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**NEWSLETTER | NOVEMBER-DECEMBER 2011**

- **Comments on the New York Times, EB-5 TEAs, and Gerrymandering**
- **Senate Judiciary Committee Hears EB-5 Regional Center Testimony**
- **AILA Comments on EB-5 Draft Policy Memorandum**
- **EB-5 Visa Segment Airs on CNN**
- **Miami Attorney Publishes Tips on Selecting an EB-5 Investment**
- **Upstate New York Receives $125,000 to Fund EB-5 Regional Center**
- **EB-5 Stakeholders Criticize "Visas for Homes" Bill**
- **and more...**

## Comments on the New York Times, EB-5 TEAs, and Gerrymandering: Part I

by Michael Gibson

The article Rules Stretched as Green Cards Go to Investors by Patrick McGeehan and Kirk Semple of the New York Times has spurred a significant amount of commentary by EB-5 industry insiders, federal and state government officials, and advocates and critics of the EB-5 visa program. But interestingly enough, much of the feedback obtained by EB5Info was in agreement on one essential point:


The New York Times

NORTH KOREA SAYS STRONGMAN DEAD AFTER 17-YEAR RULE

Buyout Profits Keep Flowing to Romney

Rules Stretched As Green Cards Go to Investors

***There is a lack of consistency and clarity on the subject of what constitutes a TEA and how some states might use a certain methodology to designate a project as qualifying while other states might not designate a project as being within a Targeted Employment Area (TEA) using the same employment data and similar census tracts.***

Which raises the questions:

- Are the majority of projects being funded today those that Congress envisioned when they enacted the laws that created the EB-5 Regional Center “Pilot” program? That is, are developers “gaming” the system in their TEA requests by including census tracts that will allow them to build projects that don’t actually employ (to any large degree) the residents who live in rural zones or areas of high-unemployment? Presumably, those would be the residents benefiting from the projects.
- How can we measure the results of the invested capital to demonstrate lower unemployment for that TEA amidst critics' claims that little actual job creation results from the EB-5 investor visa program?

I was in New York visiting with clients, EB-5 visa attorneys, and regional centers when I was asked to come and speak with Patrick and Kirk at the brand new New York Times building just off of 8th Avenue. I spent nearly two hours with Pat (Kirk had to leave at 5 PM to take his call with Director Mayorkas) discussing the benefits and issues with the program, and I was extremely impressed with the body of knowledge and amount of research they conducted in putting this piece together.

They managed to interview a large number of attorneys, economists, regional center operators, and government officials in compiling the story and trying to paint as accurate a portrait as possible of the TEA “gerrymandering” issue. Pat later explained that they had tried to get the full story to come out on Sunday, which would have given them more print real estate to describe all of the issues that states face in trying to balance the need for economic development with the vague constraints imposed by USCIS regulations, but their editors decided to print a shortened A-1 story for the front page of Monday's edition.


Michael Gibson at the New York Times Headquarters in Manhattan

***The principal question they asked was this one: Even if the TEA designations are inconsistent and the regulations are vague, who does it hurt if capital is raised to promote economic activity, even if it does not benefit, as Congress might have intended, true rural areas or areas of high unemployment?***

I said one might argue that it hurts those in rural or impoverished urban areas who cannot compete with large MSA developers since the latter group has the resources to raise funds overseas. The developers in large cities like New York, Miami or Los Angeles have significant advantages and access both traditional and non-traditional forms of capital that might not be available to their counterparts in the farm, mountain, rural states or the impoverished inner cities with collapsing industrial infrastructures.


**Above:** Location of EB-5 regional centers with concentrations in CA, FL, and the Atlantic Corridor

If the commercial enterprises being built in the low-unemployment rate MSAs (the project locations themselves would not qualify based on the unemployment rate of their individual census tracts) hired people from the surrounding qualifying areas, then I felt that would meet Congress's intent.

I agreed that projects in high density urban/commercial areas of low unemployment may more efficiently utilize the capital raised and create a much larger number of jobs than could smaller enterprises without the support of a well-developed transit and enterprise support system to bring in workers from any surrounding low income, high unemployment areas that stood to gain the most from a large-scale commercial enterprise being built within a close proximity.

For instance, a skyscraper or factory may have the potential to employ hundreds of laborers from depressed urban and surrounding rural areas whereas the farms, recreational resorts, or hotels that use the same amount of EB-5 capital in their capital stacks may only be able to employ a fraction of the same labor force located in their respective TEAs.

What we are seeing, however, is that many large coastal developers are simply using EB-5 funding to lower their existing cost of capital and that, in some cases, relatively few new jobs are created (or preserved in the case of the "troubled business" category) as the EB-5 funding is simply being used to replace other forms of more expensive debt or equity. The EB-5 funding is essentially being used to take out the interim "bridge financing" which may come from a traditional lender or may be used to help exit the equity placed by the General Partners so that they can use that equity to develop other projects. The replacement of the more traditional form of financing does not create any jobs.

***The question one could then ask is would the commercial enterprise being developed have been built and the initial jobs created (direct, indirect & induced) if there were no EB-5 funds available?***

This would not be a problem if the supply of EB-5 investors was elastic and easily accessible, but unfortunately it is not, and the competition for these high net worth foreign clients is growing increasingly steep. As a result, the projects being funded are those that are in the highest profile markets. Those away from coastal regions that are newer and with fewer resources to compete are having an increasingly difficult time raising any capital at all.

***The central question comes back to the point that Director Mayorkas was making when he asked, "The question is, are the state authorities adhering to the spirit of the law? Where is the project being developed, and where are the jobs being created? Are the people from the areas of high unemployment being employed? Because that's really the purpose. If they're not being hired from those areas, then the question is justified."***

In Part II, we'll look at what constitutes a TEA as defined in the regulations and how different states interpret that meaning. We'll also consider guidance on how the USCIS and AAO have ruled on prior petitions and include commentary from those who work with developers, states, and USCIS officials to try and determine if their projects qualify for raising capital through the EB-5 immigrant investor visa program.

