Is the Investor Visa Program an Underperforming Asset?

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Written Testimony of Matt Gordon

Chief Executive Officer, E3 Investment Group

Chairman Goodlatte, Ranking Member Conyers and other members of the committee, thank you for allowing me testify on this important topic.

Introduction

My name is Matt Gordon and I am Chief Executive Officer of E3 Investment Group. E3 Investment Group is a New York City based 21st century private equity firm whose mission is the harmonious synthesis of economic and social value creation. E3's mandates - "The three E's" are: Employment – to create well-paying permanent jobs; The Environment – to conduct our operations in a manner that minimizes our negative impact in the industries in which we focus and maximizes the positive social value creation in the communities of which we are a part; and Earnings – so we can ultimately do well for our investors, ourselves and for the communities in which we operate. We focus exclusively on the 'direct' side of the EB-5 program as all of our investors' capital creates more than ten jobs each, so there is no need for us to utilize the econometric labor creation calculation afforded to regional centers. E3 Investment Group's flagship, of which I am Chairman, is E3 Cargo, an Indianapolis, Indiana based trucking company that receives 100% of its equity financing from EB-5 investors. We are in the process of expanding to Southaven, Mississippi.

I am also one of the founding members of the More American Jobs Alliance, or MAJA. MAJA's constitutional principle is to maximize the social impact and societal value for America from the jobs created by virtue of the EB-5 Immigrant Investor Program. MAJA advocates a re-focusing of the EB-5 program on the creation of actual jobs for American workers and in particular the creation of jobs in true economically distressed and rural areas. MAJA also believes that enhanced investor integrity and national security measures are needed for the long term health and viability of the program.

By way of background, I was born raised and educated in New York State and I earned my undergraduate degree in Economics and Policy Analysis from Cornell University. I earned my law degree from the University of Pennsylvania School of Law. I live in Westchester County, NY and E3 Investment Group's headquarters is in Manhattan, New York.

I began my career as a wall street corporate lawyer and then went on to run the US division of a Swiss Telecommunications company before becoming an investment banker and management consultant. Since coming into the EB-5 program I have done a significant amount of policy and academic work. I am the editor of the EB-5 legal treatise entitled, "The EB-5 Book". In 2014, I helped the lead researchers of Initiative for a Competitive Inner City with their work related to using EB-5 capital for distressed urban communities. This work culminated in an EB-5 policy forum held at the Harvard Kennedy School of Government at which they released a white paper that featured E3 Cargo.[1] I also participated in a White House sponsored policy forum on the JOBS Act, as EB-5 is the original form of crowd funding.

Three years ago, after an increasing volume of inquiries from overseas investment banking clients about EB-5, I started looking at the program. I made several immediate observations. Firstly, it was an odd

[1] A copy of the White Paper presented at the event held at the Kennedy School on July 1, 2014 entitled, *Increasing Economic Opportunity In Distressed Urban Communities* by Kim Zeuli and Brian Hull, can be found at the following link: http://www.icic.org/ee_uploads/publications/ICIC_EB5Impact_Report.pdf (and is included herewith). The paper features several EB-5 projects that create jobs in distressed urban areas.

little part of the capital markets with 95% of all the capital was flowing into a single asset class, namely real-estate. Secondly, the way the deals were structured were pretty bad for investors. Finally, the program didn't seem to be doing a very good job delivering on its policy premise of job creation, especially in light of the way targeted employment areas (TEAs) were being manipulated.

I saw an opportunity to build a much better mousetrap where we could achieve market share by offering something that was designed with investors' interests at the forefront. At the same time, I saw a pathway to achieve the level of social impact investing without making sacrifices to achieve both social ends and profits. At the beginning, I was agnostic to sector. Everyone else had their project and wanted to jam EB-5 capital into it. We started from the premise that the program could afford us the opportunity to generate a tremendous amount of positive social impact, while simultaneously generating a large amount of wealth. We underwrote a variety of sectors and arrived at trucking as the best. $500,000 finances 10 trucks, which means 10 truck drivers. Trucking companies naturally are located in economically distressed areas. E3 Cargo is located in Marion County Indiana, which is entirely a TEA, as is the single census track in which the office sits. Our new office in Southaven, Mississippi also sits in a single census tract TEA. No gerrymandering is needed. Our thesis was if it was better for investors we could create a win-win and carve out our niche. We also believe that it is important to fulfil the spirit of the policy intent and the law, by maximizing social value from our efforts, even if the laws and regulations would allow otherwise.

