

REALIZING THE ECONOMIC-DEVELOPMENT GOALS OF EB-5 THROUGH AN INTEGRATED TARGETED EMPLOYMENT AREA DEFINITION

BY ANGELIQUE BRUNNER & DAVID M. MORRIS

As Congress now debates re-authorization and hopefully permanent extension of the EB-5 immigrant investor Regional Center Pilot Program it should also pass legislation to patch several critical legal deficiencies in this blossoming "jobs creation" program. Long overdue are improvements to the Targeted Employment Area (TEA) provision¹ enacted in 1991, which permits a lower (\$500,000) threshold investment.

An opportunity for legislative action may be possible in this 111th Congress. The first step occurred on June 22, 2009, when Senator Patrick Leahy (D-VT) chaired a Judiciary Committee hearing entitled "Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program."² The Committee heard testimony from representatives of the Association to Invest in USA³ and USCIS highlighting the enormous EB-5 economic impact to date and potential continued growth, as well as regulatory roadblocks that impair the progress of the program's effectiveness. While many known policy challenges were discussed, the failure of the current TEA definition was regrettably only briefly mentioned.

Some proponents believe that Congress should altogether eliminate the TEA structure, making the \$500,000 minimum investment nationwide, because the rules are unclear or arbitrary. Others feel that given the depth of the nation's current economic challenges and record job-loss rates, all areas could benefit from added job-creation funds. But absent the provision's elimination, we recommend that Congress should expand the definition of "Targeted Employment Area" to specifically include the well defined economic zones (such as Empowerment and Enterprise Zones) currently being used by existing federal and state economic-incentive programs. This will not only advance broader government economic policy, but also provide

the USCIS and stakeholders with clearly defined adjudication metrics.

Background on EB-5

Pursuant to INA §203(b)(5), Congress established the fifth employment-based (EB-5) preference category in 1990 for immigrants seeking to enter the United States to invest in a new commercial enterprise that will benefit the U.S. economy and directly create at least ten full-time jobs for U.S. workers.⁴

To lure capital and job creation to regions of greater economic need, Congress created the TEA and offered investors two significant incentives to place an investment in a TEA:

- Lowering of the minimum qualified investment from \$1 million to \$500,000 if the job creating entity is located there and
- Reserving 3,000 visas (of the approximately 10,000 visa numbers available for this preference each year) for entrepreneurs who invest there.⁵

To further encourage immigration through the EB-5 preference, Congress established the "Regional Center" pilot program, which sets aside 3,000 visas annually.⁶ A major benefit of the Regional Center program is the relaxed allowance that the ten full-time jobs may be created directly as well as indirectly.⁷

Many foreign entrepreneurs and immigration lawyers are surprised to learn that investing in a Regional Center (RC) project does not, of itself, lower the minimum qualified investment amount. A reduction of the investment threshold from \$1 million to \$500,000 occurs only if the job-creation activities are located inside a TEA.

¹ INA §203(b)(5)(B), 8 U.S.C. §1153(b)(5)(B).

² <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=3998>; see also *Hearing on Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program: Summary, Testimony of Stephen Yale-Loehr*, 14 Bender's Immigr. Bull. 1066 (Sept. 1, 2009).

³ Its website is at <http://iiusa.org> (last visited Sept. 29, 2009).

⁴ INA §203(b)(5), 8 U.S.C. §1153(b)(5).

⁵ INA §203(b)(5)(B)(i), 8 U.S.C. §1153(b)(5)(B)(i).

⁶ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610, 106 Stat. 1828 (1992) (codified as note to 8 U.S.C. §1153).

⁷ *Id.*

So if the entrepreneur is prepared to invest \$1 million, then he can invest any place in the United States. If, however, he is prepared to invest only \$500,000, then the investment must be located in a qualified TEA. Anecdotal evidence suggests that a clear majority of visas are issued to \$500,000 investors; thus, the role of the TEA in the success of the EB-5 program cannot be overestimated. Updating the TEA definition must be a high priority.

Defining the Current TEA

Since 1991, Congress has restricted TEA status to areas that are either "rural" or "high unemployment." This means the entrepreneur must provide the USCIS with a certification issued by the state government that shows either:

- For a rural area, that the job-creating entity is not located within any standard metropolitan statistical area AND not within any city or town having a population of 20,000 or more;⁸ or
- For a high unemployment area, that the job-creating entity is located in a particular geographic or political subdivision that has experienced an average unemployment rate of 150% of the national average.⁹

Challenges with the Current TEA Definition

At first blush, these two classifications appear to logically lure capital and job creation to regions of self-evident economic need – rural and high-unemployment areas. But many potential investors, immigration lawyers, and even local economic development agencies complain that many key terms in the TEA have not been clearly defined. And as a result, congressional intent to lure investment to "targeted" areas is being clearly frustrated.

