Draft, the combined tract area could not include a tract delineated by the U.S. Census Bureau (“Census Bureau”) specially to cover a “body of water” or a “special land use census tract encompassing a public park.”

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37 As discussed in the Modified Gerrymandering and Cluster and Extend subsections of this SIZ section, we assume that during its deliberations in 2016 Congress will revisit the December 12th Draft exclusion (re parks and bodies of water) to make sure it reflects the concepts it seeks to exclude.

38 The December 9th and December 12th SIZ definition included one alternative way to meet the TEA definition. A project location qualifies as a TEA location if it is located within a city or county that, on a weighted basis, meets the High Unemployment Threshold. For example, every project location in Detroit, Michigan would qualify as a TEA under this definition because the weighted unemployment rate in Wayne County, the county in which Detroit is located, meets the High Unemployment Threshold.

39 INA Sec. 203(b)(5)(D)(xi)(II). This adopts the maximum number of tracts to be combined under the TEA approach implemented by the State of California. [http://business.ca.gov/International/EB5Program.aspx](http://business.ca.gov/International/EB5Program.aspx)

40 INA Sec. 203(b)(5)(D)(xi)(I)(dd).  

41 INA Sec. 203(b)(5)(D)(xi)(II)(bb)(AA).
However, as further discussed below, the “body of water exclusion” would have no applicability to NYC projects. The “parks” exclusion might not have applied depending on how USCIS were to interpret the relevant terms. A limitation of 12 tracts would have been the only meaningful limitation on the gerrymandering of most projects in New York City.

For these purposes, a “body of water” was defined by reference to the U.S. Census Bureau’s delineation. Based on these delineations, none of the 2,168 census tracts in New York City constitutes a “body of water.” No water body in the vicinity of Manhattan constitutes a “body of water” by official delineation. Census tracts with rivers or other common bodies of water in the NYC area could have been included in the combined gerrymandered area of this type of TEA. For example, a tract that includes the East River could serve to connect tracts on either side of the River. Theoretically, a Project Tract on the west side of Manhattan could have been connected by the Hudson River to a tract in New Jersey.

However, the December 9th Draft is unclear about gerrymandering limitations that would have applied to public parks that might be part of a combined area. The exclusion refers to “special use land census tract encompassing a public park.” The meaning of a public park is clear. However, unlike the body of water exclusion, the section did not define “special use land census tract” by reference to the Census Bureau or otherwise. Arguably, the official delineation would nevertheless apply because there is no plain meaning of this term. On the other hand, it may be argued that the lack of a definition in the Act would give USCIS the flexibility to apply a different interpretation based on the context.

The Census Bureau defines a “special land use census tract” as one that “encompass[es] a large area with little or no residential population with special characteristics, such as large parks.” The Bureau specifically assigns a code to identify these tracts. Despite the significant number of parks throughout NYC, none of the census tracts in New York City is identified by the Census Bureau as a “special

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42 INA Sec. 203(b)(5)(D)(xi)(II)(dd). See also the Census Tract Codes and Numbers discussion in [https://www.census.gov/geo/reference/gtc/gtc_ct.html](https://www.census.gov/geo/reference/gtc/gtc_ct.html)
44 For US Census Bureau purposes, tracts that are considered a body of water have no habitable land and generally run parallel to the shoreline.
45 The SIZ definition does not appear to limit the area of combined tracts to a single county or state. It appears that the tracts that include the Hudson River can connect a project with tracts in Manhattan to New Jersey.
46 INA Sec. 203(b)(5)(D)(xi)(II)(bb)(AA)
land use census tract.” Thus, it could be argued that even though a particular tract consists largely or entirely of a park, the tract nevertheless does not fit within the definition of “special land use census tract encompassing a public park.”

Based on the above, it appears that this definition would have allowed a public park in New York City to continue to connect tracts on any sides of the park. The ability to use the park as a tract that could connect a Project Tract on one side of the park to a remote site contiguous to another side of the park was the key to the 1 Park Lane project in Manhattan qualifying as a TEA. That project was the subject of a front page article in the Wall Street Journal critical of the widespread use of gerrymandering to qualify a tract as a TEA.

As discussed in the next section, it appears that in the December 12th Draft Congress addressed the “exclusion of tracts” issues of the SIZ TEA definition, even though this definition applied a different approach to determine whether a gerrymandered area qualifies as a TEA location. If Congress were to revert to the SIZ – Modified Gerrymander definition described in this section, we assume it would adopt similar exclusion standards as those contained in the Cluster and Extend Approach of the December 12th Draft. Subject to our comments in the Cluster and Extend section below, these exclusions would close many of the opportunities created by this Modified Gerrymandering approach.

SIZ - “Cluster and Extend”

The Cluster and Extend approach was introduced in the December 4th Draft, removed from the December 9th Draft and reappeared in a modified form in the December 12th Draft. We will focus on the December 12th Draft as this constitutes the latest version of the proposed legislation.

Under this approach to the SIZ TEA definition, the maximum number of tracts that could be combined is 12, all tracts must be in the same county and all tracts bordering the Project Tract must be included in the combined area. To determine the TEA under this approach, follow these steps:

1. Cluster all the census tracts bordering the census tract in which the project is located.

48 The closest special land use census tract to New York City is in Jericho, in Nassau County, according to ReinID.com based on the tract data provided by the US Census Bureau.


50 [http://business.ca.gov/International/EB5Program.aspx](http://business.ca.gov/International/EB5Program.aspx)
2. Count the number of tracts in step 1 including the Project Tract. If the weighted average unemployment rate for these tracts meets the High Unemployment Threshold, then the project meets this TEA requirement. If not, then proceed to step 3.