## New York Times, EB-5 TEAs, and Gerrymandering, Part II

by Michael Gibson

Following the publication of the New York Times article on the EB-5 visa program, Rules Stretched as Green Cards Go to Investors, and the follow-up editorial in the Times, EB5Info asked for and received comments from a number of economists and professionals whose job it is to interpret census tract data and submit requests to State officials for TEA designations to qualify their EB-5 visa projects for Regional Center designation by USCIS. The following is a compilation of opinions and thoughts from that request.

The New York Times
The Opinion Pages

WORLD U.S. N.Y. / REGION BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS OPINION ARTS STYLE TRAVEL JOBS REAL ESTATE AUTOS

EDITORIAL

Million-Dollar Visas

Published: December 26, 2011

The federal government's investor visa, created in 1990, gives foreigners a chance at green cards if they invest $1 million to build a business in the United States that creates at least 10 jobs. Investing in an area with high unemployment would cut that price in half.

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Rules Stretched as Green Cards Go to Investors (December 19, 2011)

The program, known as EB-5, has led foreigners to invest in projects around the country, like factories, resorts, shipyards and other enterprises in designated poor areas in need of jobs. A report in The Times last week found that EB-5 applications have nearly quadrupled in two years, to more than 3,800 in the 2011 fiscal year.



One of the first responses we received was by economist Scott Barnhart, whose complete commentary can be found here. He writes:

> Like any large government program the legislation is loosely written and leaves much to be filled in by practitioners. Will there be pushing of the envelope or even abuse of the regulations? As with most government programs, more than likely the answer is yes, but should the program be axed because of this or should it be changed for the better? I would challenge anyone to find even one government program where abuse is absent. Given these circumstances, what issues raised in the article are valid and how can they be resolved?
>
> To be clear, there is much ambiguity in the law and little guidance given by USCIS in applying it. Is this the result of another bureaucratic government agency run amok? Perhaps, but my limited experience through a number of RFE's is they seem to be applying the code as best they can, but are no doubt over run with work and sorely underfunded. If USCIS is like most state and federal government agencies these days, their funding has likely been cut to the bone in recent years and they are forced to do much more with much less.
>
> Then what about the 150% unemployment and gerrymandering the census tracts? Simply put, one must demonstrate that the unemployment rate is at least 150% of the national average. The relevant code indicates what must be presented:
>
> Evidence that the metropolitan statistical area … in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate.

In addition, a state may designate the area as one of high unemployment:

The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate).

So much of the detail is left to the individual developer, regional center owner or consultant, and to the state. For example, which national average:

- The previous calendar year?
- The preceding 12 months from the current date?
- Seasonally or not-seasonally adjusted data?

In addition, considering local area unemployment has not been measured at the census tract level since the 2000 census, how does one measure census tract unemployment rates until the Census Bureau's American Community Survey is reported, probably in 2015? Census sharing methods are currently used in which 2000 census tract level employment ratios are applied to 2011 county level employment data. The approach obviously has its drawbacks. Finally, there is little guidance concerning how to collect census tracts surrounding the tract in which the project is located to use for unemployment calculations, hence the claim of gerrymandering.

If USCIS would level the playing field for all states, any perception of whether one state is "unfairly" getting more projects than is justified would be eliminated. This could be accomplished either by allowing states to claim any type of geographic region (or shape) as long as the resulting unemployment rate reaches the 150% rate or it can be done by setting very strict guidelines that all states must follow. Either of the methods will work because all regional centers and state agencies will be on equal footing. However, even the casual observer will recognize that although leveling the playing field would eliminate the perception that some states/projects have an unfair advantage, these two methods can have quite different outcomes; the former approach would foster regional center and job growth, while the second could inhibit regional center and job growth if the guidelines are too restrictive, which is clearly not the intent of the legislation. The second approach also could be very difficult to implement, e.g., concentric areas surrounding the project tract, etc., considering census tracts are designed to be homogenous regarding population and economic status, but geographically are very diverse.

## So what do the regulations say?

Joe Whalen, a former adjudicator with USCIS and someone who is intimately familiar with the program and process, references the statutes here:

The regulation at issue is found within 8 CFR § 204.6, specifically:

(i) State designation of a high unemployment area. The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by

which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I–526. Before any such designation is made, an official of the state must notify [USCIS] of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.

The States (including DC and territories) have been given specific authority within the EB-5 program within specific limits. The State has the authority to designate a geographic or political subdivision within that State as a high unemployment area (HUA) for EB-5 purposes. That State must provide a description of it methods in making that determination. However, no State is required to participate in the EB-5 program or to make any such determination. Elsewhere in the regulations at 8 CFR 204.6(j)(6)(ii)(B) discussing "evidence", there exits an option for a State to make the determination and issue a letter to the EB-5 alien investor for use in supporting his/her USCIS form I-526 petition. In the alternative, the EB-5 petitioner can do all the statistical analysis him or herself rather than ask the State to do it.

In footnote #1 within the AAO non-precedent of September 21, 2010, (excerpt follows) which ultimately upheld the Service Center Director's Denial of an I-526 filed by a Regional Center-affiliated EB-5 immigrant investor, USCIS's Appellate Body-the Administrative Appeals Office (AAO)- found itself, as an arm of USCIS bound by the agency's own regulations. In that the regulation in question, which the CSC director and AAO determined had been used to support an untenable outcome had, in fact, been properly promulgated pursuant to APA comment-and-notice rulemaking AAO lacked the authority to overrule it.

