

TESTIMONY
Jeanne Calderon

Jeanne Calderon
Clinical Associate Professor
Stern School of Business
New York University

Hearing on
“Is the Investor Visa Program an Underperforming Asset?”

Before the
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C.
February 11, 2016

Chairman Goodlatte, Ranking Member Conyers and Distinguished Members of the Committee:

Thank you for inviting me to testify today about the EB-5 immigrant investor program (the “Program”).

My name is Jeanne Calderon. I am a clinical associate professor at the NYU Stern School of Business where I have taught law and ethics courses since 1986.

I have conducted research on EB-5 and have prepared two academic papers with my NYU Stern colleague Gary Friedland. We jointly teach a course that focuses on the legal, tax and finance aspects of commercial real estate transactions. We created the course and developed all of the course materials. A segment of this course focuses on foreign investment in the United States, including EB-5 capital. This testimony reflects our collective views.

Our first paper was released in early 2015 and provides a comprehensive overview of how EB-5 capital has become a mainstream source of capital to fund large-scale real estate development projects in major urban areas. We also compiled an extensive database of 25 of the largest real estate development projects that are utilizing, or have utilized, EB-5 capital, *each* ranging from \$50 Million to \$600 Million, with a cumulative potential EB-5 capital raise of \$4.6 Billion.¹ We are in the process of updating this database to reflect the surge of recent market activity.

¹ Jeanne Calderon and Gary Friedland. *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. (May 22, 2015). New York University Stern Center for Real Estate Finance Research. Available at:
<http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf>

Our most recent paper was released as a working draft on December 23, 2015 within a week after the reform bill, S. 1501, failed in mid-December of 2015. This paper focuses on the definition of urban area Targeted Employment Areas (“TEAs”) and related matters because those were the most controversial portions of the bill. We described the three alternative approaches considered by the discussion drafts based on the reform bill in December 2015. We compared each of the alternatives. We also explained how each of the alternatives might have impacted projects in New York City, because it is at the epicenter of the debate. We also illustrated these points with maps and data. The most recent version of this paper is dated February 6, 2016.²

I have included links to each of these papers in the footnotes at the bottom of this page. I request that these papers be incorporated for the record into the statement that I am presenting today.

This morning my testimony will focus on TEAs: the original intent of the EB-5 law; “gerrymandering”; USCIS’ role in fostering gerrymandering and its authority in designating TEAs; and visa reserves.

EB-5 Program

In 1990, Congress created the fifth employment based preference (EB-5) immigrant visa category for foreign nationals seeking to invest in a commercial enterprise that will create at least 10 U.S. jobs per investor.³ Its purpose is to stimulate the U.S. economy through job creation and capital investment.⁴

Underutilized for the first 20 years since its enactment in 1990, the EB-5 Program became popular during the financial crisis when conventional sources of capital dried up. As the market has rebounded, EB-5 capital has evolved into a mainstream source of capital, particularly for real estate development projects.⁵

What is a TEA?

The statute provides that “[i]n general,” the minimum amount of capital to be invested by an immigrant seeking an EB-5 visa is \$1,000,000. The amount is reduced to \$500,000 if the

² Jeanne Calderon and Gary Friedland. *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. (Last revised February 6, 2016) New York University Stern Center for Real Estate Finance Research. Available at: <http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

³ Immigration Act of 1990, Pub. L. 101-649, Stat. (November 29, 1990).

⁴ USCIS Policy Memorandum (PM-602-0083), May 30, 2013. Available at: <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

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

investment is made in a project located in a TEA. ⁶ Thus, a project's qualification as a TEA determines whether the immigrant can qualify for the EB-5 visa by making an investment of \$1,000,000 or \$500,000. Investors strongly prefer to minimize the amount they invest in a project utilizing EB-5 capital. They typically earn less than 1% per annum under the typical loan structure because their motive for making the investment is to obtain a visa.⁷

The statute provides two routes for a project location to qualify as a TEA. First, any project located in a rural area qualifies. In urban areas, a project qualifies only if it is located in a "an area which has experienced high unemployment (of at least 150 percent of the national average [unemployment] rate)." ⁸ We will refer to this as a "high unemployment area."

