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## Repaving the Path for the Immigrant Investor

Nathan Quach

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# REPAVING THE PATH FOR THE IMMIGRANT INVESTOR

*By Nathan Quach\**

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## INTRODUCTION

The United States has colloquially been known as “the Land of Opportunity.” Individuals and families from all over the world flock to the United States each year for the chance to start a life here. In 2022, the United States granted lawful permanent residency (“LPR”) to over one million people,<sup>1</sup> with 13.9% of the total population comprising of immigrants.<sup>2</sup> Potential immigrants and aspiring citizens have a variety of avenues for obtaining permanent residency in the United States. But even with all of these options, immigration can hardly be considered “easy,” as each avenue is not without its own set of unique challenges.

One such avenue is the employment-based Immigrant Investor Program (“EB-5”), which allows foreign nationals who invest a certain amount of capital into a job-creating, U.S. company for a set period of time to obtain LPR, or a “green card.”<sup>3</sup> When simplified, some consider EB-5 akin to “buying” a green card, and to the foreign nationals who can afford it, EB-5 is enticing for that reason.<sup>4</sup> “Intended to create jobs for U.S. workers and to infuse new capital into the U.S.,” EB-5 seems like it is mutually beneficial to the American economy and to the foreign nationals who can afford to invest.<sup>5</sup> At least twenty-four other countries, besides the United States, implement immigrant investor programs, so the idea is not entirely novel.<sup>6</sup> In theory, it would bring foreign money and newly-created jobs into the country, and with the foreign nationals obtaining residency here, the invested money would ideally stay here.

The history of EB-5, however, has told an entirely different story. Due to decades of fraud and corporate governance issues, EB-5 has still not reached its potential as a mainstream investment or immigration vehicle.<sup>7</sup> From its conception in 1990 to the 2008 Housing Crisis, EB-5 was in the news largely for its rampant scandals.<sup>8</sup> While changes to the program have been rolled out over the years due to the Securities and Exchange Commission (“SEC”) taking

1. OFF. OF HOMELAND SEC. STATISTICS, 2022 YEARBOOK OF IMMIGRATION STATISTICS (2022).

2. Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (2024), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

3. *About the EB-5 Visa Classification*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (July 28, 2022), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classification>.

4. Ron Nixon, *Program That Lets Foreigners Write a Check, and Get a Visa, Draws Scrutiny*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/16/us/politics/program-that-lets-foreigners-write-a-check-and-get-a-visa-draws-scrutiny.html>.

5. Annie Anjung Lin, *Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors*, 18 CHAP. L. REV. 527, 528 (2015).

6. *International Immigrant Investor Programs*, EB5 INVESTORS (2024), <https://www.eb5investors.com/eb5-basics/international-immigrant-investor-programs/>.

7. *History of the EB-5 Program*, EB5 INVESTORS (2024), <https://www.eb5investors.com/eb5-basics/history-of-eb5/> [hereinafter EB5 INVESTORS].

8. Brooke A. Masters, *2 Accused of Immigration, Investment Fraud*, WASH. POST (Aug. 11, 2000), <https://www.washingtonpost.com/archive/local/2000/08/12/2-accused-of-immigration-investment-fraud/b7478173-023a-402d-b4c8-6ea377dfc7d7>.

a greater interest in the 2010s, EB-5 remains loosely regulated, and allegations of fraud and breaches of fiduciary duties continue now into 2024.

With Congress set to vote to renew the program in 2027, by examining EB-5's history, infrastructure, and current state, I hope to make a case for EB-5's renewal and discuss what changes I believe are necessary to increase the program's reliability and effectiveness.

## HISTORY OF EB-5

The history of EB-5 can be separated into three distinct eras: (1) 1990 to 2008; (2) 2009 to 2021; and (3) 2022 to present day. The amount of regulation and SEC attention increased with each subsequent era, but not without a share of controversies over the years. By discussing the history of each era, this note argues that, despite the issues, existing amendments to EB-5 have not addressed all the potential weaknesses affecting the program's reliability.

### A. 1990 - 2008

Congress introduced the original EB-5 Immigrant Investor Program in 1989 and signed it into law with the Immigration Act of 1990.<sup>9</sup> The Immigration and Naturalization Service ("INS")—now the United States Citizenship and Immigration Services ("USCIS")—oversaw the program.<sup>10</sup> When the program was first introduced, EB-5 required "alien entrepreneurs" to establish a new commercial enterprise, invest \$1 million into the enterprise, and with the \$1 million investment, create ten full-time U.S. jobs.<sup>11</sup> If the new commercial enterprise impacted a "targeted employment area" ("TEA"), then the investment required \$500,000 instead.<sup>12</sup> Because the foreign national was required to establish the new commercial enterprise, they were also required to take a more active role over the management and policy-making decisions of the enterprise.<sup>13</sup> If the foreign national did so and filed all of the necessary forms, then after a few years, they would be granted their green card.<sup>14</sup> This method of entrepreneurship to receive a green card would later be referred to as "direct investing."<sup>15</sup> Because the program required foreign nationals to maintain a more active role in the enterprise, EB-5 was limited to entrepreneurs and was much less accessible than it is today.<sup>16</sup>

In an effort to make EB-5 more accessible and investor-friendly, Congress passed the 1993 Appropriations Act, which created the Immigrant Investor Pilot Program ("IIPP").<sup>17</sup> The IIPP allowed foreign nationals to invest

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9. Immigration Act of 1990, S.358, 101st Cong. (1990).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Immigration Act of 1990, S.358, 101st Cong. (1990).