This is so because it was not a rule set by its own precedent but rather by the comment-and-notice process. After years of increased experience and developments in various key issues, AAO has expressed on behalf of USCIS and in hindsight that 8 C.F.R. § 204.6 (j) (6) (ii) (B) has been used to support an outcome that now appears to be in contravention to clear Congressional Intent. A Federal Court has the power to quash such a regulation as ultra vires, even through its broad interpretive authority, the agency does not have that power. If an agency's Appellate Body attempted to declare as ultra vires, a longstanding rule that had been duly promulgated, then that action would itself be ultra vires. See 5 USC § 553(esp. (b)-(d)) and § 558 (b) "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." At first glance, it looks like it may be time for a regulatory change. Or is it? As AAO has already stated:

1 The proposed investment will be wholly and entirely within Ward 2, a ward that is not itself suffering high unemployment in relation to the national unemployment rate. The director's conclusion that the investment will be within a targeted employment area is based on a designation by [REDACTED INFORMATION] for Planning and Economic Development, Washington, D.C. pursuant to 8 C.F.R. § 204.6(j)(6)(ii)(B). [REDACTED's] designation includes Ward 2, but, of necessity, includes other wards and census tracts within D.C. to reach the necessary average unemployment rate. The director's conclusion that we must accept the designation is a reasonable interpretation of 8 C.F.R. § 204.6(j)(6)(ii)(B). That said, it is clear that the petitioner's investment of only $500,000 wholly within a ward that is not itself suffering high unemployment completely undermines the congressional intent underlying section 203(b)(5)(C)(ii) of the Act. Specifically, Congress intended that the reduced investment amount would encourage investment in areas that are truly suffering high unemployment. While we are bound by 8 C.F.R. § 204.6(j)(6)(ii)(B), it would appear that this regulation has produced unintended consequences that are clearly contrary to congressional intent.

## Congressional intent and interpretation

This comes from an economist who is frequently consulted by regional centers regarding Requests for Evidence (RFEs) or denials from USCIS regarding their petitions and works with them to find workable solutions that would be accepted:

> While gerrymandering can sometimes be a concern, there is nothing wrong with configuring an irregular geographical area if there is reasonable expectation that potential hiring opportunities will be available for residents of these high unemployment areas.
>
> Often times, especially in inner city areas, there will be commercial areas with low unemployment where relatively few people live, but nearby will be economically distressed areas where residents can benefit by the employment opportunities created in easy to get to nearby locations.
>
> I have found that in cities like Boston, New York, and Chicago, developers want to build in commercial zones where few people live and/or unemployment may be low, but they need to draw their workforce from these surrounding, more populous high unemployment areas.
>
> Often times we have a skills mismatch. For example, if a hotel is being built in an affluent area of downtown Manhattan, can we expect that the service workers will be drawn from that affluent census tract? No, the potential labor pool will most likely come from the not too distant higher unemployment areas. The same type of example holds with a manufacturing plant that may be built in a rather affluent town but needs to draw workers from the neighboring blue collar town.
>
> It is not the wealth of the businesses in an area that is important, but the economic status of the people who reside in that and nearby areas. Usually when unemployment in a census tract is zero or very low there is a very small labor force in the area due to the fact that the area may be mostly commercial, a largely undeveloped parcel of land, or a waterfront area.
>
> The reference to the tract that had zero unemployment for 5 years is misleading. As the numbers are based on a 2000 census share methodology, it will always be estimated as zero until a new data source is used.
>
> It's ridiculous to consider any two tract combination as gerrymandering. In the midtown Manhattan reference, each census tract is probably one square block. If the first tract had zero unemployment and had the same labor force size as the second, than unemployment in the second tract would need to be at least 28.8% just to reach a combined qualifying rate of 14.4%.
>
> If the second tract was smaller, it would need to have even a higher rate than 28.8%. In the most likely scenario where the labor force in the first tract is probably smaller, the second tract would still need a rate in excess of 14.4%. For example, tract one (LF 100 and unemployment 0) and tract two (LF 900 and unemployment 150 or 16.7%). The combined numbers would be (LF 1,000 and unemployment 150 or 15.0%). I can't imagine anyone questioning any of these scenarios as gerrymandering and implying

that the people who live one block away would not benefit from the new employment opportunities.

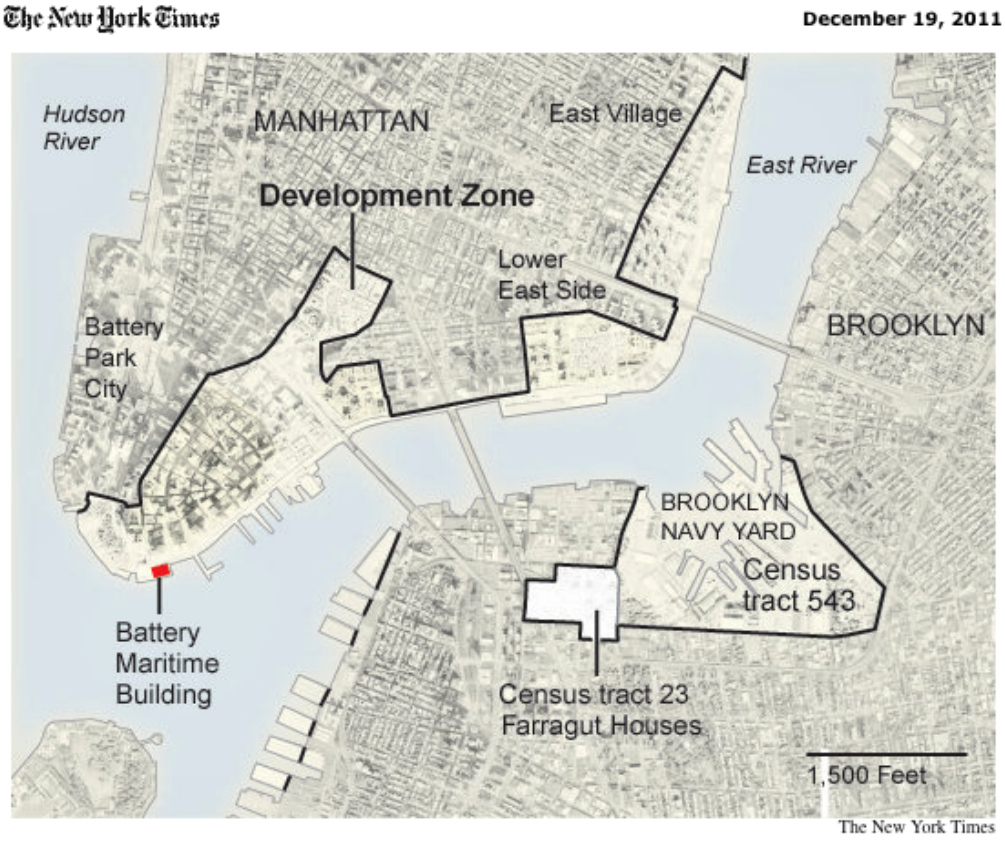
**How do states interpret the regulations?**

From one economist:

> There are differences between the states, but for the most part the TEA certifications need to follow the calculation guidelines for the Census Share Method that is provided by the US DOL and has been consistently been updated (about every 3-5 years). That being said, there are some states that are more permissive than others in terms of geographic composition (the positive interpretation is that it is "flexibility"). There are some cases where it can involve "gerrymandering," but NY is really not one of the "bad guys.