I am here before you because I am Wall Street and I am Main Street. I am urban center and I am the rural community. I am here to help get the EB-5 program back to its policy roots, as I fully and passionately believe that the EB-5 program has the potential to be the crown jewel of American Immigration policy. Immigration has always been a central theme in my life, and all our lives. My guess is that most people, if not everyone in attendance today, hails from a family that at one point crossed our border as an immigrant. My wife lived the American dream, coming to America 25 years ago with $50 in her pocket and today she is a partner in a major national law firm. Together, we have walked the path of the immigrant. I know the fear of sitting across from an immigration officer, with our family's fate in their hands, with all our hopes, our desires, our dreams, hanging in the balance. I am continually inspired by those who seek lawful permanent residence through the EB-5 program. They can choose among dozens of other countries' immigration programs. They are often talented and accomplished in their businesses and careers. We are fortunate to have among the world's best and brightest as new immigrants who choose live and work among us, helping renew and rebuild our great nation as generations of immigrants have before them.

Is the Investor Visa Program an Underperforming Asset?

The apt title of this hearing questions whether the EB-5 program is underperforming. The answer is unfortunately a resounding yes. The EB-5 program consistently fails to maximize the social value created for the green cards that our country is investing in the process. Congress had the wisdom to create the 5th employment based immigration preference as part of the Immigration Act of 1990. The policy basis was to motivate immigrant investors to invest capital in the United States in order to create jobs. For this social benefit, America, in return, granted these investors lawful permanent residency, commonly known as green cards. The goal of the program is not to enrich real estate sponsors or others, like myself, who use EB-5 as a capital formation vehicle for their businesses. That is a pleasant by-product, but it should never be seen as the goal or something worthy of protecting or perpetuating for its own sake. The goal of the program is to create jobs for US workers. An important part of the program was the creation of the policy behind 'targeted employment areas' or TEAs. TEAs are supposed to turbo-charge the social benefit created by the resulting job creation by focusing the activity in economically distressed areas. Simply put, job creation in economically distressed areas is more valuable to our society. The mechanism to incentivize this behavior was to lower the needed investment threshold from $1 million to $500,000 for EB-5 based investments that are located in a TEA.

TEA policy has been a failure, because it is not only possible but relatively easy to get any location in America designated as a TEA. Absent a few notable exceptions, including, for example, our urban-based E3 Cargo, CP Homes, which is developing an assisted living facility for senior citizens in Athens, Texas, a rural community of 13,000 people, and the rural-based Ligtt Regional Center that is developing a critical piece of national infrastructure, the vast majority of all TEA qualified projects are not located in distressed urban areas or rural communities. Despite the policy goal of wanting to help distressed urban and rural communities who desperately need the additional investment capital, virtually all EB-5 capital goes to prosperous wealthy areas. Increasingly, the market is becoming dominated by mega-projects located in the most affluent areas, such as the Hudson Yards project in Manhattan, NY. The root of the issue is the States' ability to define the geographical contours of a TEA, with USCIS only able to verify the unemployment calculations, but not challenge the overall bounds. Generally, States quickly learned to be as permissive as possible in an attempt to attract ever greater amounts of EB-5 capital.

