Written Testimony of

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Reauthorizing the EB-5 Regional Center Program: Promoting Job Creation and Economic Development in American Communities

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Mister Chairman and Distinguished Members of the Committee:

My name is Robert C. Divine. I have practiced immigration law since 1986, and since 1999 at Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C. Since 1994 I have authored Immigration Practice, a practical treatise on all aspects of immigration law. In 2004 I left private practice to serve as the first presidentially appointed Chief Counsel of U.S. Citizenship & Immigration Services (USCIS) here in Washington, and before I left USCIS in late 2006 I served a spell as Acting Director. I returned to Baker Donelson, and I have spent considerable time representing business people in developing offerings to EB-5 investors. For the last two years I have been elected Vice President of the Association to Invest In the USA (IIUSA, see www.iiusa.org), the industry association of "regional centers." Thank you for inviting me to testify about the EB-5 immigrant investor program.

I wish to explain how the EB-5 program works, how the regional center component of the program works, how renewing the regional center enabling legislation long before expiration on September 30, 2012 is critical for uninterrupted job creating effects, and how permanent authorization is timely and necessary for the program to reach its job creating potential.

Legislation to permanently authorize the program does not cost the taxpayer (and scores neutral) and generates job creating benefits.

History of the EB-5 Immigrant Investor Program

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for foreign nationals seeking to invest in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs.[1] The required investment amount is $1 million, but by statute and regulation that amount is reduced to $500,000 if the investment is made in a "targeted employment area" (TEA), meaning a high unemployment or rural part of the United States.[2]

Congress has allotted 10,000 visas annually for EB-5 investors, their spouses and minor children under age 21.[3] EB-5 investors and family could receive at most 7% of employment based visas and about 1% of all immigrant numbers. In fact, EB-5 allocations historically have gone unused, though usage has been increasing steadily in recent years as other sources of funding for projects, particularly involving real estate development, have been restricted. According to reports of the Departments of State and Homeland Security, EB-5 investor petition approvals have increased steadily from 179 in 2005 to 1,369 in 2010, and EB-5 visa numbers used (including family members) have increased from 158 in 2005 to 3700 in 2010. Since the EB-5 category's limit has not been approached, per-country limitations have not taken effect.[4]

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[1] INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 39.07 (rev. ed. 2009).
[2] INA § 203(b)(5)(C)(ii), 8 U.S.C. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f).
[3] Any unused numbers are "spilled up" annually to other employment based categories.
[4] This is by virtue of INA § 202(a)(5)(A). The Department of State has been allocating 700 otherwise unused visas per year from EB-5 to "pay" for the visas used by the Chinese Student Protection Act ("CSPA"), Pub. L. 102-404 § 2(d) (1992), which required that the visas issued under that Act be taken out of future allocations in EB categories at

The Regular EB-5 Program

To qualify under the EB-5 category as enacted in the Immigration and Nationality Act (without regional center affiliation), the new enterprise must: (1) be one in which the person has invested (or is in the process of investing) at least $1 million (or at least $500,000 if investing in a targeted employment area) after November 29, 1990; (2) benefit the U.S. economy; and (3) directly create or save jobs for at least 10 U.S. workers (per EB-5 investor). By regulation, if the investment is into a "troubled business" whose net worth has decreased by 20% during the 12 or 24 months preceding investment, jobs saved count as jobs created. Multiple EB-5 investors (and other investors) may join together in an enterprise, but the entity into which the investor places his capital or its 100% subsidiary must be the actual employer of the new jobs to be counted toward the 10 per investor EB-5 requirement.

An EB-5 investor files a Form I-526 petition and $1,500 filing fee with USCIS to show the nature of the project, the plan for job creation within two years, and the legitimate source of the investor's funds. USCIS typically takes five to ten months for adjudication. Then the investor moves forward with application for an immigrant visa at a U.S. consulate abroad or with USCIS within the U.S, which takes typically three to six months. Once the visa is approved and the investor enters the U.S., he becomes a "conditional" permanent resident with a two-year expiration on his status. Within the 90-day window leading up to expiration, he must file a petition with USCIS to remove the conditions, showing that he kept his money invested in the project and that the enterprise created the jobs or will finish creating them within a reasonable time.[5]

An EB-5 investor is not required to maintain the investment longer than the removal of conditions, but in order to extract the capital he or the project organizer would need to find someone to buy or refinance the investment. While no systematic tracking of the phenomenon has been undertaken, it seems likely that EB-5 investors able to obtain return of their initial project funds, having become U.S. permanent residents, will tend to reinvest in the United States.