Another economist familiar with program writes:

> I think some states do a better job of monitoring (not limiting) how TEAs are set up. They may approve a large geographic area that could wrongly be seen as gerrymandering but fits into a logical jurisdiction, while at the same time they may reject a smaller configuration because it doesn't show any reasonable economic linkage. The ones who keep the TEA designations as outlined and in line with the law are actually the ones that can be questioned for gerrymandering.



Most states, like New York and Florida, will allow anything within the rules and regulations, i.e. contiguous geographic or political subdivisions using approved BLS methodologies. Some of the states that have deviated from the TEA regulations have been influenced by USCIS in their attempts to eliminate what they consider to be gerrymandering. Some other states have just taken it upon themselves to simplify their own workload by arbitrarily deciding for instance to just allow any two tract combination or in one case, only individual tracts (this state actually uses outdated data from about three years ago and feels no obligation to update).

One such state influenced by USCIS is California. On the one hand they are to be complemented for thoroughly reviewing each request in terms of the information they require, the potential economic impact, and the legitimacy of the area being requested (i.e. no odd configurations or gerrymandering). They do their due diligence. On the other hand, while they adhere to the regulations that specify contiguous geographic or political subdivisions, they have incorrectly interpreted that census tracts are not geographic subdivisions (the Census Bureau specifically defines census tracts as geographic subdivisions).

As a result, they will not designate any individual or even small groups of contiguous tracts, even if for example they all had unemployment rates of over 30%. Yet, you can carve out a city council district in a large city that meets the definition of a political subdivision, put together the 50-60 census tracts that make up the area, and if the rate happens to qualify, you may be able to get your wealthy census tract in a TEA. This may seem to make no sense, but then again, it makes just as much sense as a city or MSA that automatically qualifies. Why is it OK to put a TEA project in a wealthy town in a large qualifying MSA or a wealthy census tract in a qualifying city but not OK to put a TEA in a wealthy census tract in NYC with high unemployment areas not far away?

Texas operates in a world of their own. It is the only state where authorization was not given to a state agency but to each individual Mayor. It is supposed to be given to a state agency but apparently USCIS has decided to let them continue in this manner (I really think USCIS should address this inconsistency before anything else). Just as each state can establish their own TEA procedures, each Texas city can do likewise. Compounding matters is when a TEA crosses multiple jurisdictions.

In about half the states, the Agency authorized by the Governor to do the designations, is not the labor market agency that compiles the data and does the calculations. For example, in NY, the agency that prepares the letters is Empire State Development but that person, Leonard Gaines, is not the Agency spokesperson quoted in the article. The NY Department of Labor is the one that does the calculations but you have to go through Empire State Development. In what may seem to you as odd after reading the article, I have probably had more difficulty in getting areas to qualify as TEAs in NY than in any other state. They have been cooperative but I have worked mainly with upstate areas where there are many pockets of high unemployment but the numbers are just not high enough to work into TEAs.

California also has a different agency that does the designations from the ones that produce the data but I believe there is a group effort in setting their policy decisions.

Joe Whalen makes this note about California:

I have made no secret that I admire the way that California has addressed its role for that limited part of the EB-5 program within its purview. The following is found on its website here.

Governor's Office of Economic Development

About GoED | Why CA | Start a Business | Relocate or Expand | Permits | Small Business

Home > More Resources > EB-5 Program > Targeted Employment Area

## Finding or Requesting a High Unemployment Area (HUA or TEA) Certification or Designation

*In accordance with Title 8, Code of Federal Regulations Section 204.6(i), the California Employment Development Department has been delegated the authority by the State of California to calculate unemployment rates and certify or designate the metropolitan statistical areas (MSA), counties, census designated places (CDP), and cities ot towns that meet the "high unemployment area" definition and therefore qualify for the $500,000 minimum investment threshold as non-rural TEAs for EB-5 program purposes. Unemployment rates for MSAs, counties, CDPs, cities, and their consisting census tracts are published annually.*

*The State of California uses the most recent calendar year labor force and unemployment estimates to establish high unemployment rates and high unemployment areas; therefore, the Business, Transportation and Housing Agency is currently using 2010 unemployment data for these determinations.*

The Secretary of the Business, Transportation and Housing Agency, or the Secretary's designee, may provide certifications for applicants that a proposed new business falls into an area (MSA, county, CDP, or city) that qualifies as a High Unemployment Area (HUA). In order to be classified as a High Unemployment Area, the MSA, county, CDP, or city must have experienced an unemployment rate that was equal to or exceeded 150% of the 2010 national employment rate. In 2010, 150% of the 9.6% average national unemployment rate was equal to 14.40%. (Requesting such a certification letter may not be necessary as the web site publishing this information contains a self certification option.)

At the discretion of the Secretary, the Business, Transportation and Housing Agency may provide High Unemployment Area designations for applicants who can prove that the proposed new business is situated in a geographical area or political subdivision of a MSA or city that is otherwise not a qualifying area as a whole. Requesters for such special designation must prove that the smaller geographic area or political subdivision still has a qualifying unemployment rate of 14.40% (based on contiguous census tract unemployment data) and that the proposed new business will have a material effect on unemployment in the carved out area.