15. *Id.*

16. *Id.*

17. *Id.*

into “regional centers.”<sup>18</sup> Regional centers, as they were known in 1993, were new commercial enterprises that would indirectly create ten full-time jobs rather than employing ten full-time employees itself.<sup>19</sup> With the IIPP, foreign nationals could invest \$1 million or \$500,000 into the regional centers, which would then indirectly lead to job creation as determined by “reasonable methodologies.”<sup>20</sup> This method, later known as “indirect investing,” was seen as much more attractive to potential immigrants because the investor did not have to personally take such an active role in the enterprise to guarantee the creation of ten jobs.<sup>21</sup> The 1993 Appropriations Act greatly expanded EB-5’s accessibility. And as a result, EB-5 became known colloquially as the “investor’s visa.”<sup>22</sup> Shortly afterward, the first publicized incidents of fraud emerged.<sup>23</sup>

In 1995, officials from the INS—now the USCIS—created a company called AIS that acted as an intermediary between INS and foreign investors.<sup>24</sup> Because AIS was owned by INS insiders and INS was charged with overseeing EB-5, the Government Accountability Office (“GAO”) accused INS of giving AIS preferential treatment in INS’s interpretation of EB-5.<sup>25</sup> GAO launched a probe against the INS to investigate.<sup>26</sup> Though, ultimately, no one was charged, the probe “sabotaged the residency applications of hundreds of immigrant investors and hundreds more of their family members.”<sup>27</sup> The first major fraud convictions came from a U.S. company called InterBank Group (“Interbank”).<sup>28</sup> From 1996 to 2000, Interbank collected \$21 million from 335 investors.<sup>29</sup> Defendants James Geisler and James O’Connor had not held investor money in escrow pending INS approval and had instead intermingled the investor money with their own.<sup>30</sup> Investors were not able to meet the investment prerequisite because their money was not being invested.<sup>31</sup> Due to a lack of oversight over EB-5, InterBank was able to make false claims to investors, file fraudulent reports to the INS, and fraudulently collect investor money for a span of five years.<sup>32</sup> As a result, almost all of the investors lost their

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18. *Id.*

19. *EB-5 Immigrant Investor Pilot Program*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Feb. 28, 2011), [https://www.uscis.gov/sites/default/files/document/presentations/EB-5\\_Immigrant\\_Investor\\_Pilot\\_Program.pdf](https://www.uscis.gov/sites/default/files/document/presentations/EB-5_Immigrant_Investor_Pilot_Program.pdf).

20. *Id.*

21. *Id.*

22. *Id.*

23. Department of Defense Appropriations Act, H.R. 5504, 102nd Cong. (1993).

24. James Kelleher, *Special Report - Overselling the American Dream Overseas*, REUTERS (Dec. 22, 2010), <https://www.reuters.com/article/idUSTRE6BL2LH/>.

25. *Id.*

26. *Id.*

27. *Id.*

28. *United States v. O’Connor*, 321 F. Supp. 2d 722 (E.D. Va. 2004).

29. *Id.* at 725.

30. *Id.* at 724.

31. *Id.*

32. *Id.*

investments.<sup>33</sup> Following this scandal, EB-5 was almost completely halted for years following the convictions with investors' application statuses left in "limbo."<sup>34</sup> Consequentially, INS approved forty-four conditional applications approved in 2001 and sixty-nine in 2002.<sup>35</sup>

As evidenced by the EB-5 statistics between 2001 and 2008, usage and reliability in the program was at an all-time low. According to the USCIS Immigration Statistics Yearbook, of the 703,827 people who gained LPR in 2003, only sixty-five people gained LPR through the EB-5 program.<sup>36</sup> In that same year, the U.S. government was permitted to issue 12,179 EB-5 green cards.<sup>37</sup> So, of the 12,179 EB-5 green cards available to issue, only sixty-four were issued.<sup>38</sup> Not only was the EB-5 program not mainstream, but it was also drastically underutilized.

In response to this drastic dip in usage, Congress created the Investor and Regional Center Unit ("IRCU") of the USCIS.<sup>39</sup> The IRCU was intended to be an oversight unit of the USCIS specifically designed to oversee EB-5 regional centers.<sup>40</sup> At this time, Congress also merged the duties of the INS into the USCIS.<sup>41</sup> While not a significant change, it was a step in the right direction toward providing regulatory oversight. EB-5's usage slowly increased over the next few years until it experienced a major renewal of interest in 2008.<sup>42</sup>

## B. 2008 - 2021

In 2008, the United States faced the worst financial crisis since the Great Depression, creating the opportune moment for EB-5's resurgence. Because of the Great Recession, domestic capital investment was low, and without capital investments, the economy was stagnating. Scarce domestic capital investment, in combination with "a rise in the number of wealthy investors in developing countries," created the perfect opportunity for EB-5 investment.<sup>43</sup> EB-5 was originally created in 1990 to respond to that era's own recession.<sup>44</sup> EB-5 was intended to stimulate the economy with foreign money when

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33. Courtney Creedon & Jinhee Wilde, *Regional Center Retrospective*, EB5 INVESTORS (Apr. 20, 2016), <https://www.eb5investors.com/magazine/article/rc-retrospective/> [hereinafter Creedon & Wilde].

34. *Id.*

35. *Id.*

36. OFF. OF HOMELAND SEC. STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS (2003), <https://ohss.dhs.gov/topics/immigration/yearbook/2003>.