What Was Congress' Original Intent in Establishing the TEA Concept?

The controversy surrounds the determination of what constitutes a "high unemployment area" in an urban area.⁹ The statute objectively defines "high unemployment" by reference to the national average unemployment rate. However, the "area" or boundary against which the high unemployment should be measured is not defined in the statute. Presumably, Congress left it to the Federal immigration agency to make this determination. As discussed below in the "USCIS" section, unfortunately the agency did not take the opportunity to define this. The plain meaning of the scope of the intended "area" is not clear; thus, we turned to the legislative history to determine Congressional intent.

The legislative history is illuminating. The original bill that became the Immigration Act of 1990, S. 358¹⁰, included an employment-based visa for immigrants who invest capital in a new commercial enterprise that creates 10 jobs per investor. The required investment amount was set at a single level - \$1,000,000.¹¹

On July 13, 1989, the day the Senate bill was later approved by the full Senate, Senators Boschwitz and Gramm introduced an amendment that ultimately became the framework for the TEA definition incorporated in the Immigration Act of 1990 (the "Immigration Act"). This amendment established two-tiers of investment: one at "not less than \$1,000,000", and the other at "not less than \$500,000" for investments in "rural areas or areas which have experienced persistently high unemployment... of at least one and one-half times the national average rate." ¹² The Amendment did not use the term "Targeted Employment Area," but the definition is substantially

⁶ INA § 203(b)(5)(C); 8 C.F.R. § 204.6(f). Technically, the statute authorizes a third minimum investment level - an amount up to \$3M - for areas of unemployment "significantly below" the national average unemployment rate. INA § 203(b)(5)(C)(iii).

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

⁸ INA § 203(b)(5)(B)(ii).

⁹ Again, a rural area qualifies as a TEA, irrespective of the relevant unemployment rate.

¹⁰ S. 358, 101st Cong. 1989-1990.

¹¹ Id.

¹² Amendment #264 to S. 358 (July 13, 1989)

the same as the language that appears in the EB-5 section of the Immigration Act. Without this amendment, the TEA concept might not exist.

Senator Boschwitz's remarks on the floor of the Senate make clear his purpose in creating the TEA. He opened his remarks by stating that the amendment was offered to "attract significant investment in rural America." He pointed out that he was "especially concerned with the rural investment this amendment would support."¹³

Senator Boschwitz explained that investments in rural or high unemployment areas were intended for those who invest in "rural or depressed areas." The Senator continued that he "sees no reason to shut out willing investors while our small towns and inner cities across America are facing hard times."¹⁴

Although the amendment did not include a requirement that the immigrant demonstrate that the enterprise would not otherwise be able to obtain financing, the Senator expressed his concern that "[rural] areas have great difficulty attracting the investment capital so needed for economic growth."¹⁵

The amendment included a visa reserve or set aside for 2,000 investors in rural areas. The Senator noted that in addition to these reserved visas, the remaining visas could also be used by rural investors.¹⁶ Senators Boschwitz and Gramm obviously expected greater rural investment participation than the EB-5 Program has achieved.

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

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

"[W]e are mindful of the need to target investments to rural America and areas with particularly high unemployment – areas that can use the job creation the most... America's urban core and rural areas have special job creation needs."¹⁷

¹³ 135 Cong. Rec. S7,858-02 et seq. (July 13, 1989)

¹⁴ Id.

¹⁵ Id. However, the amendment's text did not include a "but for" test.

¹⁶ Id. The Immigration Act increased this reserve to 3,000, when the quota amount increased from 6,800 to 10,000, but maintained essentially the same percentage of visa reserves to the annual quota for this category, 30%.