3. Subtract the total number of tracts in step 2 from 12. The difference represents the number of tracts to which the combined area may be extended. The goal is to connect the clustered tracts above to high unemployment tracts in the nearby area, with the result that the weighted unemployment rate is at least 150% of the national average. To perform this task, connect the closest tract in the cluster to the tracts that meet the High Unemployment Threshold. Depending on the location of the high unemployment tracts in relationship to the cluster, intervening tracts may have to be included to ensure contiguity. A project will qualify only if the weighted average unemployment rate meets the High Unemployment Threshold.

Tract exclusion: The December 12th Draft limits the type of census tracts that may be included in the combined area. Although this exclusion refers to parks and bodies of water, it avoids the potentially confusing, technical Census Bureau jargon contained in the December 9th Draft of the SIZ – Modified Gerrymandering definition. Instead, it simply and succinctly provides, in pertinent part, that a census tract that “encompasses an area with special characteristics and little or no residential population, such as a public park, public forest, or a large body of water...” may not be included (emphasis added). We emphasize that this straightforward definition of park and water body exclusion was included only in the December 12th Draft for the TEA SIZ definition under Cluster and Extend.

Even though this revised definition seems clear, it raises an issue. The above italicized language seems to be derived from the definition of a “special land use census tract” under the US Census Bureau rules. The Census Bureau uses code 9800 to specifically identify “special land-use census tracts; that is, census tracts defined to encompass a large area with little or no residential population with special characteristics, such as large parks or employment areas...”. It uses a

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51 See above discussion relating to the exclusion of certain tracts under Modified Gerrymandering.
52 Two technical exceptions apply to this exclusion. The Project Tract may encompass this type of area. The combined area may include one tract that encompasses an area with special characteristics and little or no residential population that “contains primarily business, industrial or other commercial uses.”
different code, in the range of 9900s, to “represent census tracts delineated specifically to cover large bodies of water.”

At a glance, it would appear that the exclusion is intended to cover tracks that include large public parks like Central Park. However, it should be noted that the census code for Central Park is not 9800. Even though the exclusion tracks the language of the Census Bureau for these purposes, we assume that Congress intended to exclude parks, like Central Park, from comprising part of the combined area that may qualify a Project Tract as a TEA. This would curtail the ability of the many potential project sites which border, or are located near, Central Park to use it to connect with the fewest tracts possible on one side of the park to another side of the park.

Similarly, as discussed in the Modified Gerrymandering section above, the body of water exclusion would arguably not apply to any tracts in New York City. The large bodies of water in New York City comprise part of a tract with a significant population. Thus, these tracts would not meet the “little or no population” requirement of the exclusion.

The exclusion is more significant when applied to Modified Gerrymandering because that approach allows more remote tracts to be included, thereby increasing the chance that one of the tracts might reach a park or water body. If Congress were to revive Modified Gerrymandering (rather than employ Cluster and Extend), we assume it would use the exclusions from this December 12th Draft rather than those listed in the December 9th Draft.

We assume when Congress resumes its discussion of TEA reforms it will revisit the SIZ definition under both Modified Gerrymandering and the Cluster and Extend.

Based on the December 9th and December 12th Drafts, we assume that the following concepts would apply to the combined area under either approach:

1. Maximum of 12 tracts;
2. All tracts must be located in the same county based on the limitation that was included in the December 12th Draft relating to Cluster and Extend, even though the December 9th Draft relating to Modified Gerrymandering did not contain this limitation; and
3. The park and body of water exclusions contained in the December 12th Draft.

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54 https://www.census.gov/geo/reference/gtc/gtc_ct.html
The main difference between these two SIZ approaches is whether all tracts bordering the Project Tract must be included in the combined area. Obviously many projects that were able to qualify as a TEA under the current standards, including the use of gerrymandering which is permitted by many states, would not be able to qualify under this new definition because the extended reach of the combined tracts would be severely limited. Both approaches follow the TEA qualification methodology implemented by the state of California which limits aggregation to 12 tracts. The key proposed changes from current rules would be that many projects qualify as a TEA by combining more than 12 tracts, and some involve the combination of tracts in more than one county.

In addition, all of the tracts not contiguous to the project site’s census tract, must be included under Cluster and Extend. The typical combined area under the current rules includes only one tract bordering the Project Tract to provide contiguity to more distant tracts. It is likely that in many, if not in most, cases the tracts bordering the project site will include multiple low unemployment level tracts. Thus, under Cluster and Extend the weighted average of the combined area will be severely reduced. Under the current law, one could avoid low unemployment census tracts contiguous to the Project Tract, except for the one tract needed to extend the area towards more remote areas to meet the High Unemployment Threshold.

Modified Gerrymandering is much more flexible than Cluster and Extend. Under the Cluster and Extend approach, all of the tracts contiguous to the Project Tract would have been required to be included, which would likely have reduced the weighted unemployment average of the combined area. Consequently, this approach would more severely limit the number of remote tracts with potentially High Unemployment Thresholds that could be included within the web of the combined area. In contrast, the Modified Gerrymandering definition permits only one tract contiguous to the Project Tract, and thus allows the combined area to bypass the other low unemployment census tracts contiguous to the Project Tract.

TEA - Priority Urban Investment Area (the “Good Neighbor Approach”)

Not only do the December Drafts permit the combination of up to 12 census tracts to qualify as a TEA, each provides an additional avenue for an urban area project location to qualify – Priority Urban Investment Area (“PUIA”).

55 INA Sec. 203(b)(5)(D)(ix).
main difference from draft to draft under PUIA is technical language. We explain the subtle differences in definitions from draft to draft.

The Priority Urban Investment Area definition allows a project to qualify based on the standards of its own census tract (i.e., the Project Tract), or with the help of any of its bordering (neighboring) census tracts (“good neighbors”) or certain neighboring tracts of those tracts (the “good neighbor #2”). We refer to this type of TEA as a “Good Neighbor” because this is more descriptive and reader friendly than “Priority Urban Investment Area” or its acronym, “PUIA.” Thus, “Good Neighbor Approach” includes either a Project Tract that alone qualifies or qualifies with the help of a neighboring tract.