37. *Id.*

38. *Id.*

39. EB5 INVESTORS, *supra* note 7.

40. *Id.*

41. *Id.*

42. OFF. OF HOMELAND SEC. STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS (2008), <https://ohss.dhs.gov/topics/immigration/yearbook/2008>.

43. Audrey Singer, *Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development*, BROOKINGS (2014), <https://www.brookings.edu/articles/improving-the-eb-5-investor-visa-program-international-financing-for-u-s-regional-economic-development/>.

44. EB5 INVESTORS, *supra* note 7.

domestic financing was scarce. So, there was no better time for EB-5 to spur interest than the 2008 financial crisis.<sup>45</sup>

Since 2008, EB-5's usage has exploded. From 2008 to 2009, the number of green cards granted through the program nearly tripled with 1,360 in 2008 to 3,688 in 2009.<sup>46</sup> The USCIS leveraged this momentum by implementing more changes to support EB-5 regional centers.<sup>47</sup> In 2010, the USCIS introduced Forms I-924 and I-924A which provided for greater reporting requirements from prospective and operating regional centers.<sup>48</sup> The I-924 Form clarified filing requirements for regional center designation, improved the quality of regional center applications, and better documented regional center eligibility for the program.<sup>49</sup> The I-924A Form was the regional center's annual reporting document.<sup>50</sup> I-924A required active regional centers to report: (1) the amount of capital investment; (2) the regions and industries in which capital investment was made; and (3) the number of jobs created or maintained.<sup>51</sup> Approximately ninety-one percent of EB-5 investors invest through regional centers.<sup>52</sup> By adding these minor changes, the USCIS showed that it recognized the attractiveness of regional centers and that the reliability of this investment avenue needed to be improved. The I-924 and I-924A Forms did not present wide-sweeping changes to the EB-5 program. The Forms had a narrow scope that only affected regional centers and would not prevent wrongdoers from making false reports. However, they represented a juncture for EB-5 to turn toward the mainstream as the USCIS was finally making changes to improve oversight and regulation.

Around this time, investors and entrepreneurs were not the only ones gaining a newfound interest in the Immigrant Investor Program. Prior to 2010, because EB-5 was administered by the USCIS, the SEC viewed EB-5 issues as immigration law issues. However, upon realizing that EB-5 essentially involved the sale of securities, the SEC began aggressively prosecuting bad actors after 2010.<sup>53</sup> In 2013, the SEC and the USCIS jointly issued an Investor Alert, cautioning investors for regional center fraud and improper suspicious solicitations.<sup>54</sup> The Investor Alert warned investors to beware of regional

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45. Muzaffar Chishti & Claire Bergeron, *Recession Breathes New Life into U.S. Immigrant Investor Program*, MIGRATION POL'Y INST. (2009), <https://www.migrationpolicy.org/article/recession-breathes-new-life-us-immigrant-investor-visa-program> [hereinafter Chishti].

46. OFF. OF HOMELAND SEC. STATISTICS, 2012 YEARBOOK OF IMMIGRATION STATISTICS (2012), <https://ohss.dhs.gov/topics/immigration/yearbook/2012>.

47. *Introducing Form I-924 and I-924A*, EB-5 BLOG (2010), <https://blog.lucidtext.com/2010/06/>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Chishti, *supra* note 40.

53. Kim Riley, *EB-5 Regional Centers require improved oversight, immigration lawyer says*, TRANSPORTATION TODAY (2020), <https://transportationtodaynews.com/news/18964-eb-5-regional-centers-require-improved-oversight-immigration-lawyer-says/>.

54. U.S. SEC. & EXCH. COMM'N, INVESTOR ALERT: INVESTMENT SCAMS EXPLOIT IMMIGRANT INVESTOR PROGRAM (2013), [https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia\\_immigranhtml](https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranhtml) [hereinafter U.S. SEC. & EXCH. COMM'N].

centers or any individual that guarantees returns or a green card from their investments. The SEC followed this public statement by bringing a multitude of EB-5 prosecutions. From 2013 to 2015, the SEC “filed nineteen cases involving EB-5 offerings, almost half of which included fraud allegations.”<sup>55</sup>

One of the first major SEC filings was the *Securities and Exchange Commission v. A Chicago Convention Center, LLC*, case in 2013.<sup>56</sup> In *A Chicago Convention Center*, the defendant, Anshoo Sethi, owned both Intercontinental Regional Center Trust of Chicago (“IRCTC”) and A Chicago Convention Center (“ACCC”).<sup>57</sup> IRCTC was a USCIS designated regional center, and ACCC was the job-creating enterprise.<sup>58</sup> Through IRCTC, Sethi fraudulently sold over \$145 million in securities of ACCC to investors with the promise that ACCC was a legitimate job-creating enterprise under EB-5.<sup>59</sup> Sethi solicited and convinced approximately 250 Chinese investors into wiring IRCTC \$500,000 plus \$41,000 in administrative fees.<sup>60</sup> While the funds were promised to be kept in an escrow account until the project was approved by the USCIS, the USCIS’s approval of ACCC was obtained through fraudulent filings.<sup>61</sup> Following the USCIS’s approval, the funds were released to Sethi’s personal bank account in Hong Kong and misappropriated.<sup>62</sup> The SEC alleged that Sethi violated Sections 17(a) and 10b-5 of the Securities Act of 1933, which both seek to prevent fraud.<sup>63</sup> Sethi and the SEC eventually settled the case, with Sethi agreeing to return all the money taken from investors.<sup>64</sup> *A Chicago Convention Center* presents a rare instance of investors getting their full investments returned when there is an instance of fraud or misappropriation.