The EB-5 Regional Center Pilot Program

To encourage immigration through the EB-5 category, particularly in pooled investments, Congress created a temporary pilot program in late 1992 in an appropriations bill ("Appropriations Act").[6] A copy of the text of the Appropriations Act language, as amended in 2002, is attached as Exhibit A. After five successive extensions typically tied to the appropriations process,[7] most recently to September 30, 2012, USCIS now refers to it as the Immigrant Investor Pilot Program.

1,000 per year. The other 300 for FY2011 are taken from EB-3. This CSPA payback provision and all EB per-country limitations would be stricken by H. R. 3012, which members Chafe and Smith recently introduced and was passed overwhelmingly by the House of Representatives last week.

[5] INA § 216A, 8 U.S.C. § 1186b.

[6] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).

[7] Pub.L. 105-119, Title I, § 116(a), 111 Stat. 2467 (Nov. 26, 1997); Pub.L. 106-396, Title IV, § 402, 114 Stat. 1647 (Oct. 30 2000); Pub.L. 107-273, Div. C, Title I, § 11037(a), 116 Stat. 1847 (Nov. 2, 2002); Pub.L. 108-156, § 4, 117 Stat. 1945 (Dec. 3, 2003); Pub.L. 111-83, Title V, § 548, 123 Stat. 2177 (Oct. 28, 2009).

Under the program, USCIS designates entities who apply to function as "regional centers" "with the purpose of concentrating pooled investment in defined economic zones."

A regional center is defined as “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.”[8] A center seeking USCIS approval must submit a proposal showing how it plans to focus on a geographical region within the United States and to achieve the required growth by the means specified.[9] USCIS typically takes six to twelve months to adjudicate the application, including typically a "request for information" that requires extra time and effort for response.

Importantly, an investor in a project affiliated with a regional center may count not only "direct jobs" of the investment enterprise but also "such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program." Investors may "establish reasonable methodologies" to estimate the jobs created. Regional center affiliated projects also may involve more complex funding structures than "regular" EB-5 investments.

In essence, the pilot program encourages pooling of funds for larger projects that are more impactful on communities by spurring creation of regional centers that show USCIS their readiness to identify worthy projects, to facilitate arrangements that meet immigration and other requirements, and regularly to monitor investment and job creation through at least annual reporting to USCIS. Investors in projects affiliated with regional centers can count toward the required 10 new jobs per EB-5 investor the indirect jobs projected through the same methodologies that governments at all levels use to measure job creation for a host of purposes (normally IMPLAN, RIMS II, or REDYN).

Normally regional centers include in their initial application the full documentation, including economic effects analysis, of the first project they plan. Thus, USCIS approval should give investors in that first project and others closely modeled after it a healthy sense of confidence that their petition can be approved if they can show their source of funds. USCIS has begun to allow amendment of regional center designation to approve subsequent projects so that investors in those projects can enjoy similar confidence. The complexity of the adjudication is reflected in the $6,230 filing fee for Form I-924 for this purpose. Recognizing that good business opportunities do not wait indefinitely, USCIS leadership is working to improve and streamline the regional center and project application process to facilitate resolution of complex issues associated with the voluminous and intricate sets of documents involved.

About 200 EB-5 regional centers have been approved, and more are applying as the program becomes better known. Some regional centers are controlled by a project developer or its principals, while other regional centers (some governmental) facilitate projects of unrelated developers. EB-5 regional centers now operate in 43 states and two territories and fund such projects as farms, ski resorts, film production, mixed use real estate development, nursing and

[8] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11037(a)(2), 116 Stat. 1758 (2002); 8 C.F.R. § 204.6(e) (definition of “regional center”).
[9] 8 C.F.R. § 204.6(m)(3).

assisted living facilities, and bridge construction. I encourage every member of Congress to contact the principals of the regional center(s) in his or her state to learn about the transformational projects underway or in development using EB-5 investment.

The Appropriations Act requires the Government to set aside 3,000 of the annual 10,000 EB-5 visa allotment for regional center-affiliated investors, but they have consistently constituted well over 90% of all EB-5 investors. This makes sense. While immigrants generally create new businesses themselves at significant rates, they tend to do that after they have been in the U.S. some time. Setting up a new business individually as a means to get here is daunting, particularly if that business must be organized to meet EB-5 requirements' challenging complexity. Thus, for someone reviewing options from abroad, passively investing in a business specifically configured to meet EB5 requirements is more attractive.

While regional center projects are not required to be located in Targeted Employment Areas (TEAs), almost all EB-5 investment projects are in TEAs. USCIS regulations recognize state designation of a contiguous geographic or political area meeting the high unemployment requirements based on current data and methodology recognized by the U.S. Department of Labor's Bureau of Labor Statistics. The resulting availability of projects allowing $500,000 investments tends to make projects requiring $1,000,000 impractical in the market for investors.