As further described below, unlike the SIZ TEA (Cluster and Extend or Modified Gerrymandering), this TEA definition is not limited to meeting the High Unemployment Threshold. Instead, it can be met based on meeting either the High Unemployment Threshold, or one of two thresholds which appears to be based on the threshold used to qualify a project in a “New Markets Tax Credit” program standard under the Internal Revenue Code. Those two thresholds are explained below.

If the Project Tract on its own meets any of the thresholds, it would qualify. This is similar to a single census tract TEA under the current law, except the TEA definition under the Good Neighbor Approach could be met by meeting any one of three thresholds, rather than only the High Unemployment Threshold as under the current law. The various drafts include the single census tract TEA under the PUIA definition. To be consistent with that classification system, we include the single census tract TEA under the Good Neighbor approach.

Good Neighbor Approach - High Unemployment

The Drafts allow this high unemployment version of the Good Neighbor Approach to be met under any one of three alternative tests.

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56 The Drafts do not use the term “Good Neighbor” or “Good Neighbor Approach.”
57 The New Markets Tax Credit Program (“NMTC”) is not referenced in the Act. However, this standard seems to be based on the definition of Low-Income Community in IRC Sec. 45D(e) relating to NMTC. However, NMTC is based solely on the project’s census tract and does not allow contiguous tracts to be taken into account.
58 Perhaps Congress added this classification for TEA qualification in recognition that the unemployment rate for a census tract may not be a fair reflection of the opportunity for job creation in that tract. For example, a census tract that does not qualify could have many more unemployed in absolute terms than a tract with higher unemployment rates based on a lower population. Alternatively, this may have been added at the request
1. If the Project Tract on its own meets the High Unemployment Threshold\(^{59}\); or

2. Based on the unemployment rate of the Project Tract and/or the unemployment rate of one or more bordering tracts that meets the High Unemployment Threshold (a “good neighbor”) – as explained below, the most recent drafts were unclear about how the High Unemployment Threshold is to be applied for purposes of this second test; or

3. Based on the unemployment rate of the Project Tract, the good neighbor tracts that meet the High Unemployment Threshold or a tract bordering that good neighbor (the neighbor of the good neighbor) – again, as explained below, the most recent drafts, including the December 12\(^{th}\) Draft were unclear about how the High Unemployment Threshold is to be applied for this purposes of this third test under this TEA.

In any case, this TEA definition permits one or more “good neighbor” tracts to cause the combined area to qualify as a TEA.

The relevant language for the second and third tests under this approach set forth in the December 12\(^{th}\) Draft is less confusing than that set forth in the previous Drafts, but still raises some questions. In pertinent part, it states:

“The term ‘priority urban investment area’ means an area consisting of a census tract or bordering census tracts, each of which is in a metropolitan statistical area and, using the most recent census data available, each of which has—

“(I) an unemployment rate that is at least 150 percent of the national average unemployment rate, which may also include any census tract or tracts contiguous to 1 or more of the tracts that have the requisite unemployment rate;” [emphasis added]

The phrase “each of which” raises questions. If the combined area method of test 2 or test 3 above, required that the Project Tract also meet the High Unemployment Threshold, then this would seem to render these tests meaningless because the Project Tract could have qualified on its own in accordance with test 1, independent of the contiguous tract’s high unemployment rate. In other words, if the Project Tract meets the High Unemployment Threshold then it would have qualified under test 1.

\(^{59}\) As discussed, single census tracts method does not need to rely on the status of a neighboring tract to qualify as a TEA, but for consistency with the drafts we include this under the Good Neighbor Approach.
It is unclear whether if tracts are combined to attempt to meet this standard, each tract must meet the High Unemployment Threshold or whether instead, the weighted average of the combined area must meet this standard. If each tract – i.e., the Project Tract and the good neighbor tract must meet the High Unemployment Threshold, then obviously the average would meet the High Unemployment Threshold.

The December 9th Draft suggested that under test 2 or test 3, the average of the Project Tract and the good neighbor tract must meet the High Unemployment Threshold. Under that Draft, the language was not clear, but seemed to indicate that the combined area could meet the test even if the Project Tract did not meet the High Unemployment Threshold, so long as the good neighbor tract’s unemployment rate was sufficiently high to result in the combined area meeting the High Unemployment Threshold.

The more important point is that if each of the Project Tract and the good neighbor tract would have had to meet the High Unemployment Threshold, fewer projects would have been able to qualify under this TEA definition.

**Good Neighbor Approach – High Poverty or 80% AMI**

Alternatively, the project’s location can meet the TEA definition under the Good Neighbor Approach if the Project Tract on its own, or a combined area including bordering tracts, meets a threshold based on a variation of a New Markets Tax Credit type standard. The applicable threshold is either (1) a poverty rate of at least 20% (“High Poverty Threshold”), or (2) a median family income that is not more than 80% of the applicable Area Median Income (“80% AMI Threshold”). Unlike the High Unemployment version discussed above, this test does not permit other contiguous tracts to be combined (i.e., a neighboring tract of a good neighbor tract). This standard raises the same issue discussed above relating to whether in the case of a combined tract test, the Project Tract must also meet the High Poverty Threshold or 80% AMI Threshold.

The Good Neighbor Approach introduces a TEA definition with Thresholds that are not incorporated in the current law – that is, High Poverty and AMI. Perhaps this TEA definition was added at the request of developers who recognized

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60 As stated earlier, the New Markets Tax Credit Program (“NMTC”) is not referenced in the Act. However, this standard seems to be based on the definition of Low-Income Community in IRC Sec. 45D(e) relating to NMTC. However, NMTC is based solely on the project’s census tract and does not allow any other tracts, contiguous or not, to be taken into account.