While *A Chicago Convention Center* does represent the start of the SEC’s enforcement against bad actors, the case also alludes to the Immigrant Investor Program’s glaring vulnerabilities. Firstly, the fraud occurred although IRCTC was a USCIS-approved regional center. The SEC and USCIS state in the 2013 Investor Alert that USCIS regional center approval does not mean that the USCIS or any government body approves or endorses the investments offered by the business.<sup>65</sup> At the time, prospective regional centers were required to file Form I-924 to receive regional center approval.<sup>66</sup> However, Form I-924 only required descriptions of “hypothetical” projects, so the bar

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55. *Testimony on the EB-5 Immigrant Investor Program: Hearing Before the U.S. S. Comm. on the Judiciary* (2016) (statement of Stephen L. Cohen, Associate Director, Division of Enforcement).

56. U.S. Sec. & Exch. Comm’n v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905 (N.D. Ill. 2013).

57. *Id.* at 907.

58. *Id.*

59. *Id.*

60. *Id.* at 908.

61. *Id.*

62. *Id.*

63. *Id.* at 907.

64. U.S. Sec. & Exch. Comm’n, Enforcement & Litigation: SEC v. A Chicago Convention Center, LLC, et al. 961 F. Supp. 2d 905 (N.D. Ill. 2013).

65. U.S. SEC. & EXCH. COMM’N, *supra* note 49.

66. Creedon & Wilde, *supra* note 29.



for approval was not very stringent.<sup>67</sup> This lax reporting requirement may have led investors into a false sense of security. This is evidenced by the necessity of the SEC and the USCIS's statement in the 2013 Investor Alert. Secondly, it was lawful for both the regional center and the job-creating enterprise to be owned and operated by the same individual. Sethi owned both IRCTC and ACCC, which allowed him the freedom to effectuate his scheme.<sup>68</sup> It was not unlawful for Sethi to own both the regional center and the job-creating enterprise in which the regional center was investing in, but it was unlawful for Sethi to make knowingly false statements-of-fact.<sup>69</sup> Whether or not there is disclosure, ownership of both the regional center and job-creating enterprise could lead to potential conflicts of interest and self-dealing.

In 2017, the SEC charged a New York-based immigration lawyer, Hui Feng, with defrauding immigrant investors and acting as unregistered brokers.<sup>70</sup> Section 15(a) of the Exchange Act requires that those who solicit securities must be registered with the Financial Industry Regulatory Authority ("FINRA").<sup>71</sup> The defendant in this case employed referral partners in China to encourage foreign nationals to make EB-5 investments.<sup>72</sup> The referral partners gave potential investors Feng's contact information.<sup>73</sup> Feng then referred the potential investors to a regional center.<sup>74</sup> To conclude that Feng and his associates were acting as unregistered brokers, the SEC argued that by marketing EB-5 investments in China, Feng was marketing securities.<sup>75</sup> This required the court to officially recognize EB-5 investments as securities, which the court did.<sup>76</sup> Over the years, as indirect EB-5 investments became more popular, it became common practice for EB-5 investors, on direction of the regional center, to put their money into a limited liability partnership.<sup>77</sup> The limited liability partnership was a new commercial enterprise in which a general partner would invest the foreign national's money into a job-creating entity.<sup>78</sup> The court found that because Feng was essentially soliciting the investors to purchase ownership in a limited liability company, that Feng was also soliciting securities.<sup>79</sup> Feng argued that the EB-5 offerings were not securities because the investors had no expectation of return and only

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67. *Id.*

68. *A Chi. Convention Ctr.*, 961 F. Supp. 2d at 907.

69. *Id.*

70. *United States SEC v. Hui Feng*, 935 F.3d 721 (9th. Cir. 2015).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Hui Feng*, 935 F.3d at 721.

76. *Id.*

77. ALI JAHANGIRI ET AL. *Ali Jahangiri et al, THE EB-5 HANDBOOK: A GUIDE FOR INVESTORS AND DEVELOPERS* loc. 2704 (Elizabeth Peng & Cletus Weber eds., 2014) (ebook) [hereinafter *Jahangiri*].

78. *Id.*

79. Rikard Lundberg & Tom Krysa, *Shedding new light on SEC Enforcement: EB-5 Investments as Securities, Unregistered Broker-Dealers, and Related Disclosures*, EB5 INVESTORS (Jan. 9, 2018), <https://www.eb5investors.com/magazine/article/shedding-new-light-on-sec-enforcement/> [hereinafter *Lundberg*].

expected a green card.<sup>80</sup> But the court rejected this argument on the basis that the investments have an “at risk” requirement under EB-5, implying an expectation of return.<sup>81</sup> The court held that “investments made in common enterprises managed by regional centers” were a form of investment contract, and thus, a security.<sup>82</sup>

Furthermore, in this case, Feng was not only soliciting the securities. Feng also entered into contractual agreements with the regional centers to earn commission on every investor referred.<sup>83</sup> Although it is apparently common EB-5 industry practice to pay commission, under § 15(a), it is illegal to pay commission to unregistered brokers.<sup>84</sup> As an unregistered broker, Feng failed to disclose to his clients his arrangement with the regional centers, while Feng received commissions from the arrangement.<sup>85</sup>

*Feng* was a landmark case for laws regarding EB-5 because it officially recognized EB-5 offerings as securities offerings.<sup>86</sup> In the past, EB-5 was only ever tangentially affected by securities laws, but because of the evolution of EB-5 investment practices over the years toward establishing limited liability partnerships, EB-5 offerings became akin to securities offerings. The change in classification is important because securities are subject to heightened disclosure requirements and other securities regulations. *Feng* opened the door for the SEC to have greater control over EB-5 issues in the future by bringing EB-5 offerings into the securities sphere.