¹⁷ 136 Cong. Rec. S 17,106, 17,110 (October 26, 1990)

Furthermore, Senator Simon recognized the importance of establishing a wide spread between the standard investment amount of \$1,000,000 and the reduced amount to attract investors to targeted employment areas: “The Attorney General is authorized to set the required investment at a lower amount but at least \$500,000. Clearly, the closer the Attorney General sets this to \$500,000, the more we can encourage investments in these critical areas.”¹⁸

Finally, when the EB-5 Program was created, Congress expected that most foreign investors would invest at the \$1,000,000 amount. Senator Simon continued: “One section of the [Immigration Act of 1990] that I am particularly pleased to have included from my original bill is the employment generating investor visa provision...The general rule – and the vast majority of investor immigrants will fit in this category – is that the investor must invest \$1 million and create 10 U.S. jobs.”¹⁹

It is obvious that when Senators Boschwitz and Gramm proposed the TEA concept in 1989, and when the law was enacted a year later, Congress did not contemplate the current, predominant use of EB-5 capital. The percentage of projects qualifying as TEAs has skyrocketed from the early years of the Program to the point where almost 98% of EB-5 projects qualify as a TEA.²⁰ We note that each of the 25 projects in our database of large-select real estate development projects utilizing EB-5 capital is located in a TEA.²¹

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

The required amount invested by the immigrant is typically deployed to the project as a below-market rate loan.²² The immigrant invests in the project solely to qualify for a visa. The visa eligibility motivates the investor to accept negligible returns that result in a below-market interest rate loan being made available to the developer’s project.²³ This savings to the developer is the equivalent of a government subsidy that is available because the government is willing to issue an EB-5 visa to the immigrant as the incentive for his investment.²⁴

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The percentage of conditional visas issued based on investing in projects in a TEA rose from 10% in 1992, to 41% in 2002 to an estimated 98% in 2014. See DHS Yearbook of Immigration Statistics (FY1992-FY2013); State Department preliminary data (FY2014). Also see Lazaro Zamora and Theresa Cardinal Brown. *EB-5 Program: Successes, Challenges, and Opportunities for States and Localities*. (September 2015). Bipartisan Policy Center.

²¹ See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. *Supra* at note 1.

²² See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. *Supra* at note 1.

²³ *Id.* The proceeds invested in the EB-5 vehicle are typically deployed to the project as a mezzanine loan at a discounted rate compared to the rate charged by conventional mezzanine lenders.

²⁴ The benefit to the U.S. economy is the creation of jobs and capital investment by the immigrant investor. However, a GAO Report points out the USCIS methodology might overstate some of the economic benefits derived from the EB-5 Program. For example, EB-5 capital is credited with 100% of the jobs created by the project even though the project may be primarily funded with capital from other sources. USCIS does not track whether alternative sources of capital might be available to fund the project if EB-5 capital were not provided. Government

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

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

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

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

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

Factors to be Considered by Congress in Redefining TEAs

If Congress seeks to limit the project locations that qualify as a TEA, then it must establish clear, unambiguous and objective criteria to determine which locations are deserving of the incentive that permits immigrants to invest a discounted amount. Investors in all other projects would be

Accountability Office. *Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits* (August 2015). Available at: <http://www.gao.gov/assets/680/671940.pdf>.

required to invest at a higher investment amount, so a spread between the minimum investment amounts would be achieved in practice.²⁵

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

As Congress considers the appropriate revisions to the TEA definition, it should be mindful that the EB-5 Program was woefully underutilized until the Program was liberalized and became more readily available as a funding source for real estate development projects. As recently as 2009, the USCIS Ombudsman conducted a study to determine ways to promote the Program in danger of being terminated for lack of use.²⁶ Furthermore, the increased investment activity under the Program has coincided with the rising percentage of projects that have qualified as a TEA, as well as the rebound in the real estate market.²⁷ Thus, Congress' proposed action requires a delicate balance between appropriately narrowing the scope of the TEA and building in flexibility to avoid the Program reverting to the underutilized state that existed before 2010. This is particularly important as the current stock market activity may signal more fragile economic conditions on the horizon.

