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Reflections on the Senate Judiciary Committee Hearing on EB-5: Time for TEA Reform

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"EB-5 Senate Judiciary Committee Hearing: Time for TEA Reform"
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I testified before the Senate Judiciary Committee at its Hearing on April 13, 2016 entitled: "The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse."[2] This article expands upon my responses to some of the questions posed by the Senators.

I have paraphrased some of the questions and included relevant background information, with the aim to retain the spirit of the questions. I will address the questions relating to: (1) whether the area of the Targeted Employment Area ("TEA") should be expanded to include the local commuter traffic patterns; (2) whether the unemployment rate is the best measure to identify a project location's ability to attract conventional capital; and (3) whether immigrant investors seeking an EB-5 visa ("EB-5 investors") should receive credit for 100% of the jobs created by the project, even though the EB-5 capital may represent a small percentage of the total capital costs of the project. Some of the answers overlap because these questions are interrelated.

Question 1: Under current law, a project location may qualify as a TEA entitling immigrants to invest at the "TEA discount" level of $500,000, rather than $1 Million, based on the unemployment rate of the "area" in which the project is located. Many states have allowed the area to be expanded to combine numerous census tracts to extend to remote tracts with high unemployment, so long as the tracts are contiguous. Senators Grassley and Leahy have proposed that the TEA be defined based on narrower placed-base locations, such as the census tract in which the project is located or tracts close to the project tract. Others, including Senators Schumer and Flake, propose that the TEA "area" be expanded to reflect commuter traffic patterns in relation to the project tract. Congress' original intent in establishing the TEA discount was to provide an added incentive for immigrants to invest in areas that are least likely to attract capital. Should the TEA definition be expanded to encompass the geographic area that reflect commuter traffic patterns?

Short Answer: The commuter traffic pattern standard would be inappropriate as a TEA definition. Large projects favor this approach because it would likely preserve the status quo in which virtually all projects qualify as a TEA. At best, this approach would render the TEA discount meaningless because immigrants can invest in any project at the $500,000 level.[3] At worst, it would serve as an additional incentive for investment in the largest projects in Gateway cities because, at the same investment amount, most immigrants will favor these projects as the safest route to securing an EB-5 visa.

Analysis: I assume developers and regional centers that sponsor large projects and other projects in affluent areas have analyzed whether existing large EB-5 project locations would continue to qualify under this approach, and have concluded they would qualify. Otherwise, they probably would not be strongly supporting this as a new TEA standard.[4] Thus, this approach would be ineffective to remedy the current system in which TEA status is rendered meaningless because virtually all projects qualify. The commuter traffic approach would apply different rules but yield substantially similar results to gerrymandering.

The chief argument that proponents use to support this approach is based on the concept that many workers in modern cities commute long distances to the project site. Thus, they argue that the TEA should be expanded to reflect that broader area, which is likely to include workers from high unemployment areas.[5]

However, even if the economic models that estimate the number of jobs created could identify where workers reside - which the models do not – this is irrelevant to the rationale for TEA qualification. The proponents of the commuter traffic pattern approach confuse the broad purpose of EB-5 – to create jobs and to bring immigrant capital to the US - with the purpose of the TEA discount – a special incentive to attract EB-5 capital to the most deserving locations. When evaluating which areas are least likely to be able to attract conventional capital, it is more appropriate to focus on the location of the project site, rather than the location of the workers' residences.[6]

In any event, it would be inequitable to grant the TEA discount to those projects that are most likely to be able to attract conventional capital, as well as EB-5 capital. Moreover, it would be particularly inappropriate given that these large projects contribute most heavily to the record long visa waiting line, which arguably discourages other immigrants from investing in the EB-5 Program.

The database of 52 large-scale real estate projects that I have prepared with Professor Calderon ("our Database") illustrates the ability of the large projects to attract conventional and EB-5 capital, as well as their impact on the visa waiting line. [7] These projects represent a small fraction of the total number of EB-5 projects, yet collectively they have raised, or are in the process of raising, over $10 Billion of EB-5 capital, requiring more than 20,000 investors, which translates into visa applications for more than 5 years of the total EB-5 visas available.