### C. 2021 - Today

In 2021, the Immigrant Investor Program sunsetted, but was soon renewed with the passing of the EB-5 Reform and Integrity Act in 2022.<sup>87</sup> Legislators backing the EB-5 Reform and Integrity Act sought to implement the largest changes to the program to date. Under the EB-5 Reform and Integrity Act, legislators raised the required minimum investment amounts from \$500,000 to \$900,000 in a target employment area and from \$1 million to \$1.8 million in a nontarget employment area.<sup>88</sup> Additionally, the Act heightened the requirements for regional-center-reporting standards of annual statements, business plans, persons associated with regional centers, new commercial enterprises, and job-creating entities.<sup>89</sup> However, the disclosure

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Lundberg, *supra* note 79.

85. *Id.*

86. *Id.*

87. *About the EB-5 Classification*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2022), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classification>.

88. *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2023), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program>.

89. Holly Straut-Eppsteiner, *Legislative Changes to the EB-5 Immigrant Investor Program*, CONGRESSIONAL RESEARCH SERVICE (2023), <https://crsreports.congress.gov/product/pdf/IN/IN11989>.

requirement only extends to “material disclosures.”<sup>90</sup> The EB-5 Reform and Integrity Act also made compliance with SEC regulations a condition of regional center approval.<sup>91</sup> But this compliance requirement is limited as well. Under the Act, the required compliance with securities laws “relates to using commercially reasonable efforts ‘to monitor and supervise compliance with the securities laws’” and not be the potentially broader obligation “to comply with the securities laws.”<sup>92</sup> So, while the Act resulted in massive changes in the EB-5 landscape, the legislation, citing concerns that the requirements were too burdensome, amended their original bill to reel back the standards for disclosure and securities law compliance. This possibly exemplifies the balance that legislators have to strike between providing regulatory protections for investors and facilitating EB-5 efficiency.

While the Immigrant Investor Program has seen major reform in preventing fraud through the Reform and Integrity Act, EB-5 has not seen much reform in cases concerning fiduciary duty issues. As witnessed in cases alleging a breach of fiduciary duties, courts have been reluctant to classify the regional centers, new commercial enterprises, or job-creating entities as owing fiduciary duties.<sup>93</sup> Considering the lack of reform in this area and the current landscape of EB-5, fiduciary duty issues present a contemporary challenge for the Immigrant Investor Program.

#### CURRENT EB-5 INFRASTRUCTURE AND LANDSCAPE

To understand how the Immigrant Investor Program is susceptible to corporate governance and breach of fiduciary duty issues today, we have to look at the EB-5 infrastructure and processes.

The primary players in EB-5 include the investor, the migration agent, the immigration attorney, the regional center, and the project developer.<sup>94</sup> The investor is the foreign national seeking permanent residency in the United States.<sup>95</sup> The migration agent is typically, but not always, a foreign correspondent from the investor’s country.<sup>96</sup> The migration agent’s role is to connect the investor to regional centers and immigration attorneys in the United States.<sup>97</sup> The immigration attorneys are American attorneys who help the foreign investors with the necessary filings.<sup>98</sup> The regional centers, as created from the Immigrant Investor Pilot Program, act as middlemen

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90. *Id.*

91. *Id.*

92. Carolyn Lee, *EB-5 Reform and Integrity Act of 2021: Updated Section by Section Summary*, INVEST IN THE USA (2021), <https://iiusa.org/wp-content/uploads/2021/04/EB5-Integrity-Act-Updated-Section-by-Section-Summary-CSL.pdf>.

93. *See Feng v. Walsh*, No. 19-24138-CIV, 2021 WL 8055449 (S.D. Fla. Dec. 21, 2021).

94. Jahangiri, *supra* note 77, at loc. 478.

95. *Id.*

96. *Id.*

97. *Id.*

98. Jahangiri, *supra* note 77, at loc. 501.

between EB-5 investors and the project developers in indirect investments.<sup>99</sup> Project developers are in charge of managing the new commercial enterprise, which is also the job-creating entity.<sup>100</sup> The new commercial enterprise is required to ensure that the investor's money is being used to create ten jobs.<sup>101</sup>

Other players include investment advisors, economists, business plan writers, and securities attorneys.<sup>102</sup> Investment advisors act as a neutral party from regional centers to advise investors on the likelihood of success for investments.<sup>103</sup> Economists generally only work with the regional centers to identify target employment areas.<sup>104</sup> Business plan writers work with the project developers to ensure that the project is successful and complies with the USCIS's requirements.<sup>105</sup> Of the players involved, securities attorneys are the most important regulators for ensuring SEC compliance.<sup>106</sup> Securities attorneys are usually employed by the regional center to provide the client with some reassurance that the regional center or the new commercial enterprise are acting dutifully.<sup>107</sup> It is important to note that none of these players are strictly or explicitly required by the SEC or USCIS for EB-5.<sup>108</sup>

The EB-5 process generally begins when an interested investor contacts a migration agent from within their home country.<sup>109</sup> Because the indirect investment method is the most common, these migration agents will have EB-5 contacts in the United States.<sup>110</sup> The migration agents put the foreign investors in touch with the regional centers and immigration attorneys.<sup>111</sup> It is neither uncommon nor illegal for the immigration agents and immigration attorneys to be employed by the regional center.<sup>112</sup> The American immigration attorney will then aid the foreign investor in filing the I-526 Form, known as the Petition by an "Alien" Entrepreneur. After filing the I-526 Form and showing that they have the necessary investment funds, the foreign investor will receive a two-year conditional green card.<sup>113</sup> As of 2024, the required minimum investment amount is \$900,000 in target employment areas and \$1.8 million in non-target employment areas.<sup>114</sup> From the start of the two-year period to when permanent

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99. *Id.* at loc. 523.