The Secretary of the Business, Transportation and Housing Agency, or the Secretary's designee, may provide certifications for applicants that a proposed new business falls into an area (MSA, county, CDP, or city) that qualifies as a High Unemployment Area (HUA). In order to be classified as a High Unemployment Area, the MSA, county, CDP, or city must have experienced an unemployment rate that was equal to or exceeded 150% of the 2010 national employment rate. In 2010, 150% of the 9.6% average national unemployment rate was equal to 14.40%. (Requesting such a certification letter may not be necessary as the web site publishing this information contains a self certification option.

There is, of course, much more available there. Any State that chooses not to follow California's example could easily do worse, but I doubt any could do better.

Scott Barnhart summarizes the question with the following comments:

> Will jobs be lost in Nevada, California or other states because a 34 floor glass tower is built in New York? Perhaps, but currently there is great demand for US citizenship and over 200 regional centers from which to choose. Moreover, given the current state of the US economy, the economic benefits of projects rejected based on the 150% unemployment target may simply be lost forever as locations in other area or other states are not close substitutes.
>
> For example, if the 34 floor tower typically used for retail, office space and/or residential purposes did not qualify in New York, one can be assured that states with the highest unemployment levels are not likely close substitutes for a Manhattan address for either the developer or prospective investors, so this project would likely be shelved. Similarly, a large condominium in Florida will not sell if located in a high unemployment area away from the coast instead of a lower unemployment area on the coast, yet the labor will be imported to the site.
>
> Both projects though will provide large economic benefits to their regions. So given the current robust demand for citizenship in the US, this is likely not an issue at the present, but this may change in the future. Again, leveling the playing field would come a long way in resolving any perceived or real issue.

**Solutions?**

Several economists offered solutions, one noted the following:

> I certainly can see how projects can be manipulated to approve destinations that may otherwise not qualify but I don't see this as fraud as it is within the TEA rules and regulations. The fraud comes into play with the false promises to potential investors. Sure, there could be abuse with TEAs but that would have to do with having no intention of offering employment opportunities to people in these areas."
>
> I think a better way of controlling abuse would be to monitor the residencies of the people hired. In other words, if 20 people were hired, did they all come from the project location with very low unemployment or did at least some come from high unemployment areas within the TEA geography? Is it OK to include an Indian reservation just as any other high unemployment area so maybe there should be an expectation to hire people from these areas? At least this way they will have some employment opportunities whereas if you don't allow the high area to be included, no opportunities at all will exist.

In our final article on this subject, we will profile a response from the State of Florida, which has the second largest concentration of EB-5 Regional Centers in the country and has many projects that are being promoted as located in targeted employment areas.

## Event: Strategies for Selecting an EB-5 Regional Center Investment and Managing Risk, a Webinar


**TUESDAY, JANUARY 17, 2012** from 12:30 – 2:00 PM (PST)

This webinar will examine risk and due diligence for immigrant investors choosing regional center projects. Our experienced presenters will discuss factors to consider when selecting a regional center project including:

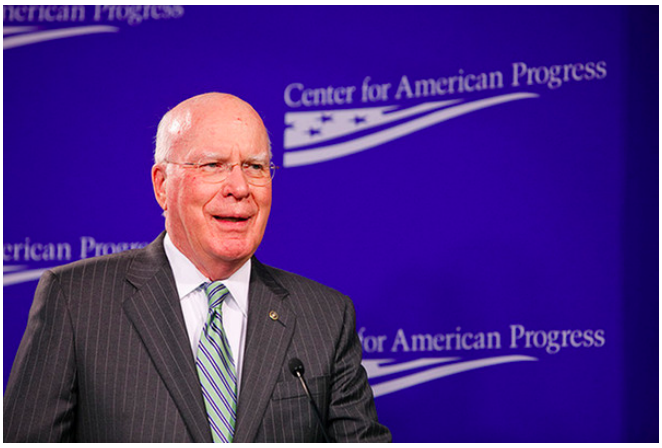
- EB-5 exit strategies
- Return of capital and redemption
- Final green card approval

Speakers include attorneys Bernie Wolfsdorf and Jor Law as well as EB-5 due diligence expert Michael Gibson. The cost is $99.00. Click here to learn more or register.

EB5info.com

## Senate Judiciary Committee Hears EB-5 Regional Center Testimony

On December 7, the EB-5 visa program featured prominently in a hearing of the U.S. Senate Judiciary Committee, an event during which prominent voices from the EB-5 community contributed testimony.




Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee

Leading the discussion was Committee Chairman Patrick Leahy (D-VT), who let it be known in his opening remarks that legislation to make the EB-5 Regional Center Pilot Program a permanent fixture of our country's immigration policy sat at the core of the day's discussions. Leahy has frequently lauded the EB-5 program and is one of its most vocal supporters in Congress.

Senator Charles Grassley (R-IA) also contributed to the opening discussion, stating his support for the EB-5 visa program with the reservation that Congress must "enact reforms that make the EB-5 Regional Center Program worthy of its goals."

Grassley mentioned rumors that overseas promoters were "mischaracterizing the program, luring investors here, and robbing them of the American dream" – a fear that is completely valid and that available evidence suggests is happening more frequently than we'd all like to believe.

### The testimony

As for the witnesses, two EB-5 supporters and one opponent shared insight and responded to questions. The first was Bill Stenger, a principal at multiple regional centers, who noted that EB-5 has helped him create "over 2,000 jobs" in his region of Vermont – a rural county with the highest unemployment level in the state.

"Unless this program is extended," Stenger argued, he and his partners wouldn't be able to continue creating jobs in northern Vermont. In addition to a ski resort they've been able to modernize and turn into a year-round operation, Stenger is also planning to build new commercial facilities, housing, and infrastructure in the region.

Ski resorts have become something of a favorite for regional centers. With almost zero chance of getting bank loans, EB-5 has turned into one of the only ways real estate projects can access low cost capital.