The EB-5 Program is radically different than when it was created in 1990 as a direct investment program. The current EB-5 capital market is dominated by real estate development projects in urban areas, where it is commonplace for EB-5 capital raises to exceed \$50M.²⁸ EB-5 capital typically represents less than 40% of such projects' total capital costs. Large projects result in more jobs filled by workers commuting from more distant locations. Similarly, the economic conditions and development patterns in many inner cities in 2016 are much different than those that existed in 1989 and earlier, especially in Gateway cities where immigrants are investing.²⁹

²⁵ A separate but related issue is the required investment amount for a TEA and a non-TEA project. The last discussion draft based on S.1501 set the amounts at \$800,000 and \$1,000,000. We believe the spread between the two amounts is more important than the absolute dollars. However, we do not have any data to support the appropriate spread necessary to stimulate investment in TEA projects based on a reduced investment amount, nor the amount that would result in a substantial reduction in investment in non-TEA projects with a greater required investment amount.

²⁶ https://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf

²⁷ USCIS' liberal policy changes in 2009 made EB-5 capital accessible to a wider range of real estate development projects. See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

²⁸ See *A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects*. Supra at note 1.

²⁹ See, for example, Richard Florida. *The Fading Differentiation between City and Suburbs*. (January 31, 2013). Urbanland. Available at: <http://urbanland.uli.org/economy-markets-trends/the-fading-differentiation-between-city-and-suburb/>

These factors should be taken into account by Congress as it decides which locations and/or project types should be entitled to TEA or equivalent incentives.

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

The challenge is to develop a TEA definition for urban areas that Congress determines is appropriate to incentivize. Our most recent paper explores the three alternatives considered by the S. 1501 and the discussion drafts based on it that were circulated in December 2015.³⁰ We realize, however, that when Congress introduces a new reform bill later this year, the bill might not reflect any of those alternatives.

After Congress drafts proposed legislation to reflect the locations and types of projects that it determines are appropriate to incentivize through TEA treatment, we suggest that Congress map the locations in key cities, based on available data, to test whether the coverage would extend only, or at least primarily, to the desired locations. This would be similar to the approach we followed in our paper that sought to measure the impact of the three alternative TEA definitions on New York City.³¹

What is Gerrymandering?

Gerrymandering is a pejorative term for census tract aggregation. In urban areas, the determination of whether a project location qualifies as a TEA depends solely on whether the project is located in a “high unemployment area”. As previously explained, the standard is whether the unemployment rate of the “area” is at least equal to 150% of the national average unemployment rate. Although the statute does not refer to census tracts, the unemployment rate is commonly measured by reference to individual census tracts.³² Thus, the census tract in which the project is located is the starting point for the determination of whether a project location qualifies as a TEA.

If the census tract in which the project is located (“Project Tract”) meets the TEA’s high unemployment standard, then the Project Tract is a TEA. This is sometimes known as a “single census tract” TEA.³³

³⁰ See *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 2.

³¹ See *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 2.

³² USCIS Policy Memorandum. Supra at note 4.

³³ See S.1501 <https://www.congress.gov/bill/114th-congress/senate-bill/1501/text>

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

The combination might be as simple as adding a single census tract with a high unemployment rate to the Project Tract (that does not meet the necessary unemployment rate) to qualify the combined area as a TEA. As an example, the project could be located towards the edge of a census tract with less than "high unemployment". However, the bordering census tract meets the "high unemployment" standard. The combination of these two tracts might enable the Project Tract to qualify as a TEA.³⁴

Often, many more tracts must be combined with the Project Tract to qualify as a TEA in thriving, urban areas.³⁵ Although the rules vary from state to state as explained in the "USCIS' Role in Fostering Gerrymandering" section below, the states generally follow a common approach. The combined area that will form the potential TEA starts with the Project Tract. The project developer identifies the closest tracts with high unemployment rates, which in thriving, urban areas are often in more remote locations from the project's location.