100. *Id.* at loc. 1553.

101. *Id.* at loc. 564.

102. *Id.* at loc. 582.

103. Jahangiri, *supra* note 77, at loc. 573.

104. *Id.* at loc. 613.

105. *Id.* at loc. 607.

106. *Id.* at loc. 602.

107. *Id.*

108. Jahangiri, *supra* note 77, at loc. 602.

109. *Id.* at loc. 478.

110. *Id.*

111. *Id.*

112. *Id.* at loc. 501.

113. *Id.* at loc. 394.

114. *Questions and Answers: EB-5 Immigrant Investor Program Modernization Rule*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/working-in-the-united-states/questions-and-answers-eb-5-immigrant-investor-program-modernization-rule> (Apr. 4, 2024).

residency is approved, the investor must, all the while, have the money “at risk” and invested in a job-creating entity.<sup>115</sup>

While the immigration attorney files the immigration papers, the regional center directs the investments to new commercial enterprises.<sup>116</sup> The new commercial enterprise could be the job-creating entity itself or it could be loaning to the job-creating entity.<sup>117</sup> It is neither uncommon nor illegal for the new commercial enterprise to also own the regional center.<sup>118</sup>

When foreign nationals invest their money into the new commercial entities, there are three different models of investment: the Loan Model, the Equity Model, and the Preferred Equity Model.<sup>119</sup> Indirect investments are generally limited to these three models because the court found in the *Matter of Izummi* that a simple capital investment is not enough to satisfy the “at risk” requirement of EB-5.<sup>120</sup>

#### A. The Loan Model

Currently, the Loan Model is the most common form of investment.<sup>121</sup> Under the Loan Model, the investors put their money as equity in a new commercial enterprise.<sup>122</sup> Typically, new commercial enterprises are structured as limited liability partnerships, with each investor being a limited partner in the enterprise.<sup>123</sup> The new commercial enterprise then establishes an interest-bearing loan with the investor money into a job-creating entity that creates ten jobs per investment.<sup>124</sup> The Loan Model is preferred by investors because it guarantees that their money will satisfy the “at risk” requirement for the life of the new commercial enterprise’s loan to the job-creating entity.<sup>125</sup> The new commercial enterprise, which exists entirely to loan money to the job-creating entity, is dissolved once the life of the loan expires, and the investment is returned to the investors.<sup>126</sup> Job-creating entities may prefer the loan model over the other models because it prevents third parties, whose interest is limited to the “at risk” investment, from having ownership. EB-5 investors may prefer the loan model over the other models because debt is higher in the job-creating entity’s capital stack. This means that the investor is more likely to see their return on investment even if the job-creating entity fails, which many do. However, since the money must be invested for the entire duration that it takes the immigration forms to process, which can vary from anywhere between two

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115. Jahangiri, *supra* note 77, at loc. 626.

116. *Id.* at loc. 811.

117. *Id.* at loc. 2515.

118. *Id.* at loc. 2541.

119. *Id.* at loc. 2303.

120. Izzumi, 22 I. & N. Dec. 169 (BIA 1998).

121. Jahangiri, *supra* note 77, at loc. 2226.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Jahangiri, *supra* note 77, at loc. 2226.

years to over ten years, it is not uncommon for the principal loan amount to be paid off before the investor has received permanent residency status.

#### B. The Equity Model

The Equity Model is the least common form of indirect EB-5 investment.<sup>127</sup> Under the Equity Model, the foreign investors are still limited partners in a new commercial enterprise.<sup>128</sup> The new commercial enterprise, instead of establishing a loan with the job-creating entity, purchases true equity in the job-creating enterprise.<sup>129</sup> The Equity Model is the least preferred model for job-creating entities because it dilutes their ownership in the project. This model is disfavored by foreign investors because, while it does create the possibility of higher returns, it also puts them lower on the capital stack. If the job-creating entity fails under the Equity Model, it is more likely that the investors do not see their money returned. And in the worst-case scenario, barring fraud, the job-creating entity fails before the investor obtains their permanent residency, meaning that the investor receives neither a permanent green card nor their money back.

#### C. The Preferred Equity Model

The Preferred Equity Model is a more common alternative to the Equity Model but still less common than the Loan Model.<sup>130</sup> This model is similar to the Equity Model in that a new commercial enterprise, in the form of a limited liability partnership, purchases equity in the job-creating entity.<sup>131</sup> However, in this model, the job-creating entity issues preferred equity instead of true equity.<sup>132</sup> The obvious benefit that this model provides for investors is that it guarantees a return in the capital stack over the developer equity. A less obvious but more important benefit that the Preferred Equity Model provides over the Loan Model is that it avoids unfavorable requirements imposed by senior lenders on debt. More senior lenders in a job-creating entity may require the job-creating entity to prohibit or to place less than ideal terms on subordinate debt.<sup>133</sup> Senior lenders may also prohibit owners of true equity from having a “put” right or redemption feature. By characterizing the investment as preferred equity, the investment is more likely to see a return than true equity and circumvents restrictions placed on debt and true equity. Similar to the Loan Model, once the investor money is returned, the new commercial enterprise’s purpose is served and liquidated.<sup>134</sup>

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127. *Id.* at loc. 2243.