Senator Leahy's statement from the Senate Judiciary Committee Meeting on February 2nd, 2016, summarizes the point succinctly:

> **I am particularly troubled by the opposition to reform of the Targeted Employment Areas. Their abuse undermines a core objective of the EB-5 Regional Center Program—to spur growth and create jobs in underserved areas where investment capital and jobs are often scarce. I do not suggest that affluent areas should not benefit from EB-5. They should. But they should not qualify as distressed areas. In many cases, these projects would be pursued regardless of EB-5, calling into question whether the EB-5 capital is creating any jobs at all.**

To be clear, I am not an enemy of regional centers. I believe there are many contexts where the econometric calculus of indirect and induced job creation is needed to fairly account of the benefit produced by the economic activity. There are some genuine questions over whether accepted input-output econometric models used by Regional Centers and accepted by USCIS in fact predict the kind of long term structural (value maximizing) employment envisioned by the policy behind the EB-5 program. That is a matter of important, but technical nuance. Hopefully, as Regional Center reauthorization is contemplated, that topic can be more thoroughly investigated. What is clear and undeniable is that the way TEAs are administered by USCIS is broken.

There are those who believe that TEAs are working fine. Their argument is premised on a labor mobility model to support the idea that TEAs are fulfilling their policy objective if the project (built in a low unemployment area) draws workers who live in high unemployment areas. To frame the debate, its either about helping the area or the people who may or may not come into the area to work. I will submit, that a geographically anchored framework must be the determinative factor. Structural investment in an area has the premise to effect structural economic change to that area and its population. Look at Times Square in New York. In the 1980's it was a dangerous place. I would avoid it during the day, let alone at night. Today, it is a vibrant and safe community. What it took was development capital in the area, operating business in the area. Back in the 1980s, if all the money were allocated based on labor mobility models advocated by some for TEA determination in the name of compromise, none of the money would have made it to Times Square. The money would have gone to the existing fancy neighborhoods in Manhattan, and the workers, who travelled there, maybe from Times Square where they lived, would have probably moved out as soon as they could have afforded it. Labor is always mobile, areas are not.

A TEA is a targeted area and so it should remain. Some frame the debate as Urban vs. Rural. I submit that it is really about helping the geographical areas that have as opposed to the areas that have-not. If the idea is to give places like Indianapolis, Memphis, Southaven and the Bronx not only a chance but an advantage in competing against projects located in LA, Manhattan's West side and Miami for job creating EB-5 dollars. There is no question that most investors want to invest in prime real estate projects in America's leading cities. For those of us focusing our efforts in cities, towns and rural communities that have fallen on hard times, our job is much harder. The overwhelming majority of all potential investors with whom I interact turn me down very early in the process precisely because we are not the tallest building in the richest neighborhood. The advocates for regional centers suggest that sticking to the policy premise would be the death knell of the program. Nothing could be further from the truth. If congress adopts a definition of TEA consistent with the original policy intent, it would look something like a single census tract (or a very small cluster or tracts around one[2]), or recognized political area of organization (town, township, village, county, borough or city) that has more than 150% of the national unemployment rate or any rural area.

There would be a proportion of projects that would continue to qualify for the lower investment rate. Others, in prime non-distressed areas would have to raise capital at higher price. The vast majority of investors with whom I and other EB-5 sponsors interact have significant assets, well beyond what is needed to support an investment at $1 million or $1.2 million. If you took all the projects that currently operate in truly economically distressed areas, it would undoubtedly account for far less than 10% of the EB-5 capital inflows. For the price sensitive investors, these projects would fully capitalize leaving the rest with only projects that offer investments at the higher investment threshold. The regional centers are just like the auto makers who cried when seat belts and then airbags were mandated. The market simply adjusted. So too will the EB-5 market adjust and in all likelihood in a manner that is consistent with the policy goal to maximize the impact on the communities that need it, rather than maximizing the number of projects that qualify for the benefit. If we get this right, maybe some of the regional centers will give Indy, Memphis and the Bronx a second look and some of their time, effort and capital will flow there. Wouldn't that be something!

In S. 1501 and the various drafts that were negotiated during December, several different approaches to TEAs were explored and structured. According to a very thorough analysis prepared by NYU Professor

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[2] The use of census tracts as the relevant political geographical is highly expedient as the needed unemployment data is readily available, but somewhat random as tracts often have no real relationship to the boundaries of communities and populations in which they sit. Marion County Indianapolis is a perfect example as there are locations, all of which are essential in the same industrial based area, that sit in one tract that is high unemployment as opposed to an immediately contiguous tract, which is not high unemployment by a small margin. Accordingly, allowing a small clustering of tracts around a high unemployment tract can help a TEA more accurately reflect the geographical boundaries of the community compared to a single tract approach.