The path of the potential TEA follows the shortest route in any direction from the Project Tract to reach the tracts with the highest unemployment rates. Tracts with low unemployment rates are sought to be bypassed because their inclusion would reduce the combined area's unemployment rate. This could disqualify the combined area as a TEA if the state, such as California, sets a maximum limit on the number of tracts that may be combined.³⁶ In other states, such as Texas, significantly more tracts may be added until the high unemployment standard is met for the combined area.³⁷

As a result, many TEAs take on unnatural, winding configurations, and the route's direction from the Project Tract varies from TEA to TEA. A criticism lodged by some is that this type of census tract aggregation constitutes gerrymandering because the poor economic conditions (i.e., high

³⁴ Unrelated to a TEA requirement, this activity might produce the ancillary benefit of spurring further economic development in both tracts.

³⁵ See, for example, <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>

³⁶ The state of California imposes a maximum of 12 contiguous tracts that may be combined in a TEA. <http://business.ca.gov/International/EB5Program.aspx>

³⁷ See, for example, <http://www.law360.com/articles/726026/group-sues-over-alleged-gerrymandering-in-eb-5-program>

unemployment) of distant, remote tracts enable a Project Tract (with low unemployment) to qualify as a TEA. This is perceived to be particularly egregious where the Project Tract and surrounding tracts are “luxury” areas.³⁸

Our second paper discusses Senator Flake’s bill that would tie the TEA definition to commuter traffic patterns relating to the project.³⁹ The proposal implicitly posits that the TEA should be expanded to encompass the geographic area within which the workers commute to the project site. Although this is consistent with the job creation purpose of the EB-5 Program, it does not reflect the economic condition of the location where the immigrants’ capital investment is made, i.e., the project tract.⁴⁰ If Congress seeks to incentivize development in areas which encounter difficulty in attracting the investment capital needed for economic growth, this would not be an appropriate use. More importantly, this type of standard would likely perpetuate the current practice, with the result that most large projects in luxury areas would continue to qualify for TEA status. Thus, if Congress’ intention is to narrow the locations that qualify as a TEA, this standard should not be incorporated. This would be consistent with the sentiments expressed by Senators Simon and Boschwitz.

USCIS’ Role in Fostering Gerrymandering

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

However, in regulations adopted in 1991, in a single paragraph, INS delegated its authority to make TEA designations to the individual states.⁴¹ The agency granted blanket authority, without establishing any rules or guidelines, and did not reserve the right to review or audit each state’s TEA determinations.⁴² We believe that INS’ delegation was appropriate in 1991 because as an immigration agency, with no existing investor program, it lacked experience and personnel with the expertise to make the required economic determinations.

In USCIS’ May 30, 2013 comprehensive Policy Memorandum, it acknowledges that the TEA designation is to be limited to enterprises that are doing business in, and creating jobs, in the

³⁸ See <http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781?tesla=y>

³⁹ See *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 2.

⁴⁰ Even if this commuter pattern approach were followed, the economic model upon which most job estimates are calculated does not indicate how many workers, if any, commute from residences in high unemployment areas.

⁴¹ 8 C.F.R. 204.6(i), effective November 29, 1991.

⁴² Even today, USCIS only reserves the right to review the state’s determination of the unemployment rate and to assess the method by which the state authority obtained the employment statistics. USCIS Policy Memorandum. Supra at note 4.

areas of “greatest need.”⁴³ Yet, more than 25 years after INS delegated TEA authority, USCIS continues to defer to state determinations of the appropriate boundaries that constitute TEAs.⁴⁴ Of course, we recognize that if S. 1501 had become law, TEA determinations would be made by USCIS rather than the individual states.

USCIS’ continued delegation to the states of the TEA authority without guidelines results in the application of inconsistent rules by the various states. More importantly, each state has the obvious self-interest to promote economic development within its own borders. Delegation presents an opportunity for the states to establish lenient rules to enable project locations to qualify as a TEA. Compounding the problem, often the state agency that is charged with making the TEA determination is the same agency that promotes local economic development. As a consequence, virtually every EB-5 project location qualifies as a TEA.⁴⁵ Gerrymandering more easily developed because the self-interested individual states were granted the opportunity to establish their own rules without any guidelines or oversight by the Federal government.