61 Technically, the High Poverty and the 80% AMI standards are listed as separate tests under the Good Neighbor Approach.
that EB-5 High Unemployment Threshold would become more difficult to meet as the local economy improves (i.e., unemployment rate declines) at a greater rate than the national average. This reflects the trend in many thriving urban areas, such as Manhattan. Some may argue if Congress were not to revise the TEA definitions from the current rules, many new project locations that would have qualified in the past based on gerrymandering, no longer would have qualified as TEAs even with the use of gerrymandering. Thus, developers or Congress may have been searching for an approach that relies upon valid factors other than unemployment rates that would support TEA status.

The maps in Section II “NYC Data, Tables and Maps” reflect the High Unemployment Threshold separate from the High Poverty and 80% AMI Threshold (the “NMTC Thresholds”). The maps reveal that more tracts in Manhattan meet the NMTC Thresholds than the Unemployment Thresholds. As explained in that section, is partly attributable to the fact that the NMTC eligibility relies upon 2010 census data, a period when the economy was much weaker than the current market. Presumably, Congress will designate the more appropriate data to be used for purposes of calculating these thresholds.

Proposed methodology – Project Tract as Urban Area TEA

If the SIZ TEA and PUIA (“Good Neighbor”) TEA were to become part of EB-5 2.0, in the case of a new project seeking to qualify its location as a TEA, the suggested methodology would be to initially determine if the project qualifies under the Good Neighbor Approach (i.e., the High Unemployment, High Poverty or 80% AMI type) because it is easier to isolate the potential tracts that may qualify under this type of TEA than a SIZ TEA). The only tracts that could qualify under the Good Neighbor Approach would be the Project Tract and a good neighbor. In contrast, the SIZ TEA (either Modified Gerrymandering, or Cluster and Extend) extends to as many as 12 tracts. This requires an analysis of which alternate combination of tracts, including remote tracts, results in a weighted average which meets the applicable Thresholds.

Below is an initial draft of a flow chart that reflects the recommended methodology.

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62 See http://beta.bls.gov/dataViewer/view/timeseries/LAUCN3606100000000003
63 As discussed in the “TEA under EB-5 2.0 applied to NYC census tracts section,” the High Poverty and 80% AMI data does not reflect the current economy.
Urban Area TEA Decision Tree

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Good Neighbor (PUIA)

- Does Project Tract meet High Unemployment, High Poverty or 80% AMI Threshold?
  - Yes
  - Does neighboring (contiguous) tract meet any of the three Thresholds? Is the weighted average meet the Threshold? *See clarification requested in the "Cluster and Extend" section of the paper*
  - No
  - Yes

Qualified for TEA Under December 12th Draft

- Are there 12 or fewer tracts? Are combined tracts connected? Has High Unemployment Threshold been met? (If any tracts contain a park or large body of water, consider "Exclusions")
- Yes

Cluster and Extend (SE)

- Cluster: Calculate the average unemployment rate for the Project Tract and all bordering tracts. If the average meets the High Unemployment Threshold, then the tract is a TEA. No need to continue to the next step; otherwise, count the number of tracts in the cluster including the Project Tract.
- Extend: Search for nearby tracts that meet the High Unemployment Threshold. The goal is to extend the cluster by connecting tracts with higher unemployment until either the weighted average meets or exceeds the requirement with no more than 12 tracts.

Note that the Dec. 12th draft substituted the term "bordering" tracts for "contiguous" tracts. This distinction should be clarified.
II TEA UNDER EB-5 2.0 APPLIED TO NYC CENSUS TRACTS

SIZ and Good Neighbor Approach Applied to NYC Data

As explained above, a project can qualify as a SIZ TEA – whether Modified Gerrymandering or Cluster and Extend – if the combined area meets the High Unemployment Threshold, subject to certain limitations.

A project can qualify as a TEA under the PUIA TEA - Good Neighbor Approach if the Project Tract alone meets the High Unemployment Threshold, High Poverty Threshold or 80% AMI Threshold. Alternatively, it can qualify if the Project Tract and one of its neighboring tracts meet any one of these Thresholds.

Accordingly, to assess the likelihood of whether many project sites in New York City would qualify under any of the Urban Area TEA Definitions (SIZ or PUIA) depends on how many tracts in NYC meet the High Unemployment Threshold, High Poverty Threshold or 80% AMI Threshold. As indicated earlier, the High Poverty Rate or 80% AMI thresholds are essentially the same as those standards under the New Markets Tax Credit (“NMTC”) program.

Data Sources

The SIZ and Good Neighbor Approach TEA definitions set forth in the December 12th Draft require that the “most recent census data available” be used.

Unemployment Data

The May 30, 2013 Policy Memorandum relating to EB-5 Adjudications Policy prepared and released by USCIS states at page 18 that: “Acceptable data sources for purposes of calculating unemployment include U.S. Census Bureau data (including data from the American Community Survey) and data from the Bureau of Labor Statistics (including data from the Local Area Unemployment Statistics).”

Consistent with the Policy Memorandum, to obtain the data to determine whether the High Unemployment Threshold is met by a particular census tract, we used a combination of the American Community Study (ACS) 5-Year Survey (2009-2013) and the 2014 BLS method, commonly referred to as the “Handbook

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64 We are grateful for the assistance of Mike McWilliams of Reinid.com in our analysis set forth in this section.
65 http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf
Method” or the “Census Share Disaggregation Method.” We used the
ReinID.com EB-5 mapping feature which utilizes this combined methodology.

The use of both the ACS and BLS method together should provide the most
accurate unemployment rate estimates. The 5 year study (ACS) is the most
accurate at the tract level. The BLS method is the most accurate at the county
level. Both are used to calculate the latest unemployment rate.

High Poverty and 80% AMI Data

These standards are not applicable to EB-5 projects under the current law
because the High Unemployment Threshold is the determining factor as to whether
a project tract or a combined area constitutes a TEA. The High Poverty and 80%
AMI Threshold are similar to the NMTC standard set forth in the Internal Revenue
Code.

The CDFI Fund, an agency of the U.S. Department of Treasury which
administers the NMTC Program, uses decennial census data for determining tracts
that qualify for that program. The 2010 census data is used for current projects.
ReinID.com has developed a mapping tool to display the poverty rate or AMI level
under the NMTC standard.

Based on the USCIS Policy Memorandum, we recognize that this might not
be viewed as the most current data available. We realize that USCIS may require
the use of the ACS 5-year study to determine the poverty rate and 80% AMI. However, for simplicity sake, we used the NMTC information that was readily
available on the ReinID.com incentives map. We believe this should give the reader
a reasonable estimate of tracts in New York City that would meet this standard.

Obviously, the New York City economy has improved since 2010. It is likely
that some of the tracts that qualified in 2010 may no longer qualify in 2015. We
assume that generally census tracts in New York City that did not qualify as high
poverty or 80% AMI in 2010 are still not likely to qualify in 2015. Nevertheless, for
purposes of the table below, we use the 2010 data. Based on the above, the
number of tracts that qualify based on a standard that would use the most current
data may be less than the number reflected in the table.

The ReinID.com mapping tool does not isolate whether a census tract
meets the High Poverty Threshold or 80% AMI Threshold. It simply indicates
whether a tract qualifies under the NMTC program. Thus, we did not distinguish
between these two Thresholds.

66 http://www.bls.gov/lau/laumthd.htm
67 ACS released its 2014 data sources on December 3, 2015.
68 http://www.cdfifund.gov
NYC Data, Tables and Maps

We analyzed the supporting data for census tracts in New York City. However, we focused primarily on Manhattan, and to a lesser extent on Brooklyn, because the greatest development activity is centered there.

Below is a series of tables and maps that show the number of tracts in Manhattan and other boroughs that may meet one or more of the Urban Area TEA thresholds (these tracts are referred to as “Threshold Tracts”). Each of the Threshold Tracts would qualify as a Single Census Tract TEA.

Furthermore, each of the Threshold Tracts may serve as an essential part of a combined area that would enable a Project Tract to meet one of the urban area TEA definitions. Whether or not a Threshold Tract would so enable a Project Tract to meet an Urban Area TEA definition (other than Single Census Tract) would depend on the rules that apply for the specific Urban Area TEA Definition (i.e., Modified Gerrymandering, Cluster and Extend or the Good Neighbor Approach, as described in the sections above) that may pertain to the particular Project Tract.
New York City High Unemployment (HU), High Poverty (20%) or 80% AMI

Below is a schedule that we created that shows the total number of census tracts in each borough, the number of tracts that meets the High Unemployment Threshold, the High Poverty Threshold and/or 80% AMI Threshold. As stated above, we included High Poverty and 80% AMI in the same category because the same mapping tool under NMTC reveals tracts that meet either Threshold. This should not be construed to mean that these tracts qualify as a TEA and depends upon the applicable/specific TEA definition.

<table>
<thead>
<tr>
<th>Borough</th>
<th>County</th>
<th>Tracts</th>
<th>HU</th>
<th>High- Poverty/ 80% AMI</th>
<th>Meet Both Reqs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manhattan</td>
<td>New York</td>
<td>288</td>
<td>47</td>
<td>124</td>
<td>42</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>Kings</td>
<td>761</td>
<td>204</td>
<td>512</td>
<td>172</td>
</tr>
<tr>
<td>Queens</td>
<td>Queens</td>
<td>669</td>
<td>113</td>
<td>291</td>
<td>63</td>
</tr>
<tr>
<td>Bronx</td>
<td>Bronx</td>
<td>339</td>
<td>183</td>
<td>264</td>
<td>169</td>
</tr>
<tr>
<td>Staten Island</td>
<td>Richmond</td>
<td>111</td>
<td>16</td>
<td>23</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>2168</td>
<td>563</td>
<td>1214</td>
<td>456</td>
</tr>
</tbody>
</table>
Manhattan – Map of Threshold Tracts

The map below shows tracts in Manhattan that meet any of the Thresholds. The map on the left shows the High Poverty and 80% AMI Threshold Tracts and the map on the right shows the High Unemployment Threshold Tracts.

Brown (orange) tracts depict High Unemployment Threshold Tracts. Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.
Manhattan and Brooklyn – Threshold Table

The table below indicates the percentage of tracts in Manhattan and Brooklyn that meet the TEA Thresholds as a percentage of total tracts. Some of the tracts meet both Thresholds. Thus, the total number of qualifying Thresholds is fewer than the total of the tracts under each Threshold.

Note the significant number of tracts in Brooklyn that meet the High Poverty or 80% AMI Threshold. However, as indicated above, this is based on 2010 census data acceptable to the CDFI Fund. It is likely that this data would not be viewed as the most current data available for EB-5 purposes. Given that the NYC economy has improved since the census was taken in 2010, it is likely that fewer tract would qualify based on the “most current data available.”

Also note that most of the Threshold Tracts in Manhattan are located north of Central Park, or towards the northern end of the Park.

Manhattan and Brooklyn:
Thresholds as % of total tracts

<table>
<thead>
<tr>
<th>Borough</th>
<th>Tracts</th>
<th>HU</th>
<th>HU % of Total</th>
<th>High-Poverty/80% AMI</th>
<th>High-Poverty/ 80% AMI % of Total</th>
<th>Meet Both Reqs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manhattan</td>
<td>288</td>
<td>47</td>
<td>16%</td>
<td>124</td>
<td>43%</td>
<td>42</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>761</td>
<td>204</td>
<td>27%</td>
<td>512</td>
<td>67%</td>
<td>172</td>
</tr>
</tbody>
</table>
Manhattan and Brooklyn – Maps of Threshold Tracts

The maps below show tracts in Manhattan and Brooklyn that meet any of the Thresholds. The map on the left shows the High Unemployment Threshold Tracts and the map on the right shows the High Poverty and 80% AMI Threshold Tracts.

Brown (orange) tracts depict High Unemployment Threshold Tracts.
Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.

Manhattan and Brooklyn:
Thresholds as % of total tracts

<table>
<thead>
<tr>
<th>Borough</th>
<th>Tracts</th>
<th>HU % of Total</th>
<th>High-Poverty/ 80% AMI % of Total</th>
<th>Meet Both Reqs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manhattan</td>
<td>288</td>
<td>47</td>
<td>16%</td>
<td>43%</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>761</td>
<td>204</td>
<td>27%</td>
<td>43%</td>
</tr>
</tbody>
</table>
Below 96th Street (Manhattan) – Threshold Tables and Maps

We focused on the area in Manhattan below 96th Street because it is generally considered the prime development area in New York City. The table below indicates the number of tracts in Manhattan below 96th Street that meet the Threshold by West Side or East Side.

The table and maps below demonstrate that very few Threshold Tracts are located below 96th Street in Manhattan. Thus, few project locations would qualify as a Single Census Tract TEA. Similarly, there are few Threshold Tracts available to enable projects located below 96th Street to meet one of the Urban Area TEA definitions.

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Total</th>
<th>Westside</th>
<th>Eastside</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Unemployment</td>
<td>9</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>High Poverty or 80% AMI</td>
<td>33</td>
<td>10</td>
<td>23</td>
</tr>
</tbody>
</table>

Brown (orange) tracts depict High Unemployment Threshold Tracts. Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.
Application of Urban Area TEA Definitions to two examples of major TEA projects in NYC

Ironically, two New York City projects that were the subject of front page Wall Street Journal articles⁶⁹ – 1 Park Lane and Hudson Yards - as illustrations of gerrymandered project that would apparently continue to qualify as TEAs under the EB-5 2.0 standards. We realize that this is theoretical because these projects are likely to be fully subscribed and all investors in these projects would have filed their I-526 forms before any changes to the law are made. ⁷⁰ However, we assume it is likely that future development at Hudson Yards will seek additional EB-5 financing, in which case the new law’s TEA standards will apply.⁷¹

We analyzed whether these two projects and another major EB-5 project, 101 Murray Street in Manhattan, would still qualify as a TEA location under EB-5 2.0’s proposed, new standards as set forth in the December Drafts.

⁷⁰ See the discussion below re TEA and Minimum Investment Effective Dates.
⁷¹ In contrast, 1 Park Lane, an isolated project, presumably involves a single tranche of financing.
1 Park Lane – existing, approved TEA

Below is a map illustrating how 1 Park Lane qualified as a TEA

All map images were created using Microsoft® Bing® Maps and ReinID.com Geospatial Platform. Color codes: Green=TEA, Brown=High Unemployment Tracts outside TEA.

Map: http://reinid.com/map/36061011201,36061014300,36061016800/#eb-S

EB-S Report: http://reinid.com/map/36061011201,36061014300,36061016800

Tract 112.01 is the project tract (black outline). Three census tracts make up this TEA. Current rules allow tracts that includes a park to be part of the combined area. Tract 168 is a high unemployment tract in Harlem.
1 Park Lane would appear to still qualify under “Good Neighbor”

The project qualifies as a TEA location under the Good Neighbor Approach. Tract 102 meets the high poverty rate and/or 80% AMI standard. Click on the link below the map to see the report detail.

This assumes that Tract 102 would qualify as a “bordering” tract even though it only has a single point in common with the project tract. We did not check whether the average of the two tracts would meet either of the Thresholds.

Color codes: Green=Project Tract, Red/Yellow=Poverty and/or AMI.
Map: http://reinid.com/map/36061011201,36061014300,36061016800/#nmtc
EB-5 Report: http://reinid.com/map/36061011201,36061014300,36061016800
1 Park Lane would not qualify as a TEA under SIZ – Modified Gerrymandering or Cluster and Extend

Under the SIZ approach, in this case, the pivotal determination would be whether the census tract in which Central Park is located is permitted to connect the project tract to the remote high unemployment tract. See our analysis of the park exclusion above in the SIZ section.

If the new law were to adopt the exclusions in the December 12th Draft regarding public parks, then Central Park could not be included in the combined area. In that case, the combined area would include the tracts along the east side of Central Park, none of which meets the High Unemployment Threshold. To reach the high unemployment tract, Tract 168, would require that more than 12 tracts be combined. Thus, this would not qualify as a Modified Gerrymandering. A greater number of tracts would be required to reach the tract under Cluster and Extend because all of the tracts bordering the Project Tract would have to be included. Thus, the project would not qualify as a TEA location under Cluster and Extend.

If the December 9th Draft approach were followed instead, then the park would be eligible for inclusion in the combined area. In that case, the combined area would qualify as a TEA under Modified Gerrymandering.
Hudson Yards would appear to still qualify under Good Neighbor Approach

Below is a map that illustrates how Hudson Yards would qualify as a TEA under the Good Neighbor Approach. 72

Color codes: Green=Project Tract, Red=Poverty and/or AMI
Map: http://reinid.com/map/36061011201,36061014300,36061016800/#nmtc
Hudson Yards Census Tract #99
Contiguous Tract #83: Poverty Rate - 34.2%; AMI: 36.6% http://reinid.com/nmtc/36061008300
Contiguous Tract #97: Poverty Rate - 21.5%; AMI: 60.1% http://reinid.com/nmtc/36061009700

72 We have not calculated the Threshold based on the average of the Project Tract and the good neighbor.
Hudson Yards would not qualify under the SIZ TEA

Hudson Yards would not seem to qualify under the SIZ TEA due to the 12 tract limitation, under either Modified Gerrymandering or Cluster and Extend. The combined area using solely the Project Tract and the bordering tracts absorbs 10 tracts. In contrast, in order to qualify as a TEA for its current EB-5 tranches, the Hudson Yards project gerrymandered numerous tracts extending several miles north into the upper reaches of Manhattan, as depicted in the sketch that appeared in the Wall Street Journal article.