128. *Id.*

129. *Id.*

130. Jahangiri, *supra* note 77, at loc. 2243.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

## EB-5'S POTENTIAL VULNERABILITIES AND SUGGESTED SOLUTIONS

Although the Immigrant Investor Program has thoroughly evolved from its initial implementation in 1990, the program in its current state is still susceptible to issues of fraud and breaches of fiduciary duties. Unless these vulnerabilities are addressed before EB-5's set renewal date in 2027, EB-5 will be unlikely to reach any mainstream usage.

### A. Investment Adviser Registration

As of 2024, it is unclear whether regional centers or developers that serve as managers or general partners of a new commercial enterprise are required to register as investment advisers under the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>135</sup> Entities that register as investment advisers are held to higher record-keeping standards and are limited in the type of compensation that registered investment advisers receive.<sup>136</sup> The lack of clarity about whether or not their activity falls within the Dodd-Frank Act allows these regional centers and developers, who functionally act as investment advisers in the new commercial enterprise, to manage these investments without the same regulations required of other investment managers. This potentially opens EB-5 up to more fraud than other forms of investment.

To address this issue, I propose that EB-5 legislation solidifies that regional centers or developers that act as investment advisers must register as such. By specifically requiring regional centers and developers that manage new commercial enterprises to register as investment advisers, the law would subject them to higher regulation and provide greater protections for immigrant investors.

### B. Investment Adviser Exemption for New Commercial Enterprises

The new commercial enterprise itself, unlike regional centers, is likely to be considered an investment company, and investment companies are subject to investment adviser registration.<sup>137</sup> Because of the current EB-5 practice of purchasing equity in a new commercial enterprise and having the new commercial enterprise invest into a job-creating entity, the new commercial enterprise is clearly an investment adviser. However, the most common exemption available to new commercial enterprises is the 3(c)(1) exemption.<sup>138</sup> Under the 3(c)(1) exemption, investment companies with 100 or fewer investors are not required to register.<sup>139</sup> This means that new commercial enterprises could potentially invest up to \$180 million of foreign investors' money without registering as an investment adviser. Without the requirement,

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135. Jahangiri, *supra* note 77, at loc. 2226.at loc. 2295.

136. *Id.*

137. *Id.* at loc. 3000.

138. *Id.* at loc. 3008.

139. *Id.*

a potential \$180 million being managed may not be subject to the same regulations that investment companies with smaller portfolios would be subject to. Because EB-5 funds have this exemption available, it increases the risk of fraud for 100 investors.

Legislators should cover this vulnerability by carving out a special exemption for EB-5 new commercial enterprises to the 3(c)(1) exemption. The exemption should say that new commercial enterprises are not granted the 3(c)(1) exemption to register as an investment adviser. The lack of reliability is an important issue unique to EB-5, and while it would place a burden on new commercial enterprises, it is also a necessary exemption to ensure further protections for EB-5 investors and bolster reliability in the program.

### C. Disclosure Requirements

While the EB-5 Reform and Integrity Act of 2022 heightened disclosure requirements to the USCIS, the current disclosure requirements are still insufficient to properly protect investors. Under the Reform and Integrity Act, EB-5 regional centers and projects are still not required “to disclose the following: past foreclosures, past breaches of fiduciary duty toward investors, past lawsuits of any type, past loan defaults, past loss of EB-5 investment capital, past fines by the SEC, USCIS, or other governmental agencies, [and] past USCIS project denials.”<sup>140</sup> Without disclosure to immigrant investors of any of these topics, investors, who already have a difficult time navigating the system, cannot properly gauge the trustworthiness of any particular regional center, new commercial enterprise, or job-creating entity.

Rather than having immigrant investors try to ascertain this information themselves, the EB-5 program should require regional centers and developers to report this information to investors outright. While the USCIS has this information, merely reporting it to the USCIS does not help potential investors conduct their own due diligence. In balancing this requirement with the desire for the program’s administrative efficiency, disclosure requirements to investors would not be overly burdensome because the regional centers, new commercial enterprise, and job-creating entities would already have the information readily available to them.

### D. Waiver of Fiduciary Duties

The issue of fiduciary duties owed to EB-5 investors remains undetermined by courts or legislators. While lawsuits have surfaced over the years alleging breaches of fiduciary duties, courts have not uniformly decided the issue.<sup>141</sup> Where most fiduciary duty issues arise is with new commercial

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140. *Risk Factors for EB-5 Investors Under the EB-5 Reform and Integrity Act of 2022: What the RIA Doesn't Cover*, EB5AN, <https://eb5visainvestments.com/2023/02/03/risk-factors-for-eb-5-investors-under-the-eb-5-reform-and-integrity-act-of-2022-what-the-ria-doesnt-cover/> (last visited May 12, 2024)[hereinafter EB5AN].