Jeanne Calderon and Scholar-in-Residence Gary Friedland[3], each of the new approaches to TEAs would have had the effect of reducing the number of projects that qualified for the reduced investment rate. Of course, this is precisely the point. To change the rules to simply allow non-economically distressed areas to qualify as TEAs would simple subvert the policy goals by another name and reduce the potential positive social impact from the EB-5 program.

In the end, the question is simple. If Congress wishes to maximize the social impact of the EB-5 program, then it must provide for an incentive for both investors and sponsors to create jobs in truly economically distressed areas. This incentive can take the form of a material reduced investment amount, and/or, it can take the form of segregating a number of visas for investors in 'true' TEAs. The later approach would have the effect of significantly reducing the time it takes for mainland Chinese born investor to receive their lawful permanent residence in the current retrogression environment.[4]

Related areas with respect to future legislative changes in the EB-5 program

An important topic to keep in mind with respect to any changes to current EB-5 law or regulations is the issue of retroactivity and its alter ego – grandfathering. The EB-5 program, while a pathway to immigration is an investment program. While there is some precedence for retroactive changes to rules in the immigration context, such actions with respect to investors should be undertaken very carefully. In an investment program of a modern economic system, in particularly the leading economic system of the world, the rules of the game are typically considered immutable post-facto. During the run up to the expected changes in December, Investors filed I-526 petitions in tremendous numbers. This has the potential to create a significant backlog for issuing visas, especially in China, for years to come. A retroactive effective date for investor I-526 filings to earlier in 2015 may have the effect of fixing that problem, only to then cause investors everywhere to lose confidence in the entire program itself. Who in the future might be willing to commit $500,000 or more, for at least 4 to 5 years, and move one's family, only to face the risk that the rules can be changed at a future point rendering the past actions meaningless? Congress is now faced with the hard decision between reducing the visa backlog via retroactive rules or maintaining investor confidence in the system albeit one with long delays for those from China.

It is important to note that the any protections should be thought of in the context of investor protection, not sponsor protection. If Congress, in the new law, allows recent filers to benefit from the rules prior to the passage of the next law, Projects or sponsors should not be given similar deference. In the months leading up to December's flurry of attempted legislative action, a huge number of Regional Centers filed exemplars hoping that previously proposed grandfathering provisions[5] would insulate them from coming reform. If projects are grandfathered, it would effectively delay for years the effectiveness of any reforms. Many project sponsors complain that if they are not grandfathered they would be cut off from EB-5 funds mid-stream, which could imperil current investors. I believe there is a critical distinction between a project related risk, which all investors accept, and a risk of post-facto changing the system, which they do not.

[3] "What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data", Working Draft, latest revision dated January 25, 2016, is available at http://www.stern.nyu.edu/sites/default/files/assets/documents/What-TEA-Projects-Might-Look-Like-under-EB5-2.0-Alternatives-with-Maps-and-Data_0.pdf

[4] Congress can also consider mandating a faster processing time for those investing in TEAs, regardless of the investors' national origin.

[5] See Senate Bill S. 1501 introduced by Senators Grassley and Leahy.

Another topic is the proposed integrity measures, which are a series of national security and investor protection measures, that were included in S. 1501, the various drafts from December, and to a lesser extent in the stand alone legislation proposed by Senators Flake, Cornyn and Schumer.[6] Strong integrity measures are essential for the long-term viability of the EB-5 program. As an investment program, albeit a unique one, instilling a bedrock of confidence in the marketplace is a basic predicate for the proper functioning of the market. To maximize the value of the EB-5 program as a nation asset, the integrity of the marketplace must be sacrosanct. As an immigration vehicle, it is also critical to ensure that the EB-5 program cannot be used by foreign governments in any way that may subvert our national interests, otherwise, the economic value of the EB-5 program, whether maximized or not, will be irrelevant.

[6] S.2415: EB-5 Integrity Act of 2015