EB-5 Projects as Securities Offerings

Regional centers inherently facilitate pooled passive investments, which directly implicate U.S. securities laws. No regional center project I know of has elected to pursue the exhaustive and expensive process of "registering" the security as an initial public offering with the Securities and Exchange Commission. Instead, they typically make use of the "Regulation S" exemption for offerings conducted outside the U.S., and/or of the "Regulation D" exemption for private offerings to "accredited investors" (having at least $1 million in assets or $300,000 annual income).

Even when issuers use securities exemptions, U.S. law prohibits offerings from being misleading. Thus, almost all regional center-affiliated offerings to EB-5 investors include a private placement memorandum carefully summarizing the nature of the investment vehicle and the job creating activity, and detailing any conflicts of interest and business and immigration risks to the investors. Thus, when combined with careful professional economic analysis, the preparation of a project for EB-5 approval is a significant multi-month effort. IIUSA seeks to educate its members about compliance with immigration, economics, securities, and other requirements.

Some EB-5 offerings, made by humans in a difficult business climate, are likely to be subject to the same types of problems that plague other offerings: bad luck, unexpected delays, poor planning or execution, market fluctuations, technical violations, or even misrepresentation. Such failures will result in a frustrating loss of investment and loss of immigration status for affected EB-5 investors. Nevertheless, the inevitable failure of some EB-5 businesses will not reflect that the EB-5 program is ineffective, but that it inherently involves business and immigration risk, and sometimes risk results in failure. U.S. securities laws are not designed to prevent risk or

failure in investment, nor should they be. Risk is inherent in investment, and USCIS specifically requires that the foreign national's investment be "at risk." What is required is honest disclosure.

It appears that USCIS has opened channels of communication and coordination with the SEC, and it makes sense for USCIS to flag and refer opportunities for SEC enforcement in the EB-5 context. Investors affected can pursue remedies with the SEC and in the courts, where existing authorities support harsh personal consequences for those who mislead investors. Countries of significant EB-5 participation are becoming more aware of the program and are tightening regulation of and enforcement against brokers operating under their own countries' laws. Meanwhile, investors should heed the prominent warnings on their offering documents and on the SEC web site[10] diligently to investigate potential investments and their principals before investing.

Source of Funds and Investor Scrutiny

USCIS continues to apply rigorous analysis to the source of an investor's funds. The agency scours the path of funds from the investment enterprise back to where the foreign investor or his grantor earned it, in an unapologetically "hypertechnical" analysis. USCIS requires license or clearance from the Treasury Department's Office of Foreign Assets Control (OFAC) for investments made by Iranians or originating in Iran or other countries subject to economic sanctions.

USCIS and the State Department require of EB-5 investors and their families the same background screening, aided by biometrics matching against databases, that is applied to permanent residence applicants in all other categories.

The Economic Impact of the EB-5 Program

In 2003, Congress asked the U.S. Government Accountability Office (GAO) to study the EB-5 program.[11] The GAO report concluded that the program has been underused for a variety of reasons.[12] The report found that even though few people have used the EB-5 category, EB-5 participants had invested an estimated $1 billion in a variety of U.S. businesses.

That amount has dramatically increased in the last eight years as the number of approved regional centers has skyrocketed and the number of approved investor petitions has gone from essentially zero to approaching 1,500 per year. Assuming $500,000 per investor, this is $750,000,000 of investment per year that could result in 15,000 jobs per year. While some businesses will fail to reach their potential, others plan far more than 10 jobs per investor, and some may do better than planned.

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[10] See, e.g., http://www.sec.gov/investor/pubs/askquestions.htm.
[11] Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 5, 117 Stat. 1944.
[12] U.S. Government Accountability Office, No. GAO-05-256, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors (Apr. 2005), *available at* http://www.gao.gov/new.items/d05256.pdf.

If all 10,000 EB-5 green cards were used each year, and if half of the numbers represented investors (the rest being family), the investment would be $2.5 billion dollars and job creation might be 50,000 per year. Yet the economic impact is far greater than that. Many EB-5 investors have far more than their minimum $500,000 investment. EB-5 investors invest considerably more in the U.S. economy than the minimum capital required. They do so by buying houses, sending their children to private universities, paying local, state and federal taxes, and investing in our economy both through publicly traded securities as well as in private investments. Their job-producing capacities far outstrip their actual EB-5 investment. And, having immigrated, they become U.S. investors, not foreign investors.