141. *Feng*, *supra* note 88.



enterprises. While new commercial enterprises can take any corporate form, they are typically formed as limited liability partnerships.<sup>142</sup> This is because the foreign investors, who might be abroad during the process, are only passively engaged with the new commercial enterprise's investment. Since new commercial enterprises are typically formed as limited liability partnerships, the general partner or manager owes the limited partners, who are the EB-5 investors, the fiduciary duty of care and the fiduciary duty of loyalty.

However, like most companies, new commercial enterprises are often formed in Delaware.<sup>143</sup> Being that Delaware is a state that allows exculpatory agreements and liability waivers, it is common for the limited partners in the new commercial enterprises to have waived the duty of care requirement for general partners and managers.<sup>144</sup> The general partners and managers of new commercial enterprises are entrusted with the foreign investors' money. The foreign investors have to rely on the general partners and managers to secure not only their hefty \$1.8 million investment, but also their permanent residency status in the United States. The immigrant investors have so much at stake in these EB-5 agreements, yet they lack the necessary protections. In forming these limited liability partnerships, the EB-5 investor has the choice to either accept the terms of the partnership including the waiver or to forfeit their chance of a green card through the Immigrant Investor Program. Although the direct investment option is still available, direct investing is less than ideal because it requires the investor to manage their own business in the United States. Managing a business that creates ten jobs for the entire processing period is not feasible for most potential immigrants, especially if they are living abroad. Thus, immigrant investors are given little choice but to accept the terms of the new commercial enterprise and waive the duty of care of the general partner or manager.

The issue of the duty of care waiver is further exacerbated when considering the types of job-creating entities or projects that accept EB-5 funding. The job-creating entities that accept EB-5 funding have generally been unable to derive funding from other sources and have to resort to EB-5 funding after either exhausting or being denied other lines of credit.<sup>145</sup> The projects may not have been able to secure other sources of funding because other types of investors conducted their due diligence and determined that the project was not likely to be successful. The reason EB-5 funding is less preferred by project developers as compared to other types of funding is because project developers would prefer to not be beholden to foreign investors. This is especially true for new commercial enterprises that implement the Equity or Preferred Equity Models. So, by this virtue, many

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142. Jahangiri, *supra* note 77.

143. *Id.*

144. *Exculpatory Agreements and Liability Waivers in All 50 States*, Matthiesen, Wickert, and Lehrer, S.C., <https://www.mwl-law.com/resources/exculpatory-agreements-liability-waivers-50-states/> (last visited May 12, 2024).

145. EB5AN, *supra* note 140.

job-creating entities that new commercial enterprises invest in have a higher likelihood of not being successful. As of 2024, less than 1% of EB-5 projects fail due to fraud; however, “the actual percentage of EB-5 investors who lose funds is much higher than 1%.”<sup>146</sup> Besides fraud, almost all of these investors, who lose their funds, lose them because of the inherently high risk of failure associated with EB-5 projects.<sup>147</sup>

While every investment has its risks, EB-5 projects’ risks are abnormally high, and the general partners or managers of new commercial enterprises are often investing in them without the proper disclosure or due diligence. By waiving their duty of care, general partners or managers would not be found liable for negligence in disclosing the risks associated with job-creating entities nor would they be found liable for negligence in doing their due diligence on the projects. The duty of care waiver, combined with the already high-risk EB-5 projects, leads to unnecessary risks for immigrant investors who rarely have the option to reject the circumstances.

The issue of duty of care liability in the Immigrant Investor Program is more contemporary than the issues of fraud from the past. It is an area of EB-5 that neither the Reform and Integrity Act or courts have touched. As such, I propose that EB-5 new commercial enterprises should be treated differently than other corporate forms. New commercial enterprises are not like other traditional companies. They are investment companies, in which the investors’ primary interest is a green card. Because the only way of indirect investing is through new commercial enterprises, EB-5 investors do not have the same bargaining power to negotiate against waivers as other types of investors do. Courts and legislators should take the new commercial enterprise’s unique circumstances into account and forbid duty of care waivers for EB-5. By forbidding duty of care waivers in new commercial enterprises, the law would provide immigrant investors with a valid claim against general partners and managers to potentially see some of their funds returned. Concurrently, forbidding duty of care waivers would also incentivize general partners and managers to conduct proper due diligence and provide more disclosure to investors about the high-risk projects. The inherently high-risk nature of EB-5 projects is not something that legislation could change, but prohibiting general partners and managers from waiving their duty of care would avoid creating any more unnecessary risk.

## CONCLUSION

In summary, the EB-5 Immigrant Investor Program was designed to have a role in both immigration and economic development by enabling foreign nationals to invest in the American economy and gain lawful permanent

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146. Samuel B. Silverman, *EB-5 Investment Transparency: A Guide to Understanding Risks and Identifying Red Flags*, EB5AN (2023), <https://tinyurl.com/EB5-Investment-Transparency> (last visited May 12, 2024).

147. *Id.*

residency. While the program was intended to be mutually beneficial, enhancing both the United States economy and the investors' residency status, its implementation left a lot to be desired and has been fraught with challenges, including fraud and corporate governance issues. In response to these problems, the EB-5 program has undergone various reforms to improve its reliability and effectiveness, particularly with increased regulation and oversight. As Congress approaches the decision on whether or not to renew the program in 2027, it is crucial that EB-5 undergo further reform to better address the ever-present issue of fraud and the contemporary issues of governance. As someone who had family members who both lost their investment and came to the United States through the Immigrant Investor Program, I recognize EB-5's untapped potential and its glaring issues. Through the implementation of the necessary changes that I have proposed, I believe EB-5 could make substantial strides toward becoming a mainstream avenue of investment.