The developers of these projects include the most successful developers in the U.S., if not the world. Several of these developers have been quoted as admitting that they are able to fully fund the project without EB-5 capital, and do so.[8] They introduce EB-5 capital to replace more expensive conventional capital, in many cases after all of the jobs have been created. Yet USCIS' liberal policy allows all of these jobs to be credited to the EB-5 investors, even though no EB-5 capital was deployed to fund the construction of the project.[9]

Extending TEA qualification to all locations benefits the large projects the most, especially those in affluent areas. It provides little benefit to the smaller projects, especially those that are located in areas that are less likely to attract capital – rural areas and economically distressed areas. The investor's goal is to secure the EB-5 visa and then to recover his or her capital investment. Securing the visa is largely dependent upon the proposed construction expenses being spent as that is typically the key determinant of whether the requisite number of jobs has been created. Many investors rely upon their migration agent in their home country, as well as their family members who reside in the U.S., to advise them as to which cities are most desirable and which developers are known to possess a track record of successful projects.

Given the choice to invest at the same level, a significant number of EB-5 investors opt to invest in large projects in the Gateway cities, especially those in affluent areas, by "brand-name" developers, as well as by major Chinese developers, some of which represent the investment arm of the Chinese government.[10] EB-5 investors must select a particular project as the basis for their visa applications.

For example, assume an EB-5 investor is presented with the choice to loan $500,000 to one of two condominium projects, each loan with the same interest rate and other terms. One project is located on 5th Avenue neighboring Central

Park in Manhattan and being developed by an internationally-known developer, and the other project is located in the South Bronx of New York being developed by a local developer. Of course, most investors will select the Manhattan project. The vast number of immigrants who have chosen to invest in the large projects in our Database evidence this preference. Immigrant investors are merely exercising sound business judgment in the same manner as any rational non-EB-5 investor.

The function of TEA qualification is to enable immigrants seeking to secure the EB-5 visa to invest $500,000, rather than $1 Million.[11] The TEA debate often overlooks the fact that a developer's project that does not qualify as a TEA remains eligible to obtain all of the other benefits provided to a developer by EB-5 capital, including the use of EB-5 capital at the same low cost that is available to a TEA project - significantly less expensive than conventional capital.[12]

Obviously, the challenge is for Congress or USCIS to set the differential between the TEA and non-TEA minimum investment amount at a level that will incentivize EB-5 capital to flow to deserving TEA projects, yet continue the flow to projects that do not qualify as a TEA. The objective is to avoid the Program reverting to the state that existed before 2010 when the Program was underutilized.

The Discussion Drafts circulated in December 2015 evidenced the intent by some in Congress to accept a differential as low as $200,000, a dramatic reduction from the $500,000 spread contained in the current law and a reduction of $200,000 from the $400,000 spread proposed in S. 1501.[13] Although no empirical data is available to determine the impact of the spread, it is obvious that the lower the spread, the less of an adverse impact non-TEA status will have upon a project's ability to raise EB-5 capital.

We are not aware of any academic papers that study the locations that EB-5 investors prefer. However, in late 2015, a Chinese research group prepared a report based on a survey of 284 high net worth individuals from mainland China with an average net worth of $4.6 Million (US Dollars) who have emigrated, or were considering emigrating.[14] These investors expressed a preference to invest in real estate projects in Los Angeles, San Francisco and New York over any other locations in the world.

In recent years, the most popular investment structure is for EB-5 capital to be deployed to large projects as "gap" financing (technically, "mezzanine financing").[15]

Large developers prefer to use conventional senior mortgage proceeds to fund 50% to 65% of the total project costs. The mortgage lender, the EB5 investors and the developer's other investors insist that the developer have a financial stake ("skin in the game") in the project in the range of 10% to 30% of the total project costs. Developers select EB-5 capital to fill the gap between the senior mortgage and the developer's equity because it is the least expensive source for this slice of the capital stack. This results in the optimal capital stack for the developer because the interest rate for EB-5 capital is in the range of 5% to 10% less expensive per annum than conventional, construction mezzanine financing that is available to fill this gap.

Many of the projects in our Database have total project costs of $500 Million or more. Let's examine a $500 Million project as an example. The required equity is 10% to 30% of the total, or $50 Million to $150 Million. The senior mortgage loan amount is $250 Million to $300 Million (or 50% to 60% of the total project costs). The EB-5 capital component would be in the same range as the equity, or $50 Million to $150 Million. If the developer is able to fund $100 Million of equity and attract a mortgage loan of $300 Million, this should be a good indication that this type of project does not have difficulty attracting capital.

Each of the 52 projects in our Database raised or proposes to raise a substantial amount of EB-5 capital. The EB-5 capital component is at least $100 Million for 34 of the projects and at least $200 Million for 19 of the projects. To be conservative, I will assume the EB-5 mezzanine loan rate saves the developer only 5% per annum compared to conventional construction mezzanine financing.

For example, on a $200 Million loan this results in an annual savings of $200 Million x 5%, or $10 Million per year x 5 years equal to $50 Million over the term of a 5-year loan. The migration agent and regional center affiliate (in many cases, an affiliate of the developer) in the aggregate earn an additional 4% to 6% per year, or $8 Million to $12 Million per year x 5 years equal to $40 to $60 Million over the loan term. In addition, the EB-5 investor pays an administrative fee of $50,000 to the regional center, a portion of which is paid to the migration agent.

Thus, if the commercial traffic pattern approach would enable the large-scale real estate projects in Gateway cities to qualify as a TEA, it is difficult to view this approach as a serious effort at TEA reform. It negates the original intent of Congress, provides the greatest incentive for immigrants to invest in the largest projects and in affluent areas that are most likely to be able to attract conventional capital, and thus, renders TEA status meaningless.

Question 2: Under current law, a project location in an urban area qualifies as a TEA only if it meets a standard based on the unemployment rate for the area compared to the national average unemployment rate. Is the unemployment rate the most meaningful measure to identify an area's ability to attract capital?

Short Answer: No, the income of the area's residents is the most meaningful measure. Capital providers – conventional lenders and investors – do not consider the unemployment rate of residents as a significant factor in deciding whether to invest in a particular project. Instead, real estate lenders and investors focus on the income level of the area's residents. They favor affluent areas over poor areas.

Analysis: We will approach this question from the perspective of a real estate development project because most EB-5 capital is deployed as an investment in this type of project. Two types of capital sources fund a real estate project: debt and equity. A simplistic analysis follows to illustrate the point.

Let's first focus on the debt side. The senior mortgage lender provides the bulk of the capital necessary to fund the total project costs. In evaluating whether to make a loan and if so, the terms of the loan, the lender assesses the risk posed by the potential loan, including the ability of the cash flow generated by the property to repay the loan.

The unemployment rate of those living in the neighborhood is at most a minor factor. Lenders certainly do not consider the unemployment rate of an expanded area consisting of a string of tracts that are either gerrymandered together, or that represent the commuter traffic patterns in relation to the project site. Furthermore, the unemployment rate of a tract might be low, but substantially all of the residents might be employed at minimum wage jobs. Most importantly, this is not a measure to which mortgage lenders accord great weight when evaluating a potential property to serve as security for a loan.

Instead, lenders concentrate on other economic measures of the immediate area of the project. For example, consider a residential project – for sale condominium units or rental apartments - or a hotel project - the dominant project types for which EB-5 capital is deployed. Lenders are apt to lend in an affluent area, where the resident's average or median income is high. This will tend to indicate that the project is likely to attract other high income buyers or renters. It is obvious that high income buyers or renters will seek, or be attracted to, rental or for sale units in affluent areas. Also, the existing homes in the area will provide "comparables" that will serve as a basis for projecting the estimated future cash flows or revenues of the project and the absorption rate for the sale or rental of units. This provides lenders with support to justify investment in these areas. Similarly, hotels, especially luxury hotels, will prefer to locate in affluent areas. In contrast, poor areas expose the lender to greater risk, because such areas are unlikely to attract higher income buyers or renters and will generally lack successful market-rate projects to serve as comparables.

Although lenders take into account regional factors, lenders focus on place-based measures. Real estate values are based on "location, location, location." Location is specific to the immediate area - a neighborhood or street within a census tract, not a remote location where workers may reside. One of the best locations for a residential building is a neighborhood where other residential buildings with relatively high sales prices or rentals already exist. Hotels will also prefer to locate in these area.

Similarly, developers and investors evaluating potential development sites prefer sites that are located in affluent, prime areas – neighborhoods with established business, that are economically stable and preferably growing, and where wealthy individuals reside. Obviously, the price is an important factor. Similar to the criteria applied by lenders, developers and investors accord little weight to the unemployment rate of the neighborhood.

It is significant that critics of a TEA standard based on place-based measures (a single census tract or a combination of tracts close to the project) do not focus on the high "unemployment" status of an area. Instead, they focus on the income level of the neighborhood, and contend that EB-5 incentives should not be dedicated to "poor" neighborhoods. Their focus reinforces the importance of the income level of the neighborhood over the unemployment rate for the commutable area.[16]

Furthermore, the New Markets Tax Credit Program ("NMTC") was enacted by Congress in 2000 to incentivize investment in low-income communities. It focuses on the economic condition of the residents in the single census tract in which the project is located.[17] More specifically, the basic way a tract qualifies as a low-income community is based on income of the residents - the Area Median Income ("AMI") of the tract in relation to the local (MSA or state) area median income, as well as the poverty rate. Specifically, the project tract must have an AMI of 80% or less of the relevant AMI.[18] Presumably, when Congress considered the NMTC legislation it was aware of the EB-5 unemployment standard, and determined, with hindsight 10 years later, that AMI was a preferred measure to identify the areas that are least likely to attract capital.[19]

Similarly, the Community Reinvestment Act seeks to encourage member banks to lend in poor areas and to meet the credit needs of the communities in which they operate. It identifies these areas by reference to the income level based on AMI, not to the unemployment rate.[20]

Nevertheless, I realize that even if the TEA rules are amended by Congress, the unemployment rate of a census tract might be retained as a factor to determine whether a project is located in a TEA. Based on the analysis above, I suggest that tracts in affluent areas be automatically excluded from TEA eligibility. One way to define this would be by reference to the AMI rate of the particular census tract in which the project is located. For example, if the AMI of the project tract exceeds a specified percentage, such as 120% AMI, then the project would not be eligible to be a TEA, even if a combined area met the applicable unemployment standard. Not surprisingly, the census tract in which the Beverly Hills Waldorf Astoria TEA is located exceeds a 300% AMI.

Towards the end of this article, I address an alternative TEA definition that was proposed by one of the other witnesses who testified at the Senate Hearing.

Question 3: EB-5 requires that 10 jobs be created for each EB-5 investor who invests in a project. Should 100% of the jobs generated by the project be allocated to EB-5 investors (the "100% credit"), even though EB-5 capital often represents only 10% to 25% of the total capital cost for large projects?

Short Answer: The statute requires that EB-5 capital creates 10 jobs per investor. It does not address the 100% credit. USCIS adopted the regulation that authorized this when EB-5 capital represented a much higher percentage of the total capital costs of a project. Crediting more than the proportionate share represented by the EB-5 capital is economically justified only if development and construction of the project would not proceed without EB-5 capital, a position that few project developers could likely demonstrate. In 2009, USCIS announced a policy shift that counted significantly more jobs for real estate development projects, even though the jobs may be relatively short-term in duration. Given that projects in rural areas, such as manufacturing, do not generate as many construction activity jobs, a lower job requirement for these type of projects or locations should be considered.

Analysis: The statute merely provides that 10 new jobs must be created per EB-5 investor. It does not address how the jobs are to be counted, or how they should be credited amongst the investors, including immigrant investors. The plain meaning of the statute would seem to support the interpretation that the jobs should be proportionate to the share of the total capital represented by the EB-5 capital.

However, in 1991, USCIS adopted regulations that took an expansive view, allowing all of the jobs to be credited to the EB-5 investors.[21] Several reasons may account for USCIS adoption of this position and allowing it to continue. First, in 1991, the Program was only a direct program, not a Regional Center program. Jobs under the direct program are based on creation of direct jobs (actual employees employed by the recipient of the EB-5 capital), while the Regional Center program allows economic impact models that count direct, indirect and induced jobs resulting in the "creation" of significantly more jobs. Secondly, as has been well documented, the Program remained underutilized until the Financial Crisis of 2008-2009. Thirdly, EB-5 capital represented a much larger share of the total capital stack until recently, so the 100% credit was not as disproportionate by comparison to the actual EB-5 capital deployed to the project. When the regulations were adopted mezzanine financing was not a popular financing tool, and did not become a popular investment structure for EB-5 projects until after the Financial Crisis, particularly since 2012.

Not as well publicized is that in 2009, USCIS adopted two policies that represented a shift in its position. It allowed construction-activity jobs to count, and allowed large projects (those lasting at least 2 years) to count even more jobs. These construction-activity jobs, which tend to be of relatively short duration, serve as the bulk of the jobs created for most real estate development projects in today's market. [22]

These policy changes resulted in EB-5 capital to be more readily available to a wide range of real estate development projects. Simply stated, under some of the economic models, construction-activity jobs are deemed created by spending money on construction. A multiplier factor is applied to total construction expenditures to arrive at the total number of jobs created. The multiplier factor varies depending on a number of inputs, including the project's geographic location. A lower factor applies to projects located in rural areas.

The advantage to real estate projects in affluent urban areas is accentuated by the type of project financing used for these projects. At the Senate Hearing, House Judiciary Committee Chairman Goodlatte pointed out the egregious case where EB-5 capital represented only 18% of the total project costs, yet it was credited with 100% of the jobs. However, this small percentage of EB-5 capital represents the norm for large real estate projects.

As explained in my response to Question 1, EB-5 capital often funds only 10% to 30% of the total project costs, with the bulk of the financing provided by banks and other conventional mortgage lenders. Since all of the jobs created by the project are allocated to the EB-5 investors, the lesser the amount of EB-5 capital sought for a project, fewer EB-5 investors are involved and thus, fewer total jobs are required to meet the EB-5 job requirement. Our Database includes many real estate projects that created at least 1-1/2 times more jobs than the number required by EB-5, with some projects creating 2 to 3 times the number of required jobs.

The statute requires that EB-5 capital must "create" 10 jobs for U.S. workers. If the statute were strictly applied, a project would be required to demonstrate a causal link between the EB-5 capital and the job creation. Instead, the regulations implicitly assume in all cases that the EB-5 capital created all of the jobs.

A more logical presumption would be that the EB-5 capital be credited for a proportionate share of the jobs, based on the relative capital that it represents. A greater percentage is justified only if the project would not proceed to be funded and built, and hence the jobs created, without the infusion of EB-5 capital. Given that in many real estate projects EB-5 capital represents a small slice of the capital stack and other sources of conventional financing (such as construction mezzanine financing and preferred equity) are relatively plentiful, this might be a challenge for most projects to demonstrate. Furthermore, the 100% credit is especially inappropriate where the EB-5 capital is brought into the project to replace more expensive capital after the project is fully funded and all of the jobs have been created by those other capital sources. This has become increasingly common since USCIS announced its liberal bridge financing rules in the May 2013 Policy Memorandum.

However, for policy reasons, to promote the continued use of EB-5 capital as a mainstream tool for real estate development and as a real job creator for many projects, Congress may choose to allow the 100% credit to continue.

I do recommend that the playing field be leveled for certain types of projects and locations that do not have the advantages offered by EB-5 capital to real estate development projects.

Rural projects have more difficulty qualifying for mortgage loans because the real estate market and other businesses in general in these rural areas do not readily attract capital. These projects do not have the luxury of using EB-5 capital as gap financing. They tend to require EB-5 capital to fund a greater share of the total project costs to start a project. Thus, a much stronger case could be made for the 100% credit for rural projects.

According to USCIS, 160 industries, mostly in the manufacturing sector, do not create as many jobs under the economic impact models as real estate development projects.[23] Consideration should be given to reduce the number of jobs required for these projects and locations, especially if these projects do not generate as many jobs for EB-5 purposes as real estate development projects because by their nature they do not "create" construction-activity jobs,. Further investigation is needed. The extent to which it should be reduced requires further study to determine the appropriate number of jobs required based on the type of project and project location.[24]

Additional Notes:

NMTC Approach to TEA Qualification: In his testimony at the Senate Hearing, Dan Healy of Civitas Capital Group proposed that a version of the NMTC standards be applied to a single census tract to determine whether a project qualifies as a TEA, rather than base TEA qualification on the "area" meeting a high unemployment standard (the "NMTC Approach"). [25] His proposal would extend this requirement to rural areas, even though under the current EB-5 law rural areas automatically qualify as a TEA.

As briefly explained below, the NMTC Approach is worth exploring as a standard for TEA qualification in urban areas. However, it is not suitable for rural area projects.

The NMTC Approach appropriately takes into account important economic conditions of the project tract that are not taken into account under the current EB-5 law which focuses solely on the unemployment rate. The approach also limits the area, resulting in less distortion of the economic conditions at the project site that occurs when the area is expanded to include more remote tracts.

This is a variation on one of the alternative TEA definitions that surfaced in the December Discussion Drafts. I prefer that definition because it is more flexible than the NMTC Approach proposed at the Senate Hearing. One of the December Drafts allowed a project site to qualify as a TEA applying less restrictive AMI and poverty rate levels. It also allowed a project tract that did not meet the NMTC standards to qualify as a TEA if a bordering tract met the economic thresholds. This recognizes that economic development in one tract could stimulate economic development in the neighboring tract. [26]

Those who might object to this approach should be aware that many more census tracts might qualify under a standard based on NMTC than under a high unemployment standard. For example, as explained in our "TEAs under EB-5 2.0" paper, 43% of the tracts in Manhattan and 67% of the tracts in Brooklyn meet at least one of the NMTC economic thresholds.[27]

Rural areas, without having to meet an unemployment standard, are unable to attract significant amounts of EB-5 capital. The December Discussion Drafts continued this approach. Adding an economic hurdle, such as the one suggested by the NMTC approach, would only exacerbate this problem.

The existing NMTC Program imposes an economic hurdle upon rural projects that contributes to the difficulty in raising NMTC capital for rural projects. For example, a New Market Tax Credit Program Evaluation prepared in 2013 at the request of the US Department of the Treasury found that only 17% of the NMTC projects were located in rural (technically nonmetropolitan) areas.[28] The report identifies multiple reasons why economically distressed rural area projects have difficulty raising capital compared to urban area projects. "These include fewer banks to compete for borrowers; predominately small and locally owned banks that often employ conservative lending practices; limited investment opportunities;; insufficient population density to support investments; small deal sizes; lack of supporting infrastructure; [and] lack of understanding about how equity works for venture capital investments." The NMTC Program awards additional points and created a rural project set aside to further incentivize investments in these areas.

Furthermore, although the NMTC Approach is worth further consideration, the proposal to limit the differential between the minimum investment required for a TEA and non-TEA project location should be rejected. This minor spread would render the TEA definition meaningless. It is unlikely to influence the investment decision of any immigrant, especially the high net worth individuals who are able to afford an EB-5 investment. Obviously a much wider spread than $50,000 is warranted to make TEA status meaningful. As stated earlier, the challenge is to arrive at the appropriate spread.

Jay Peak: The focus of this Hearing was TEA reform. The day after the Hearing, the SEC announced the commencement of an enforcement action arising out of alleged fraud relating to the Jay Peak Resort in Vermont, one of the most prominent EB-5 projects.[29] This case, and three other SEC actions commenced towards the end of 2015[30], have a common thread: diversion of EB-5 investors' funds. The alleged misappropriations occurred before the funds reached escrow, or after release from escrow but before invested in the project.

I suggest that the Integrity bill introduced in the Senate and House be amended to include a requirement that EB-5 funds be tracked by an independent third-party administrator, preferably in real time so that any violations can be detected immediately.[31] This requirement should commence with the escrow period and continue throughout the immigration process until the funds are returned to the investor. An audit requirement might also be appropriate. These requirements might be more important than any other protections or safeguards mandated by the Integrity bills.

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[1] Gary Friedland is a Scholar-in-Residence at the NYU Stern School of Business.

[2] My Written Testimony is available at: https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Friedland%20Testimony.pdf. My Written Testimony contains more detailed citations for some of the points set forth in these endnotes.

[3] After the Senate Hearing, Jeffrey Carr, President and Senior Economist of Economic & Policy Resources, informed me that in his experience 10% to 15% of project locations do not qualify as a TEA.