USCIS’ Current Opportunity

Although we are not advocating that USCIS should take action as an alternative to legislative change by Congress, we point out that USCIS already possesses the power to change the manner in which TEA determinations are made.⁴⁶ USCIS has at least two basic choices, if it decides to act.

USCIS could formulate uniform standards for making TEA determinations that would be applied by the different states. Obviously, these standards should be objective and easily applied. In addition, presumably USCIS would exercise power of oversight, review and audit. At the Senate Judiciary Committee Hearing on EB-5 reform that was conducted on February 2, 2016, Mr. Nicholas Colucci, Chief of the Immigrant Investor Program Office for USCIS, stated that the USCIS is in the process of drafting regulations to address this.

USCIS could simply use the California model as a starting point.⁴⁷ Many factors might be considered.⁴⁸ Also, it might choose to consider one or more of the urban area TEA definitions

⁴³ USCIS Policy Memorandum. Supra at note 4.

⁴⁴ Id.

⁴⁵ Data is not readily available as to the percentage of TEA determination letter requests that are approved or denied by each state.

⁴⁶ Obviously, this would be subject to compliance with the Administrative Procedure Act.

⁴⁷ See <http://business.ca.gov/International/EB5Program.aspx>

⁴⁸ Matters to consider would include: the appropriate dataset and methodology for unemployment rate calculations; whether factors other than unemployment rate should be considered; whether certain tracts should be excluded; whether, if a maximum number of tracts were set, what the maximum number should be; whether the combined TEA area should reflect the smaller size of census tracts in densely populated urban areas; and whether workers’ commuter traffic patterns should be taken into account.

set forth in the discussion drafts based on S.1501 that circulated in December of 2015.⁴⁹ Further discussion of this is beyond the scope of this testimony.

Alternatively, USCIS could revoke the authority delegated to the states, and administer the TEA designation process from its national office in Washington, D.C. Obviously, this would necessitate formulating and implementing standards and procedures at a time when the agency is processing a record number of applications and petitions.⁵⁰ We note that S. 1501 provided that TEA determinations would be made by USCIS.

USCIS might not have the authority to apply the TEA investment amount to certain project types (such as infrastructure, manufacturing and closed military bases), because the existing statute defines a TEA by reference to a location, rather than a project type. We also point out that the statute provides for the minimum investment amount for a TEA and a non-TEA project to be increased without Congressional action.⁵¹ This is beyond the scope of my testimony.

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

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

Visa reserves are an alternative method for Congress to stimulate investment in those locations or project types that Congress may wish to incentivize.⁵² As the visa waiting periods extend to at least 6 years, the right to move towards the front of the visa line may be more important than qualifying for an investment at a lesser amount. Many wealthy investors will be motivated by the quickest path to securing a visa, than merely qualifying for a lesser investment amount.

The discussion drafts based on S. 1501 would have increased the minimum investment amount to \$800,000 for projects located in a TEA, while retaining the minimum amount at \$1,000,000 for projects not located in a TEA. This \$200,000 differential would reflect a narrower spread than the \$500,000 provided under existing law. However, if the TEA definitions are tightened and strictly enforced, the \$200,000 would represent an increase in the "real world" spread. Presumably, this would stimulate some investors to select TEA projects, but undoubtedly some of the wealthy investors who utilize this Program will still be attracted to large projects by major developers that the investors perceive to be safer and more likely to be completed. Thus, the narrower spread increases the importance of the visa reserve.

⁴⁹ For a discussion of the different approaches, see *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 2.

⁵⁰ See written testimony of Nicholas Colucci (Chief of the Office of Immigrant Investor Program) at the Senate Judiciary Committee on EB-5 Reform conducted on February 2, 2016.

⁵¹ INA § 203(b)(5)(C); 8 C.F.R. § 204.6(f).

⁵² *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. Supra at note 2.

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

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