Other projects

However, many projects that qualified as a TEA under the existing law would no longer qualify under the proposed TEA definitions. For example, 101 Murray Street in Manhattan would not qualify under either the SIZ or Good Neighbor Approach.

Below is a map that illustrates one combination of 12 tracts relating to 101 Murray Street that would not qualify under the SIZ Modified Gerrymandering. The project also would not qualify under the more restrictive Cluster and Extend.

Color codes: Green=Project tract, Brown=High unemployment tracts, Black outlines denote an attempt to gerrymander tracts to create a TEA. Also, the weighted average unemployment rate is below 150% and does not qualify.

Map: http://reinid.com/map/36061002100,36061003100,36061002900,36061002700,36061000800,36061000600,36061000201,36061000202,36061001001,36061001002,36061002000,36061002400,#/eb-5

73 We did not evaluate whether this TEA could be met if the Hudson River served as a connector to tracts in New Jersey.
III OTHER TEA CONSIDERATIONS

Other new categories that qualify for $800,000 minimum investment

Under the Drafts, the minimum investment amount for public infrastructure projects and manufacturing projects is each set at $800,000, irrespective of the project’s location. 75 Thus, these types of projects are not technically included in the TEA definition because the location is irrelevant.

TEA and Minimum Investment Effective Dates (“Grandfathering”)

The June Bill’s generous proposed effective dates and grandfathering provisions invited a flood of applications to be filed with USCIS by investors and developers.

The original Senate bill proposed that if a project exemplar was pending with USCIS before the enactment date (at that point anticipated to be September 30, 2015), then the old law’s TEA definitions (including gerrymandering) and minimum investment amount ($500,000) would continue to apply to future investors in that project, irrespective of the dates they filed their individual I-526 petitions.76 Encouraged by this, regional centers filed exemplar applications for project preapproval with the hope of being grandfathered. Reportedly, applications were prematurely submitted to USCIS for some projects that were not shovel ready and lacked required information.

As rumors spread that the grandfather clause in the final bill might instead focus on the date that the investor files his individual immigration petition, investors were counseled by their migration agents and immigration attorneys to rush to finalize their investment in a project so they could file their I-526 petition as soon as possible. USCIS filings in the quarter ended September 30, 2015 represented 50% of the petitions filed for the entire fiscal year. 77 Applications for project preapproval and investor petitions continued to be submitted at a feverish pace after the September 30th deadline hoping that the new law’s enactment date would be the cutoff. However, developers, regional centers and investors were disappointed when they reviewed the December 4th Draft that proposed the

75 INA Sec. 203(b)(5)(D)(iv) and (vi).
76 Sec. 4(g) of S.1501. Technically, an “application for business plan approval” was required to be filed to qualify for this exception to the effective dates under the proposed law, even though an exemplar typically is accompanied by a sample I-526 petition.
effective date be based solely on whether the investor files his I-526 petition before or after the enactment date.

That spike in filings resulted in more than 17,000 visa applications (Form I-526 petitions) pending before USCIS as of October 1, 2015.\(^78\) This does not reflect the additional filings submitted over the past two months, and the likely surge in applications that will be filed until September 30, 2016, or at least until Congress releases its revised EB-5 reform bill. Based on the historical average of approximately 2.7 visas per investor (because immediate family members also qualify), the visa petitions outstanding as of October 1, 2015 are expected to absorb the EB-5 visa quota for at least the next 4 years.\(^79\) Despite this backlog, the annual visa quota will not limit the number of new investors who may subscribe to projects each year; however, these investors will have a longer waiting period to obtain their green cards. At some point the rise in the backlog for visa issuance might influence the investors’ decision to invest in EB-5 projects.

In light of the unexpected reprieve extended to investors and developers as a result of the Program’s extension, it would not be surprising if Congress takes a harsh position on effective dates under the 2016 reforms.

**Visa reserves**

As expected, the Drafts retained the visa quota under the EB-5 Program at 10,000 per year. The investor’s immediate family members would continue to count towards the visa cap. Retrogression would remain a major issue for immigrants from mainland China. For the foreseeable future, substantial backlogs should be expected, especially with the flood of petitions filed since the June Bill and expected to be filed by investors hoping to be covered by the current rules before any reform changes might take effect.

The December 12\(^{th}\) Draft would have specifically reserved for each fiscal year visas to 2,000 immigrants in each of the following categories: (1) those who invest $1,000,000 in a non-TEA project; (2) those who invest in rural area projects (which by definition qualify as a TEA); and (3) those who invest in a Priority Urban Investment Area project (the type of TEA we refer to as the Good Neighbor Approach).\(^80\) In the aggregate, these 6,000 visas would represent 60% of the

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\(^79\) \( (17,367 \text{ visa petitions} \times 2.7)/4 = 46,890/10,000 > 4 \text{ years.} \)

\(^80\) INA Sec. 203(b)(5)(B)(i).
annual 10,000 visa quota, without taking into account the investor’s dependent family members who apply for a visa.

This provision was obviously aimed to stimulate investment in these three categories. However, Congress’ rationale for proposing to include non-TEA investors in this special visa allocation is dubious. This favored treatment for non-TEA investors, which was added by the December Drafts, seems to offset the favorable treatment accorded by that provision to rural area projects. This is another example of the December Drafts attempting to minimize the significance of TEA qualification.

Furthermore, this special visa allocation would obviously not be available to investors in other project locations and types not listed, such as SIZ TEAs, infrastructure or manufacturing projects. Again, Congress’ rationale for favoring urban area projects that do not qualify for TEA treatment over these types of projects is curious. Perhaps this was a concession to the large number of urban area projects that would no longer be able to qualify as a TEA.81 Undoubtedly, Congress will revisit these reserves in connection with its reconsideration of appropriate TEA definitions.