In addition to the significant economic contribution EB-5 investors themselves add to the economy, their investments in also prime small and large EB-5 regional center projects most of which would not go forward otherwise. In the current economy, EB-5 money is filling the gap in the traditional levels of equity to debt. All this occurs at no expense to the U.S. taxpayer.

USCIS has initiated a new, systematic effort to track the primary results of EB-5 regional center investment. This month the first annual filings are due from regional centers using Form I-924A, which collects from each regional center the number of dollars invested and jobs created, sorted by industry, by investment enterprise, and by project. This exercise involves more complexity than one might expect, and USCIS is working on clarifications for regional centers in using this form that with hope will provide useful information to Congress going forward. But the form will not track the significant non-EB-5 financing that EB-5 capital begets or the other spending and investment that EB-5 investors and their families make.

The Need for Immediate and Permanent Re-Authorization of Regional Centers

The arrangements and documentation associated with EB-5 projects take significant time and money to put together. Only upon completion can the regional center file for project approval. In many cases, investors cannot file their individual petitions (even after investing) until the regional center is amended with the project approved. Many investors understandably insist that their money be held in escrow until USCIS approves their petition or even until conditional residence is approved, so many projects provide for escrow. All of these processes create significant lag time to get EB-5 money injected into their job-creating projects. Some projects have imploded during the waiting process. Bridge financing is not always available. Considering the inherent time challenges to realizing EB-5 capital to a project, it is not surprising that the program has not experienced full utilization.

Given the development life cycle of an EB-5 project resulting in EB-5 approvals, the prospect of regional center pilot program expiration on September 30, 2012 already has begun to shut down development of worthy projects. This can be understood by looking at the timelines in reverse. In order to obtain and keep an EB-5 green card, an investor must make it all the way to admission as a conditional permanent resident before the Appropriations Act expires on September 30, 2012.[13] So, working backward, and even assuming the fastest typical times:

[13] USCIS has stated that investors definitely cannot receive I-526 petition approval after the law expires. USCIS and the State Department have not determined whether an investor whose I-526

- Immigrant visa processing: 3-6 months (June 30, 2012)
- I-526 petition to USCIS: 5-10 months (December 30, 2011)
- I-924 Regional center/project approval: 3-12 months (September 30, 2011)
- Economic/offering document preparation 3 months (June 30, 2012)

This shows that the specter of expiring authorization has been affecting project development for six months already. Of course, some developers and investors have confidence that the program will be extended, or they have no other options, so they continue to pursue projects. But many savvy business people, knowing that extensions are not always enacted and that immigration legislation is particularly sensitive politically, will not be willing to take the significant risk.

Permanent authorization is needed, and it is time to have it. The pilot program has been extended five times for 19 years. The program went through its darkest hour in the late 1990s and came through it. It has gained ground in the last several years, primarily due to contraction of financing otherwise available for business developers and to the anxiety of wealthy people in a few particular countries. But the EB-5 program will not be able to draw the interest of larger institutional interests until it receives permanent extension. Permanent extension will tend to improve the quality of the projects offered to EB-5 investors, whose experience with the program in turn will build confidence for future investors.

USCIS, which is committed to careful adjudications at every stage, is trying to staff up for speedier and ever-higher quality adjudications, but the prospect of expiration of the legislation at the heart of the EB-5 program has to undercut the agency's ability to commit to the levels of officers and significant training needed in complex EB-5 issues. Prompt and permanent re-authorization will authorize USCIS with the confidence to hire and train the needed staff to conduct its rigorous analysis in a timely basis to make EB-5 financing worth pursuing for more developers of excellent job creating projects.

Conclusion

Since the last Senate hearing in 2009, the EB-5 Immigrant Investor Program has caught on better, and it is creating needed jobs for U.S. workers in a suffering job market, but the regional center pilot program at the backbone of the program needs immediate and permanent legislative authorization to bring the program's job creating potential to its originally intended level in an internationally competitive environment.

Thank you. I look forward to answering your questions.

Attachment: Copy of the current authorization, expiring September 30, 2011

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petition has been approved before expiration could then obtain an immigrant visa and be admitted after expiration, so investors and developers must assume the negative. It appears clear that someone admitted as a conditional permanent resident before the law expires would be able to remove conditions and keep the green card, but the notion of involvement of a regional center in that process after expiration of the law giving rise to regional centers is confusing.

Exhibit A to testimony of Robert C. Divine

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, as amended, provides:

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

(b) For purposes of the pilot program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3000 visas annually until September 30, 2012 to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act, to accompany or follow to join such aliens.

(c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program

(d) In processing petitions under section 204(a)(l)(H) of the Immigration and nationality Act (8 U.S.C. 115(a)(l)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the pilot program described in this section. Notwithstanding section 203(3) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence.