UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLORIDA EB5 INVESTMENTS, LLC
1571 S. Atlantic Ave. Unit 205,
New Smyrna Beach, FL 32169

Plaintiff,

v.

Civil Action No. _____

CHAD WOLF,
in his official capacity as
Acting Secretary of the
Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

KENNETH T. CUCCINELLI,
in his official capacity as
Acting Director of United States
Citizenship & Immigration Services
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

EDIE PEARSON,
in her official capacity as
Policy Branch Chief of the
Immigrant Investor Program Office
131 M Street NE, 3rd Floor,
Washington, DC 20529

Defendants.

COMPLAINT
INJUNCTIVE RELIEF SOUGHT

Plaintiff Florida EB5 Investments, LLC ("**EB5 Investments**") seeks declaratory and injunctive relief against Defendants, the Acting Secretary of the Department of Homeland Security ("**DHS**") Chad Wolf, the Acting Director of the United States Citizen & Immigration

Services ("**USCIS**") Kenneth T. Cuccinelli, and the Policy Branch Chief of the Immigrant Investor Program Office Edie Pearson, each in their official capacities (collectively "**Defendants**") based on the following allegations.

NATURE OF THE ACTION

1. At issue in this case is whether a federal agency – DHS – has the right to promulgate a regulation that changes the requirements for a statutory-based visa program while ignoring data demonstrating the harmful economic impact of such a rule.

2. The EB-5 Immigrant Investor Program ("**EB-5**", the "**Program**", or the "**EB-5 Program**") is an effective and essential program that provides an opportunity for foreign nationals and their families to apply to become permanent United States residences when they invest in American businesses that create jobs for American workers.

3. The Program was originally created in 1990 to encourage job creation and foreign investment in American businesses. It gained substantial popularity after developers had difficulty obtaining bank loans in the wake of the 2008 recession. Foreign investment through the EB-5 Program allowed large-scale construction projects to continue despite the recession, which led to substantial economic development and job growth.

4. Prior to last week, the Program provided that foreign investors could invest $1 million, or $500,000 in certain high unemployment or rural areas, in a business and if that investment created ten jobs, then the investor could be eligible for a visa.

5. On November 21, 2019, DHS issued a final rule amending its regulations for EB-5 to change the Program (the "**Rule**"). *See* Ex. 1, *Final Rule of EB–5 Immigrant Investor Program Modernization*, 84 Fed. Reg. 35750 (July 24, 2019). This Rule proposed many changes to the Program, the most salient of which appear to be: (i) significant increases in the requisite investment levels; and (ii) a new targeted employment area ("**TEA**") designation process that

eliminates the input of the individual states in designating such areas in which investments are made.

6. This Rule will have a severe economic impact on regional centers like Plaintiff EB5 Investments that facilitate the process for foreign nationals to invest in American businesses through the Program. In addition, the significant increase in the requisite investment levels will deter foreign investors from using the Program, which will undermine the worthy policy goals of the Program.

7. DHS enacted the Rule despite available data in support of the severe economic impact on regional centers and the United States generally. Instead, the Rule claims that the impact is unknown, and blindly enacts the rule changes anyway.

8. In addition, DHS goes beyond the scope of its authority when it usurps individual states' authority to determine TEAs within its own borders. Nothing in DHS's enabling statute or other statutory authority permits DHS to make determinations so far outside its expertise. This determination and policy goal for fostering economic development is one that has traditionally been within the province of the states, and a cookie-cutter nationwide standard cannot possibly account for the unique nuances of each state's economically depressed areas.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331, which confers original jurisdiction over all civil suits arising under the Constitution and the laws of the United States, and 28 U.S.C. § 2201 (authorizing declaratory relief), 5 U.S.C. § 601 *et seq*. (Regulatory Flexibility Act), and 5 U.S.C. § 701 *et seq*. (judicial review provisions of the Administrative Procedure Act).

10. Venue is proper pursuant to 28 U.S.C. § 1391(e).

PARTIES

11. Plaintiff EB5 Investments is a Florida limited liability company that operates as an EB-5 Regional Center ("**Regional Center**"). Regional Centers are organizations designated by USCIS that sponsor capital investment projects with investments from applicants to the EB-5 Program.

12. Defendant Chad Wolf is the Acting Secretary of DHS. Wolf is sued only in his official capacity. His official residence is Washington, D.C. and the Rule is issued out of Washington, D.C.

13. Defendant Kenneth T. Cuccinelli is the Acting Director of USCIS, a division within DHS. Cuccinelli is sued only in his official capacity. His official residence is Washington, D.C. and the Rule is issued out of Washington, D.C.

14. Defendant Edie Pearson is the Policy Branch Chief of the Immigrant Investor Program Office within USCIS. Pearson issued the Rule and is sued only in her official capacity. Her official residence is Washington, D.C. and the Rule is issued out of Washington, D.C.

BACKGROUND OF THE EB-5 VISA PROGRAM

15. The EB-5 Program was established as part of the Immigration Act of 1990. Congress established the Program to stimulate the U.S. economy by giving foreign entrepreneurs the opportunity to invest in U.S. communities that are economically disadvantaged in exchange for residency.

16. The EB-5 Program gained popularity after the 2008 recession when project developers could not obtain traditional bank loans and sought out other sources of funding. In the last decade, the Program received recognition among foreign entrepreneurs as an excellent opportunity to live and work in the United States.

17. To be considered for permanent residency, a foreign investor must invest at least $1 million in a new commercial enterprise in the United States that will create at least ten full-time jobs for United States citizens or legal aliens. *See* 8 U.S.C. § 1153(b)(5).

18. This initial $1 million investment was set by statute, although the statute states that the Secretary of Homeland Security, "in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified . . . ." 8 U.S.C. § 1153(b)(5)(C). Before this Rule, DHS had never acted on such authority, however, and the current standard investment minimum remained at $1 million. *See* 8 C.F.R. § 204.6.

Targeted Employment Areas

19. The Immigration and Nationality Act ("**INA**") provides a reduced investment threshold for depressed areas of the country, stating that "in the case of investment made in a targeted employment area, [the Secretary of Homeland Security may] specify an amount of capital required . . . that is less than (but not less than 1/2 of) the [standard investment amount] . . . ." of $1 million. 8 U.S.C. § 1153(b)(5)(C)(ii). In sum, the minimum investment for an EB-5 investor who invest in such targeted employment areas ("**TEA**") was relaxed from $1 million to $500,000.

20. The statute defined TEA to be "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)," and it defines "rural area" to be "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." *See* 56 Fed. Reg. 60897 (1991) at 8 C.F.R. § 204.6(e); 8 U.S.C. § 1153(b)(5)(B).

21. The determination as to whether an investor was required to make the reduced investment of $500,000 or the "standard" investment of $1 million was largely contingent upon an individual state's determination as to what areas within its borders constitute "high unemployment areas." *See* 56 Fed. Reg. 60897 (1991) at 8 C.F.R. § 204.6(i). The original implementing regulations acknowledged the States' role in this process:

> 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 the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic subdivision is a high unemployment area.

Id.

22. Historically, 97% of all investments by foreign investors are made in TEAs at the reduced levels of $500,000, thus rendering this $500,000 level a *de facto* standard." EB–5 Immigrant Investor Program Modernization, 82 Fed. Reg 4747 (January 13, 2017).

RULEMAKING AUTHORITY

23. As a general matter, the "Secretary of Homeland Security [is] charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

24. The primary mission of the DHS is, in part, to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland . . ." *See* 6 U.S.C. § 111(b)(1)(F).

25. Congress has directed the Secretary of DHS to "establish such regulations ... and

perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Id.* § 1103(a)(3).

26. Section 203(b)(5) of the INA makes visas available to immigrants investing in new commercial enterprises in the United States that will benefit the U.S. economy and create full-time employment for not fewer than ten United States workers. *See* 8 U.S.C. § 1153(b)(5)

27. Section 204(a)(1)(H) of the INA mandates individuals to file petitions with DHS when seeking classification under section 203(b)(5). 8 U.S.C. § 1154(a)(1)(H)

28. Section 216A of the INA places conditions on permanent residence obtained under section 203(b)(5) and authorizes the DHS Secretary to remove such conditions for immigrant investors who have met the applicable investment requirements, sustained such investment, and otherwise conformed to the requirements of Sections 203(b)(5) and 216A. *See* 8 U.S.C. § 1186b.

29. Section 610 of the Judiciary Appropriations Act of 1993, Pub. Law 102-395, authorizes the designation of regional centers for the promotion of economic growth and authorizes the DHS to set aside visas authorized under section 203(b)(5) of the INA for individuals who invest in regional centers. *See* 8 U.S.C. § 1153.

30. As stated above, the Secretary of Homeland Security, "in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified . . . ." 8 U.S.C. § 1153(b)(5)(C).

THE NEW EB-5 RULE

31. On July 24, 2019, DHS, acting through the USCIS, published a rulemaking entitled "EB-5 Immigrant Investor Program Modernization" in the Federal Register, 84 Fed. Reg. 35750, which implemented the Rule. The Rule took effect on November 21, 2019.

32. The Rule drastically changed several aspects of the EB-5 Program.

33. First, the Rule increases the minimum investment amount from $1 million to $1.8 million, representing an 80 percent increase in the minimum investment. *See* the Rule at 8 C.F.R. § 204.6(f)(1).

34. Second, the Rule increases the minimum investment amount in a TEA from $500,000 to $900,000, another 80 percent increase in the minimum investment. *See* Rule at 8 C.F.R. § 204.6(f)(2).

35. Third, the Rule eliminates state sovereignty in the determination of TEAs. 84 Fed. Reg. at 35752; Rule at 8 C.F.R. § 204.6(i). Instead, DHS will alone determine the designation of a "high unemployment" area, usurping the role of the state to determine economically depressed areas within its own borders. It states:

> **(i)** Special designation of a high unemployment area. USCIS may designate as an area of high unemployment (at least 150 percent of the national average rate) a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business, and may also include any or all census tracts directly adjacent to such census tract(s). The weighted average of the unemployment rate for the subdivision, based on the labor force employment measure for each census tract, must be at least 150 percent of the national average unemployment rate.

4 Fed. Reg. at 35752; Rule at 8 C.F.R. § 204.6(i).

36. USCIS's new nationwide TEA standard makes clear that DHS will severely restrict its designation of TEAs within metropolitan areas. Cities and towns with a population of 20,000 or more *within* a metropolitan statistical area ("**MSA**") (as designed by the Office of Management and Budget) can no longer qualify as a TEA, regardless of the city or town's rate of unemployment. The practical effect of this rule is that developers who seek to fund projects using EB-5 investments will be locked out of building in larger cities that contain economically depressed areas, unless they can find foreign investors willing to invest $1.8 million in a project.

Since the lower TEA requisite investment has historically been *de facto* standard for EB-5 investors, the Rule disincentivizes economic development in cities and towns within MSAs. To obtain the benefit of the lower investment requirement, foreign investors must now fund projects in non-urban areas, viability of which is riskier than developments in urban areas.

EFFECT OF RULE ON PLAINTIFF AND ECONOMY

37. With the higher investment requirement mandated by the Rule, the Program will lose popularity with foreign investors. Ex. 2, Declaration of W. Cummins ("**Cummins Decl.**") ¶¶ 9-10. Developers will choose to abandon relying on the Program to fund its anticipated projects, and some projects will never begin because developers will not be able to receive funding.

38. Plaintiff EB5 Investments relies on the Program to sustain its business. Cummins Decl. ¶ 5. The company's business model collects fees from its project developers ("**Affiliates**") that partner with the regional center and foreign investors who make an investment to these Affiliates. *Id.* ¶ 5. The more popular the Program is, the more profit EB5 Investments generates from Affiliates and investors alike.

39. EB5 Investments has already seen its Affiliates abandon the Program for funds or abandon their projects entirely after the mere announcement of the Rule prior to the Rule taking effect. Cummins Decl. ¶ 9. Several of its Affiliates have pulled out of the Program, foregoing future opportunity for EB-5 funding, and have refunded money to foreign investors. *Id.* Some of EB5 Investments' Affiliates have abandoned their projects entirely. *Id.*

40. EB5 Investments will continue to see depressed profits once the rule takes effect. A majority of the projects it sponsors will stop raising money from the Program because of the anticipated attrition of foreign investors' interest. *Id.* ¶ 10. Many Affiliates will simply walk

away from their pending EB-5 projects, refund existing investors' money, and pull out of the Program entirely. *Id.* As Affiliates and investors lose interest in the Program, EB5 Investments will not have the revenue to continue operations. *Id.* ¶ 11.

41. In addition to the effects on regional centers, the Rule's effects on the U.S. economy will be severe. The Program has generated billions of dollars of investment in the U.S. economy in the past decade. *See* Ex. 3, Declaration of J. Carr ("**Carr Decl**.") ¶ 4. In an unconstrained environment, studies have shown that the EB-5 Program creates hundreds of thousands of new jobs annually, and can account for roughly 6 percent of all job gains. *Id.* ¶¶ 4, 5. Since th Rule constrains the Program, these economic gains would suffer or disappear completely.

DHS EITHER IGNORED OR PURPOSEFULLY DISREGARDED ECONOMIC IMPACT OF THE RULE

42. USCIS issued the Rule despite a purported lack of data available to assess the economic impact of increased investment requirement and the new TEA designation process.

43. USCIS recognized the limitations of its data when it first proposed the Rule. Before settling to increase the minimum investment amount for TEAs to $900,000, USCIS proposed the minimum investment amount for TEAs to be $1.3 million. However, in recommending $1.3 million, USCIS stated the following:

> In summary, DHS believes that the proposed increase in the minimum investment amount would bring the nominal investment amounts in line with real values and increase the investment amounts in areas where it is needed most. However, DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. DHS does not have the data or information necessary to attempt to estimate such mitigating effects. It is reasonable to conclude that the higher investment amounts could deter some investors from EB-5 activity and therefore, negatively impact regional center revenue in some cases, although the magnitudes and net effects of these impacts cannot be estimated. However, it is also possible that the higher investment amounts could attract additional capital overall and stimulate projects to get off

> the ground that otherwise might not. Due to the complexity of EB-5 financial arrangements and unpredictability of market conditions, DHS cannot forecast with confidence how many projects could be affected by the increased investment amounts through a change in the number of individuals investing through the EB-5 program. However, it is possible that some projects could be forgone and that others would proceed with a higher composition of non-EB-5 capital, with resultant changes in profitability and rates of return to the parties involved. An overall decrease in investments and projects would potentially reduce some job creation and result in other downstream effects.

See Notice of Proposed Rulemaking, 82 Fed. Reg. 4738, 4758 (Jan. 13, 2017) (emphasis added).

44. Even after a two-year comment period to collect relevant studies, USCIS still claimed that it lacked the requisite data to assess the Rule's economic impact. USCIS made many statements in the explanation of the Rule that reference and discuss its purported limitations in this regard. For example, DHS admits that:

a. "DHS made a good faith effort to analyze the impacts of this rule. DHS reviewed numerous studies and requested comment from the public but *received no credible data or information that would provide a more accurate estimate of the impacts*." Rule, at 35,791, Col. 1;

b. "*DHS cannot predict with accuracy* changes in demand for the program germane to the major categories of revisions that increase the investment amounts and reform the TEA designation process. *DHS has no way to assess* the potential increase or reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore quantitatively estimate any impacts* concerning job creation, losses or other downstream economic impacts driven by these major provisions." *Id.* at 35,792, Col. 2-3;

c. "As discussed further in the FRFA, *DHS cannot estimate the exact impact* to small entities." *Id.* at 35,792, Col. 3;

d. *Potential* reduced numbers of EB-5 investors *could* prevent certain projects from moving forward due to lack of requisite capital." *Id.* at 35,793, Col. 3.

e. "However, *DHS is unable to estimate* the potential reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore estimate any impacts concerning* job creation, losses or other downstream economic impacts driven by the investment amount increases." *Id.* at 35,797, Col. 1;

f. *DHS therefore cannot estimate* how many past investors would have been unable or unwilling to have invested at the new amounts, and hence *cannot make extrapolations to potential future investors and projects* . . . However, the net effect on regional center costs is *not something DHS can forecast with accuracy*." *Id.* at 35,797, Col. 2;

g. "There are numerous ancillary services and activities linked to both regional center and direct investments, such as, but not limited to, business consulting and advising, finance, legal services, and immigration services. However, *DHS is not certain* how the rule will affect these services. Similarly, *DHS does not have information* on how the revenues collected from these types of activities contribute to the overall revenue of the regional centers or direct investments." *Id.* at 35,797, Col. 3;

h. "DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. *DHS does not have the data or information necessary to attempt to estimate* such mitigating effects . . . Due to the complexity of EB–5 financial

arrangements and unpredictability of market conditions, *DHS cannot forecast with confidence* how many projects would be affected by the increased investment amounts through a change in the number of individuals investing through the EB–5 program." *Id.* at 35,798, Col. 1;

i. "DHS is not able to predict how many investors and projects will be affected, nor can we predict the impact to the capital available for projects." *Id.* at 35,798, Col. 1-2.

j. "While DHS has determined, via the preceding analysis, that a significant share of regional centers may be considered small entities, DHS does not have enough data to determine the impact that this rule may have on those entities. Therefore, while many regional centers may be small entities, DHS cannot determine whether this rule will have a substantial impact, positive or negative, on those small entities." *Id.* at 35,806.

(emphases added).

45. DHS even admits that increased requisite investments *could* have a deterrent effect stating: "DHS acknowledges that the higher investment amounts could deter some portion of investors." *See* Rule, 84 Fed. Reg. at 35,788. However, DHS qualifies this admission, noting that "in the absence of objective evidence on the impacts of the proposed increases on demand, DHS believes that it is reasonable to increase the minimum investment amounts to account for inflation for the reasons stated elsewhere, and to make future inflation adjustments based on the initial amount set by Congress in 1990." *Id*.

46. Despite its admissions that it lacked reliable data to determine the economic effects of the Rule, DHS asserted without evidence that the increased investment requirement

and new TEA designation process are unlikely to have a substantial adverse effect on investment or affect the economy. *Id.* at 35,802. It relied on this bald assertion, ignoring its own admissions to the contrary, in its justification to enact the Rule.

47. DHS claimed that the Rule would not have a substantial effect of more than $100 million on the economy to prevent classifying the Rule as a "major rule," which requires additional procedural hurdles for DHS, such as Congressional approval. By stating that this Rule does not have a substantial effect on the economy, DHS was attempting to avoid heightened scrutiny by Congress.

48. Moreover, DHS's claims that there was no available data to assess the economic effects was simply false. DHS also ignored a plethora of available data demonstrating the economic effects of the Rule. It did so because these studies undermine DHS's preferred finding that the Rule would not have a substantial effect on the economy.

49. One such available study prepared by Economic & Policy Resources Inc. and presented to DHS examined the benefits that the pre-Rule EB-5 Program, using lower investment levels, had on the United States economy (the "**EPR Study**").[1]

50. The EPR Study estimated that during FY2014-2015, an unconstrained EB-5 Regional Center Program's economic benefits to the U.S. economy were nearly $11 billion, which represented 2% of all foreign direct investment net flows into the U.S. economy for that period.

51. In addition, the EPR Study found that more than 335,000 jobs were created during that same period, accounting for roughly 6% of all jobs gains for that time.

52. The EPR Study also found that the Program resulted in nearly $55 billion, or

[1] *See* Ex. 3, Carr Decl. & accompanying exhibit; *See Assessment of the Economic Value and Job Creation Impacts of EB-5 Project Capital Investment Activity Under the EB-5 Regional Center Program*, ECONOMIC & POLICY RESOURCES, INC. (Feb. 28, 2019).

3%, added to U.S. economic output and more than $23 billion in labor income.

53. In addition, trade group Invest In The USA provided a detailed analysis (the "**IIUSA Study**") to DHS that echoes EPR's conclusions.

54. The IIUSA Study noted an IMLAN Group conclusion that capital investment through the Program contributed over $34.5 billion in foreign direct investment to the United states at no cost to the taxpayer. At the time of the notice of proposed rulemaking, the Program contributed 2.6 billion to the U.S. gross domestic product and created or supported 33,000 American jobs during FY 2010-2011.[2]

55. Many comments to the proposed rule also directed DHS to a government-sanctioned study by the U.S. Department of Commerce (the "**DOC Study**") from January 2017 to support commenters' position that the new Rule would harm participation in the Program. The DOC Study concluded that that the Program created almost 170,000 American jobs between FY2012 and FY2013. [3] It further concluded that, for that same period, more than 11,000 immigrant investors provided $5.8 billion in capital, equating to roughly 35% of the total investment ($16.7 billion) for 562 EB-5 related projects active in FY2012.

56. These studies show that in an unconstrained environment, the EB-5 Program provides significant gains to the economy at little to no cost to the United States. The comments provided data demonstrating that the proposed rule change would reverse these economic benefits.

57. These studies only represent some of the available presentations to the agency demonstrating the economic impact of the Rule. DHS did not articulate an explanation for

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[2] *See EB-5 Economic Impact*, INVEST IN THE USA, http://iiusa.org/eb5-economicimpactmap/. IIUSA also provided a comment to DHS during the comment period that came to similar conclusions.

[3] *Estimating the Investment and Job Creation Impact of the EB-5 Program*, U.S. DEPT. OF. COMM., https://www.commerce.gov/sites/default/files/migrated/reports/estimating-the-investment-and-job-creation-impact-of-the-eb-5-program_0.pdf.

excluding these; on the contrary, it feigned ignorance about the availability of reliable data. DHS chose to charge ahead with its Rule despite evidence of the Rule's harmful effects.

CLAIMS

Count I
The Rule is Violative of the Administrative Procedure Act ("APA") Because it is Arbitrary and Capricious (5 U.S.C. § 706(2)(A))

58. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 – 57, above.

59. DHS failed to conduct a complete assessment of the economic impact of the Rule during the rulemaking process. It did not consider relevant data put forth by commenters and other agencies that described the economic consequences of enacting the rule.

60. By ignoring these studies, DHS failed to examine the relevant data and articulate a satisfactory explanation for increasing the minimum investment requirement and changing the TEA designation standards in the final Rule. The Rule's reasoning failed to include a rational connection between data showing substantial adverse effects on the economy or a lack of reliable data regarding such effects on one hand, and the choice to enact an increased minimum investment threshold and restrictive TEA designation standards on the other hand.

61. Thus, DHS did not adequately consider an important aspect of the problem, the substantial effects on the economy, and offered an explanation for its decision that ran counter to the evidence before it. Accordingly, its decision to raise the minimum investment in the Rule was arbitrary and capricious. in violation of 5 U.S.C. §§ 706(2)(A), and therefore, must be vacated.

WHEREFORE, the Rule should be vacated.

Count II
The Rule Is Violative of the APA Because DOL Failed to Properly Perform an RFA Analysis
(5 U.S.C. § 601 *et seq*.)

62. Plaintiff incorporates by reference the allegations set forth in ¶¶ 1 - 61, above.

63. EB5 Investments is a small business as defined by the Regulatory Flexibility Act (the "**RFA**") and Small Business Administration.

64. The Rule is subject to the RFA because it has an impact on small businesses.

65. The RFA requires agencies, as part of the rulemaking process, to conduct an initial and then a final regulatory analysis of the economic impact that a putative rule will have on small entities, to set out the less onerous alternatives considered by the agency, and to discuss the agency's rationale for declining to adopt these less costly alternatives.

66. DHS failed to conduct an RFA analysis with any sort of diligence. It admits that it did not have enough data to make an assessment on regional centers or the projects developers they support. DHS claimed it could not estimate the impact on regional centers because it is "not sure how many, if any, investors will be deterred from the EB-5 program due to the increased investment amounts and the new TEA requirements." 84 Fed. Reg. 35,806. As stated, DHS feigns ignorance despite data confirming that there will be investor attrition from the Program.

67. Thus, DHS did not conduct a proper RFA analysis because it made no determination on the Rule's effect on small businesses like regional centers. It vastly understates that the only impact will be costs associated with individuals familiarizing themselves with the rules, totally approximately $400. This assertion does not adequately assess the impact of the Rule.

68. Therefore, the Rule is in violation of 5 U.S.C. § 601 *et seq.* for DHS's failure to

complete an adequate RFA analysis.

WHEREFORE, the Rule should be vacated.

Count III
The Rule Is Violative of the APA Because DHS's Attempts to Designate TEAs Exceeds Its Statutory Authority
(5 U.S.C. §§ 706(2)(C))

69. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 - 68, above.

70. The APA requires agencies to include "reference to the legal authority under which the rule is proposed[.]" 5 U.S.C. § 553(b)(2).

71. The Rule does not reference any statute that expressly authorizes the DHS to designate TEAs. Instead, DHS states that its rulemaking authority stems from the primary mission of DHS to: " . . . **(F)** ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland . . ." 84 Fed. Reg. 35,750, *citing* 6 U.S.C. § 111(b)(1).

72. "Economic security" is not defined in the statute, but is limited under the statute to ensure that economic security "is not diminished by efforts, activities, and programs aimed at securing the homeland." This is supported by DHS's other statutory missions, which all entail protection of the homeland in some form or fashion.[4] The foregoing power, therefore, contains a common thread of security and protection.

73. Therefore, DHS's mission as it pertains to "economic security" is not to foster

[4] These other mission objectives include: "**(A)** prevent terrorist attacks within the United States; **(B)** reduce the vulnerability of the United States to terrorism; **(C)** minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; **(D)** carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning; **(E)** ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress . . . **(G)** ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland; and **(H)** monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking." 6 U.S.C. § 111(b)(1).

economic development, as with TEA designations, but rather to secure and protect the homeland. Determining which geographic areas in the United States are rural or deserving of economic development based upon contiguous census tracts does not fall within any of the foregoing powers.

74. Instead, the expertise and powers needed to make such determinations have already been bestowed by Congress upon other governmental agencies, including, but not limited to, the Department of Labor and the individual states.

75. In addition, DHS creates a national standard for TEA designation that runs afoul of the plain statutory language of the INA. The INA defines a TEA as either a rural area *or* an area experiencing high unemployment. The INA does not limit qualification for a high-unemployment TEA by population size or whether the city is included within an MSA. The Rule, however, limits high-employment TEAs to larger cities and towns (exceeding 20,000 in population) only if they are *outside* an MSA. Therefore, DHS exceeded its statutory authority by limiting the Program in a way Congress did not intend.

76. As a result, DHS's Rules designating the geographic areas in the United States that are considered TEA's was "in excess of . . . authority" in violation of 5 U.S.C. §§ 706(2)(C), and therefore, must be vacated.

WHEREFORE, the Rule should be vacated.

Count IV
The Rule Violates the 10th Amendment

77. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1-76, above.

78. By removing states from considerations of whether to designate certain localities as TEAs, DHS has, in essence, directed foreign investment to state cities and towns of its choosing.

79. This constitutes an unconstitutional usurpation of the states' power to conduct their own government and foster economic development within their respective borders.

80. The concept of federalism is one that is rooted in our nation's history. *Federalist Paper* No. 45 explains the concept:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiation, and foreign commerce....The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state.

The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

81. The Tenth Amendment essentially codifies this federalism principle, stating "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

82. States and localities have significant information about their own employment needs and are best equipped to make the fact-specific and specialized determinations of where to direct and encourage investment.

83. DHS's predecessor recognized and endorsed this role for the states when it originally promulgated the current TEA designation process:

> "[w]ith respect to geographic and political subdivisions of this size . . . the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government."

56 Fed. Reg. at 60,897-01.

84. Therefore, the Rule is violative of the 10th Amendment.

WHEREFORE, the Rule should be vacated.

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing Complaint, Counts I-IV, Plaintiffs pray that the Court:

1. Enter a temporary restraining order and preliminary injunction, pending a decision on the merits, enjoining the Defendants from implementing the rulemaking of DHS entitled "EB-5 Immigrant Investor Program Modernization", which was published in the Federal Register, 84 Fed. Reg. 35750.
2. Enter a declaratory judgment as to Counts I, II, III, and IV that the Rule is invalid, and enter an order vacating the Rule and permanently enjoining Defendants from implementing it;
3. Enter a declaratory judgment as to Count II that DHS failed to undertake the required Regulatory Flexibility Act analysis and a permanent injunction to prohibit Defendants from implementing the Rule or otherwise giving effect to the Rule until such time as the head of the agency with proper rulemaking authority discharges his or her responsibilities under the Regulatory Flexibility Act to the satisfaction of the Court, and retain jurisdiction of this case to ensure compliance with the Regulatory Flexibility Act;
4. Award Plaintiffs their costs and expenses, including reasonable attorney's fees whether under the Equal Access to Justice Act or otherwise, and expert witness fees; and
5. Award such further and additional relief as is just and proper.

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Respectfully submitted,

/s/ Michael R. Sklaire

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