Attorney Robert Divine of Baker Donelson also testified before the committee and noted that the EB-5 program must be made permanent now rather than later so that investors won't be scared away from investing in projects. The idea that the program has to come up for renewal and be approved every few years makes investors hesitant, he said.

The only witness to voice opposition to the program was David North of the Center for Immigration Studies. And it isn't just the program's extension that North opposes. He unequivocally opposes the EB-5 Regional Center Program's very existence, calling it "a dysfunctional portion of a silly program which should be allowed to wither and die."

That certainly sounds harsh, but we've heard from David North before.

The EB-5 program "attracts sub-par investments and often scandals," he told the committee. "Such programs should be about creating business entities, not passive investments," he said.

Senator Leahy noted that the record included a statement from North which referred to Stenger's ski resort as "decaying" and a poor use of investor funds. Upon asking Stenger, whom Leahy earlier disclosed was a personal friend of his, whether his facility was, in fact, decaying, Stenger responded that it wasn't – not at all.

"We're not decaying," he said. "We're thriving."

North's response: "I don't think the U.S. Senate should operate on anecdotes."

**And the conclusion?**

There wasn't one. Nothing concrete, at least.

In addition to Senators Leahy and Grassley, Senators Sessions (R-AL) and Cornyn (R-TX) offered statements that should be encouraging to the folks at IIUSA as well as other EB-5 supporters.

EB-5 investors will have "wealth to bring," said Senator Sessions. "They will be job creators."

With respect to Senator Grassley's initial concern regarding foreign promoters sending investors the wrong message, Divine closed by noting that EB-5 investments "are covered

by U.S. securities laws." If promoters in China, for instance, are telling investors anything misleading, "it would be a violation of U.S. securities laws" as well as China's, he said.

In short, Divine believes it's an issue for the SEC to address.

If this hearing of the Judiciary Committee is anything close to a microcosm of the U.S. Senate's opinion of EB-5, things look good for the program whenever its permanent extension actually does come up for a vote. With the nation still deep in a recession, it would be hard not to support a program with a proven track record of creating new jobs.

*Image credit: Center for American Progress*

## AILA Comments on EB-5 Draft Policy Memorandum

The deadline to submit comments to USCIS regarding its latest EB-5-related draft policy memorandum just passed, and the American Immigration Lawyers Association (AILA) assembled a comprehensive list of issues it would like the agency to address.

On November 9, USCIS Director Alejandro Mayorkas led a conference call to discuss the draft memo (PDF warning). Unlike previous memoranda, it seeks to compile all EB-5 memoranda into a single document that will guide the adjudication process going forward. This is the latest instance in the agency's recent effort to streamline EB-5 adjudications and work more closely with the EB-5 community to create jobs for American workers.

### The memorandum

Although policy in the memo technically hasn't taken effect yet, a few changes became effective immediately following its being issued last month:

- The agency will defer to a state's TEA designation.
- Regional center operators can use investor capital in various ways (e.g. bridge financing, funding operations, et al.).

In stating that it will honor a state's TEA designation, specific language in the document confirms the agency's intention to defer "to the state's designation of the boundaries of the geographic or political subdivision that will be in the targeted employment area."

This issue had previously been a point of contention between EB-5 stakeholders and the agency.

As for the ability of EB-5 regional centers to use investor funds in a number of ways, it's important to note that the agency still must see that EB-5 projects have created jobs as a result of the capital invested. It is, after all, the business itself, not to mention local economic environments, that allow job creation to occur. Capital investment simply allows an operation to run and to grow – new job creation is the result of a growing enterprise.

USCIS invited EB-5 stakeholders to comment on these and other aspects of the draft policy memorandum. The deadline was December 9, exactly one month after Director Mayorkas's conference call.

**AILA's response**

Given the Director's comment that USCIS is sharing the draft policy memorandum now in order to "obtain valuable real-time input and to define a collaborative approach with the stakeholder community," AILA has really stepped up to the plate with an extensive list of comments.

Although the organization "[believes] that much of the Draft Memorandum contains an accurate recitation of the law and existing policy," according to introductory remarks that precede its list of comments, AILA seeks to clarify several facets of the memo:

> Our comments include (a) areas where the law has been incorrectly stated; (b) areas covered by the Draft Memorandum where further clarification would be beneficial; and (c) areas not covered by the Draft Memorandum where we ask for the opportunity to provide suggested language.

What follows are several pages containing a total of 24 comments, many with multiple bullet points. All of the organization's comments are available for download here.

Despite any reservations it has about the draft policy memorandum and the changes it would like USCIS to implement, AILA also "applauds the efforts of USCIS to create a comprehensive memorandum that consolidates the agency's guidance to stakeholders in the EB-5 area."

It's probably safe to say that the rest of the EB-5 community does, too.

## EB-5 Visa Segment Airs on CNN


CNN aired a segment today from reporter Deb Feyerick, who asks whether EB-5 immigrant investors are "Buying green cards, or investing in American businesses?"

The segment portrays the construction and development of the Jay Peak resort in Vermont, one of the projects under the umbrella of the VACCD. Bill Stenger, the co-owner, describes how just being a seasonal resort was a recipe for failure since "without sustained year round operations you can't survive [and] you must be a 12 month a year operation". When he approached the banks for a $250 million loan to expand his operation without the 30% equity that they required, they turned him down.

***"If you don't have the capital you can't make things happen," ~Bill Stenger, Jay Peak, Vermont***


Since then, he has managed to raise over $250 million from over 500 investors in 56 countries. Among them are Birinder Bhullar and his wife Roshi, who came over from India.

CNN's Feyerick then describes how the EB-5 visa program, which has been around for 20 years, has brought in over $2 billion and is being promoted heavily by the Obama administration in an effort to create jobs, especially in rural areas with high unemployment.


The program is not without critics, however, and David North with the Center for Immigration Studies, an organization which supports strict limits on immigration, believes that if the United States is going to sell green cards, they should do so for much more and that the proceeds should go to the U.S. Treasury, not to developers.


The segment then returns to Bill Stenger who describes what the capital has meant to Jay Peak and the region, showing off the golf course, water park, indoor ice rink, conference center and retail shops and describing how the program has allowed Jay to create "hundreds and hundreds" of jobs.