**Job creation methodology**

Under the December Drafts, the number of new jobs generated by a project would have continued to determine the maximum amount of EB-5 capital that could be raised for a project. Most EB-5 real estate projects qualify based on indirect jobs, substantially all of which relate to construction activity. In an effort to ensure that a certain percentage of the jobs would be direct jobs, Drafts would have limited indirect jobs to 90%.82 Thus, direct jobs would be required to constitute at least 10% of the jobs. However, the December Drafts rendered this requirement relatively meaningless because it would have counted direct jobs based on economic impact model methodology, rather than on actual jobs.83

Furthermore, even though the minimum investment amount would have been raised as stated above, the number of jobs required to support each investor’s

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81 The December 12th Draft would have delayed the effective date for these reserves. The reserve for non-TEA projects would not have started until the government’s fiscal year beginning October 1, 2019, and the reserve for the other two categories would have been delayed until the fiscal year beginning October 1, 2016.

82 INA Sections 203(b)(5)(E)(iv) and (v)(I)(aa).

83 For example, compare S. 1501 to the Act. In addition, under the Act, a job held by an employee of the JCE count as a directly created job, not only those held by an employee of the NCE as required by the old law. INA Sec. 203(b)(5)(E)(iv). The Act also counts tenant occupancy jobs if the jobs are not existing jobs that have been relocated. INA Sec. 203(b)(5)(E)(v)(II)(aa).
petition would have remained at 10. Thus, the leverage provided by the jobs created by a new project would have been substantially increased as a result of the proposed law. The same 10 jobs would have supported $800,000 or $1,000,000, rather than $500,000, of EB-5 capital.

For example, consider a project that creates 100 jobs. Under the current law, these 100 jobs would support 10 investors in a TEA project for a $5,000,000 capital raise. Under the Drafts, the same number of jobs would support a capital raise of $8,000,000 or $10,000,000, depending on whether the project is located in a TEA.

Similarly, contributions by substantially fewer investors would result in a substantially higher capital raise – 60% to 100% more. For example, if a TEA project sought to raise $10,000,000 of EB-5 capital, under the current law 20 investors or 200 jobs would be required. Under the Drafts, the same project would have required only 100 or 125 investors, depending on whether it were located in a TEA. (These examples do not take into account the additional jobs provided by most projects to satisfy the investors’ demand for a “job cushion,” in case some of the jobs are not actually created.\textsuperscript{84})

**CONCLUSION**

When Congress resumes its EB-5 reform deliberations, undoubtedly urban area TEA definitions will be a major focus of EB-5 2.0. The new bill might be based on the latest drafts of the 2015 EB-5 reform bill that failed.

However, we recognize that Congress might choose to formulate a new TEA standard. Based on the data for New York City, and Manhattan in particular, it is likely that few projects will qualify as a TEA unless very different standards are considered.

A review of the legislative process surrounding the EB-5 reforms considered by Congress during the last session reveals that the proposed urban area TEA definitions evolved over a relatively short period of time, with the most significant changes occurring over a two week span leading up to the extended deadline. We are unable to determine the factors that influenced Congress in proposing the alternative methodologies because the process was closed to the public. Similarly, it is unclear whether Congress carefully weighed how the definitions would have applied in operation, particularly in the urban areas of greatest concern to Congress. The change in TEA definitions from draft to draft over this short period

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suggests that Congress may not have had the opportunity to carefully consider this as the deadline loomed.

Our review and analysis indicates that the methodology reflected in the latest draft, the December 12\textsuperscript{th} Draft, would have been effective to substantially limit the number of new projects in Manhattan that would qualify as a TEA. Presumably similar results would have applied in other Gateway cities. If that was Congress’ objective, apparently it would have succeeded. We note that a dramatic reduction in TEA status in Manhattan might have occurred in the absence of any new legislation, based simply on the improving employment data relative to the national average.

In any event, we encourage Congress to provide a more open forum for EB-5 stakeholders and the general public to react to Congress’ new EB-5 reforms and to suggest alternatives.

\textit{(As noted at the beginning of this paper, we intend to update this working draft.)}
APPENDIX A

Urban Area TEA Definitions from Senate Legislative Counsel Draft of December 12, 2015 (the “December 12th Draft”)

Priority Urban Investment Area (“PUIA”):85

(ix) PRIORITY URBAN INVESTMENT AREA.—The term ‘priority urban investment area’ means an area consisting of a census tract or contiguous census tracts, each of which is in a metropolitan statistical area and, using the most recent census data available, each of which has—

(I) an unemployment rate that is at least 150 percent of the national average unemployment rate, which may also include any a census tract or tracts contiguous to 1 or more of the tracts that have bordering the tract with the requisite unemployment rate;
(II) a poverty rate that is at least 20 percent; or
(III) a median family income that is not more than 80 percent of the greater of the statewide median family income or the metropolitan statistical area median family income.

Special Investment Zone (“SIZ”).86

(xi) SPECIAL INVESTMENT ZONE.—The term ‘special investment zone’ means an area, using the most recent census data available, consisting of—

(I) a city or county that has an unemployment rate that is at least 150 percent of the national average; or
(II) a census tract or an area consisting of not more than 12 contiguous census tracts that—

(aa) includes each census tract that is bordering the tract where the project is primarily physically located, unless such tract is located in a different county;
(bb) has an unemployment rate that is at least 150 percent of the national average unemployment rate; and
(bb) may not include a census tract in which the project is not primarily physically located that is—

85 We refer to this as the “Good Neighbor Approach”
86 We refer to this as “Cluster and Extend”
characteristics and little or no residential population, such as a public park, public forest, or a large body of water, except that such area may include one tract that encompasses an area with special characteristics and little or no residential population that contains primarily business, industrial, or other commercial uses.