[4] If the proponents of this approach have not yet tested its impact on large-scale EB-5 projects, then they should explain how this approach would work and the proposed boundaries of the TEA in various examples. The 52 large-scale projects in Our Database (referenced in endnote 7 below) could be tested to see whether these locations would continue to qualify under this approach.

[5] See S. 2115; Also see Senator Schumer's remarks at the Senate Hearing.

[6] This point is further developed in my response to Question 2 of this article.

[7] The two databases are contained in two papers I co-authored with Professor Jeanne Calderon of NYU Stern School of Business. The first database is contained in our "Roadmap" paper dated May 22, 2015 and is available at : http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf; The more recent database is contained in our March 29, 2016 paper and is available at: http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Capital%20Project%20Database%20-%20Revised%20and%20Expanded.pdf

[8] See pages 3 to 7 of my Written Testimony. Supra at endnote 2 above.

[9] 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

[10] See the Database contained in our March 29, 2016 paper. Supra at endnote 7.

[11] Technically, TEA status also affects the investor's ability to qualify for one of the 3,000 visas set aside for investment in a NCE which will create employment in a TEA, pursuant to INA §203(b)(5)(B).

[12] EB-5 benefits include: (1) low interest rates – at 5% to 10% lower than conventional loans on the market; (2) a nonrecourse construction loan with terms that tend to be more lenient than conventional construction loans; (3) a relatively long period for a construction loan, longer than conventional; (4) no need to prove that the jobs were created by the use of the EB-5 capital; (4) construction-activity jobs count even though these jobs may be relatively short term; (5) EB-5 investors credited with 100% of the jobs created by the project even though EB-5 capital may represent only 10% to 30% of the total capital; and (6) use of conventional capital sources to fully fund the project's total cost and introduce EB-5 capital to take out the capital after the project is completed and the jobs are created, yet credit is given to the EB-5 investors for all of the jobs.

[13] This is explored in detail in our "TEAs under EB-5 2.0" paper, 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

[14] I have neither verified the independence of this research group nor the validity of the methodology of the study, including the sample size and how many of the individuals are, or have been, investors in the EB-5 Program. http://www.hurun.net/EN/ArticleShow.aspx?nid=15690.

[15] See pages 48 and 49 of our Roadmap paper. Supra at endnote 7.

[16] http://blogs.wsj.com/washwire/2016/04/13/chuck-schumer-says-eb-5-developers-wont-build-in-poor-neighborhoods/

[17] IRC §45D

[18] See IRC §45D(e)

[19] The NMTC Program does take into account high unemployment to determine whether a tract is "severely distressed" or meets a "higher distressed" criteria.

[20] 12 U.S.C. 2901 (1977); https://www.ffiec.gov/cra/ Middle income tiers take into account unemployment.

[21] 8 C.F.R. §204.6(g)(2), 56 FR 60910, published November 29, 1991.

[22] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations entitled "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and form I-829 Petitions; Adjudicator's Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)" dated December 11, 2009 and Memorandum from Neufeld entitled "EB-5 Alien Entrepreneurs – Job Creation and Full Time Positions" dated June 17, 2009. Also see the discussion in our Roadmap paper. Supra at endnote 7.

[23] See Government 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.

[24] Alternatively, to the extent the multiplier factor used to determine job creation is based on project location, consideration should be given to fixing the factor at the same level throughout the U.S., irrespective of the project's location. However, feedback should be sought from economists as to the feasibility of this adjustment and the likely impact this might have on the number of jobs deemed to be created.

[25] https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Healy%20Testimony.pdf

[26] For a more in-depth discussion of this alternative, see pages 21 to 30 of our "TEAs under EB-5 2.0" paper. Supra at endnote 12.

[27] See page 41 of our "TEAs under EB-5 2.0" paper. Supra at endnote 12.

[28] http://webarchive.urban.org/UploadedPDF/412958-new-markets-tax-final.pdf. The CDFI Fund that administers the NMTC awards points to further incentivize NMTC investment in rural areas.

[29] https://www.sec.gov/news/pressrelease/2016-69.html

[30] Yang: https://www.sec.gov/litigation/complaints/2015/comp23414.pdf
Zhong: http://www.sec.gov/news/pressrelease/2015-263.html
Feng: http://www.sec.gov/news/pressrelease/2015-274.html

[31] S. 2415 and H.R. 4530.