Construction worker Brad Quintin used to have to travel far to other states but is now happy that work is close by.

The program was fairly balanced with most of the footage showing how the capital invested by the foreign nationals was being used to create economic activity in an area that was not able to attract more traditional sources of funding. After viewing the segment, there is little doubt that without the infusion of foreign equity into this Vermont project through the EB-5 immigrant investor program, U.S. jobs would not have been created.


## Miami Attorney Publishes Tips on Selecting an EB-5 Investment

If you're an attorney who counsels clients on the selection of an EB-5 visa investment, here's an article that's definitely worth a look. Well-known and respected Miami immigration attorney Roger Bernstein has published the article Tips on Selecting an EB-5 Regional Center, which illustrates the dramatic changes in the EB-5 visa program that we have all witnessed over the past few years.

Here's a little info about Roger:

### Roger A. Bernstein

Roger A Bernstein is a Florida Board Certified Immigration attorney with fifteen years of practice devoted exclusively to immigration law. He spent six years with the U.S. Department of Justice serving as an INS trial attorney, sector counsel to the INS' Inspections and Investigations Divisions and INS Asylum Officer. Since co-founding Bernstein Osberg-Braun, LLC in 1998, Mr. Bernstein has focused his practice on assisting immigrant investors, acquiring employment based visas and complex immigration litigation.

Mr. Bernstein has represented and counseled foreign governments, Fortune 500 companies and large-privately held companies. He has also successfully acquired non-immigrant visas and residency for hundreds of individuals who desired to live and work in the United States.

A graduate of Brown University and the University of Miami School of Law, Roger Bernstein serves on the Miami-Dade County Enterprise Zone Advisory Council, the Board of the American Jewish Committee, the Great Florida Bank Advisory Board and the Florida Bar Immigration Certification Committee. He is admitted to practice law in Florida, the 11th Circuit Court of Appeals and the Supreme Court of the United States.

In the article, he outlines the tremendous growth that the program has experienced and the large number of Regional Centers which have come emerged recently. He also goes over recent efforts by USCIS and the California Service Center to streamline and improve their operations and provide more transparency and uniformity in adjudications.

Roger then offers his advice for potential EB-5 visa investors and their attorneys when evaluating an EB-5 Regional Center project offering. Here is a brief summation of his points:

1. **Choose experience:** A substantial record of I-526 and I-829 approvals is one of the best indications of success.
2. **Velocity:** Be wary of overly ambitious projects if there is no track record of raising funds expeditiously.
3. **Management team:** Ensure that the regional center has a familiarity with the EB-5 program and understands its responsibility to complete the project and create the requisite jobs.
4. **Job creation:** The central focus needs to be on whether the economic methodology used to make these job forecasts is reasonable.
5. **Is the Regional Center invested?:** Does the developer have skin in the game? Is the regional center's success tied to the investor and the performance of the asset? They often aren't, but they should be. If you're looking at a loan-based model, ensure that the project is sufficiently collateralized and that the investor's interest is not subordinated to a massive bank loan. Above all, seek qualified help to evaluate the investment.

This is good advice for both seasoned practitioners as well as attorneys just entering the EB-5 field, and we encourage everyone to read his informative article.

## Upstate New York Receives $125,000 to Fund EB-5 Regional Center

ALBANY, NY. The State of New York has just approved a grant of $125,000 to fund the development of an EB-5 visa Regional Center. The funding was part of a $62.7 million package to stimulate growth in the 11-county capital region also known for its tech corridor. This disbursement was part of a competition set up by Governor Andrew Cuomo to promote jobs and economic development in the area.

The recipient of the funds is a private, not-for-profit organization known as the Center for Economic Growth (CEG). Its mandate is to foster economic growth in Upstate New York by providing assistance to members competing in a global marketplace. Those spearheading the effort hope to attract capital to fund their initiatives, grow the local economy, and increase employment in the region.

In addition to this grant, the CEG receives funding from its members and the Empire State Development's Division of Science, Technology and Innovation, which endeavors to facilitate the integration of new technologies throughout New York.

## EB-5 Stakeholders Criticize "Visas for Homes" Bill

After publishing a post last month about a new visa bill that targets high net worth foreign nationals, at least one of our readers was quick to express his distaste for the measure:

> "This is a *huge* problem for EB-5 people! *Please* call or write your Senators and Congressmen and urge them to kill this bill immediately. It is a bank bailout at a time when we need jobs. *Very*, *very* problematic for EB-5!"

Is the risk the bill poses really so great? It certainly does provide an alternative route to living in the U.S. for some people who might otherwise want to utilize the EB-5 visa. And that is what has some EB-5 stakeholders a little worried.

The VISIT-USA bill, sponsored by Senators Schumer (D-NY) and Lee (R-UT), would provide tourist visas to foreign nationals who purchase a home for at least $500,000 in cash. The idea is that such an initiative would spur activity in the housing market, not to mention bring more money into the country generally.

But wouldn't would-be EB-5 investors just turn to one of these visas instead of investing in job-creating projects? It's a good question, but it's important to remember that this visa:

- doesn't offer a path to permanent residency;
- is only good for a limited period of time; and,
- doesn't allow recipients to work in the U.S.

And as a recent article in the South Florida Sun Sentinel notes, all of those things are "what many Chinese investors want." China, after all, would presumably be among the largest target markets (if not the largest) for such a visa.

It also looks like a provision in the bill would require visa holders to pay U.S. taxes on their global income. As attorney Larry Behar weighed in for the Sun Sentinel article, many Europeans and Latin Americans who already own property here don't stay year-round specifically because they don't want to be taxed like U.S. citizens. Needless to say, leaving that part of the bill intact might ensure that very few foreign nationals deign to utilize it.

Mo Abbas of the Gold Coast Florida Regional Center even suggested to the Sentinel that the bill would do little besides inflate home prices in some areas in order to attract buyers trying to meet the minimum purchase requirement – a possibility lawmakers may need to consider before voting on the bill.

That the new visa would be at least somewhat of a distraction from the EB-5 program, which is a job creation solution and not a housing market stimulus, is probably true. How much of a distraction is unclear. The Sentinel mentions how one EB-5 regional center was set up to fund construction of the University of Miami's Life Science Technology Park, a project that demonstrates in a very visible way how EB-5 can create lasting benefits for communities. There's clearly concern that any amount of waning interest in the EB-5 program would be bad for projects like that one.

But a glorified tourist visa is still a far cry from a green card. Even if the bill does pass in its current form, the tax provision and the limits on how long visa holders can stay here might be enough to curb any interest from many would-be applicants.

*Image credit: Deborah Wei*

## More Major Publications Cover EB-5 Program in December 2011


December of 2011 may well go down in EB-5 history as the time the program began experiencing heightened levels of interest from the public.

With the New York Times and CNN both covering EB-5, the volume of commentary about the program has grown significantly. And since the New York Times story picked up on issues involving TEA designations and accusations of gerrymandering, several prominent insiders are weighing in with their opinions on the matter, some of them right here on this blog.

Of course, this isn't the first time a large publication considered the goings-on of EB-5. Let's not forget that it was only a year prior to the latest Times article that Reuters published its huge exposé on the program, much of which focused on what that publication called "overselling" of EB-5 visas to foreign national immigrant investors.

Now the EB-5 program appears to be more visible to the public than at any time in recent memory. And the New York Times, as it happens, wasn't the only major publication to consider details about the program's administration.

### EB-5 in the Economist

In an Economist piece published December 3, the news magazine points out how some immigrant investors are sending capital to limited partnerships that lend money to companies employing workers – an action that is permissible since not all jobs created under the Regional Center Pilot Program need be created directly.

This "evolution of the EB-5 scheme has angered some of those offering traditional investments to immigrants," the article states, because it means investors can simply purchase local government bonds, which carry less risk.

As an example of such a project, the article refers to a Washington Regional Center effort in which EB-5 investors bought $48 million worth of Washington state bonds to replace a floating bridge near Seattle.


The Economist also interviewed Henry Liebman of American Life Regional Center, who asked why an investor would hand $500,000 to a developer when he or she "has the chance to buy a bond backed by the full faith and credit of the state." It's a good question, and it's easy to understand why this development makes some organizations seeking EB-5 capital a little nervous.

Overall, however, the Economist's view of the program was pretty rosy (if not also a bit ironic; the article subheading reads, "Give me your Gucci-clad masses"):

> The Obama administration would like to see [the number of EB-5 investors] increase to 10,000 a year, which should bring in billions of dollars for building shops, offices and infrastructure. It should also mean tens of thousands of jobs for the poor, huddled masses of America's unemployed.

In its praise, the Economist also managed (mostly) to portray the EB-5 program as a job creation effort as opposed to just a cash-for-green-cards scheme – a depiction stakeholders ought to welcome.

**More public radio coverage**

As many of our readers know, NPR frequently runs stories on the EB-5 program, most of which contain basic information geared toward a general audience. Sometimes, they'll even focus on a project and show how it's creating jobs.

But on December 19, KPCC, a California NPR affiliate, asked readers and listeners to consider the following questions:

> Are state authorities adhering to the spirit of the law? Federal regulators have said states determine whether projects are located in areas of greatest need, but should the federal government be doing more to ensure that states are using these funds properly? Is this system fair for those who want citizenship put [sic] don't have an extra $500,000

to invest? Are there risks associated with having too much foreign money invested in U.S. real estate?

Needless to say, public responses to questions like these will run the gamut.

With competition for immigrant investors growing ever fiercer and concerns about the program's administration on the rise, we can probably expect to see even more media coverage of the EB-5 program in 2012, not to mention more commentary from the public.

EB5info.com

## The Final Chapter in Victorville's EB-5 Termination?

The Victorville saga is over. Maybe.

Now that the city has lost a final appeal to save its regional center, there may be nothing left for it to do other than accept that EB-5 visa funding is no longer a viable option for its projects.

Last year, the Victorville Regional Center in Victorville, California became the first EB-5 regional center to be terminated by USCIS. According to the agency, the regional center was trying to count jobs that it was unable to receive credit for having created. That, and its financial reports contained "material factual discrepancies."

The regional center received an initial "Notice of Intent to Terminate" in May of 2010. A second one arrived in August, followed by a "Notice of Final Termination" in which USCIS rendered the regional center ineligible to receive EB-5 visa funding for its wastewater treatment plant construction project.

Since then, only one other regional center out of nearly 200 has met a similar fate.

### The appeal

Upon receiving a denial from USCIS when it appealed to overturn the agency's decision, the city filed a lawsuit against USCIS, the Department of Homeland Security, and officials involved in the agency's decision.

However, instead of actually pursuing the lawsuit, the city agreed to sit on it until receiving final word from the agency's Administrative Appeals Office (AAO). On December 21, the city received the AAO's decision – one that wasn't to its liking. It seems Victorville was still unable to prove that it used investor funds to create jobs rather than simply preserve jobs that already existed.

Details on all of these proceedings appeared in the December 23 edition of the Victorville Daily Press. According to the article:

> "The city built its wastewater treatment plant primarily using interfund loans, pledging to pay them back in part with EB-5 funds. Now the city has refunded all $9.5 million in loans it had collected and is hoping the regional Victor Valley Wastewater Reclamation Authority will buy its plant so it can replenish reserves."

**Lawsuit?**

Now the Victorville City Council will have to decide whether it wants to pursue the lawsuit against the federal government. Doing so would be "pricey," according to the Daily Press, and the council won't decide whether to move forward with it until January 17.

Last January, the city approved spending $50,000 to fight the termination in court. At that time, it also refunded $500,000 to at least one investor.

Victorville accrued a total of 19 investors prior to its termination.

*Image credit: Ken Lund*

**Are you an EB-5 practitioner who would like to contribute an article?**
**Email Adam Green, Editor: adam@usadvisors.org**
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