Some of the more popular criticisms about the current TEA policy include the following:

- State, county, and local government agencies share overlapping management responsibilities on issues of unemployment and population. So which agencies have USCIS authority to issue TEA certification letters?
- Why are some federal- and state-defined blighted and distressed areas not included in the TEA definition?
- What is the validity period of a TEA certification letter? Some states issue letters for twelve-month periods (such as California), and others issue on an "as requested" basis.

- Other federal and state blighted-community definitions have multi-year designations; why doesn't the TEA?
- What is the impact to investors of a Regional Center project if unemployment dips below the 150%? Is that project "grandfathered," automatically allowing a \$500,000 minimum to later investors?
- Can a Regional Center "gerrymander" a project census tract or political subdivision to manufacture a high unemployment TEA?

Criticism of the current TEA policies is no secret. For example, on March 18, 2009, the USCIS Ombudsman issued a report analyzing current EB-5 policy and offered several recommendations to stabilize the program¹⁰. With regard to the TEA issue, the Ombudsman wrote:

Designation of High Unemployment Area and Effect of Later Changes in Unemployment Rate. Clarification is needed on which government office(s) is/are appropriate to designate an area as a qualified "high unemployment area." The EB-5 legislation permits a lower (\$500,000) threshold investment in areas so defined. In addition, clarification is needed on what impact an improvement in the unemployment rate would subsequently have on an investor who invested in a formerly designated "high unemployment area." The lack of clarity in these matters might cause investors to avoid investing in areas which could otherwise benefit from an infusion of foreign capital and related job creation.¹¹

Moving to a Better TEA Definition

With respect to updating the TEA provision, Congress does not need to reinvent the wheel. In fact, the legislature need only to import the well defined body of law currently being used by federal and state governments

¹⁰ USCIS Office of Ombudsman, Employment Creation Immigrant Visa (EB-5) Program Recommendations (Mar. 18, 2009), posted on AILA InfoNet at Doc. No. 09031868), available at http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf (last visited Sept. 29, 2009); see also Carolyn S. Lee, Nicolai Hinrichsen & Stephen Yale-Loehr, *USCIS Ombudsman to the Rescue: Trying to Save the EB-5 Program*, 14 Bender's Immigr. Bull. 657 (June 1, 2009); Stephen Yale-Loehr, *USCIS Clarifies Key Aspects of EB-5 Program*, 14 Bender's Immigr. Bull. 835, 839 (July 15, 2009).

¹¹ USCIS Office of Ombudsman, Employment Creation Immigrant Visa (EB-5) Program Recommendations, *supra* note 9, at 14.

⁸ INA §203(b)(5)(B)(ii), 8 U.S.C. §1153(b)(5)(B)(ii).

⁹ INA §203(b)(5)(B)(iii), 8 U.S.C. §1153(b)(5)(B)(iii).

to advance economic development policy. In doing so, it is necessary to have a broader definition for TEAs.

In general, both Congress and state governments have defined areas, such as Empowerment and Enterprise Zones, to target areas of disadvantage with economic incentives to businesses to encourage their location to the areas. Integrating these existing federal and state geographic definitions with the TEA definition makes common sense and will align the EB-5 program with broader economic-development policy goals. The current definition of "Targeted Employment Area" is unique to the EB-5 program, and does not include other federal or state economic-incentive designations designed to promote economic development. These designations already carry tax incentives, wage credits, or other investment incentives.¹² Why not immigration incentives?

A Brief History of Economic-Incentive Legislation

Best known among all economic incentive designations is the "enterprise zone." The purpose is to encourage private investment in communities that have experienced severe economic decline and to help drive revitalization and provide jobs. In general, areas designated suffer from pervasive poverty, unemployment, and other social problems.¹³ Many credit Peter Hall, a British professor of urban planning, with the creation of the concept of an enterprise zone; however his thesis covered only urban areas.¹⁴ In his thesis, Mr. Hall wrote that enterprise zones are "supposed to be areas in which economic freedom is maximal and the forces of the market are to be unleashed. The basic notion is that economic activity is to be stimulated through the provision of incentives." Mr. Hall emphasized the importance of young businesses and entrepreneurship.¹⁵ In practice in the United States designations include rural areas.

While a legislative discussion of enterprise zones started in Congress in 1980,¹⁶ it was thirteen years be-

fore Congress enacted the first Enterprise Zone/Empowerment Community (EZ/EC) legislation in 1993.¹⁷ Ironically, federal law followed state law. By 1993 many states had enacted enterprise-zone legislation¹⁸ in anticipation of federal law. States believed that such designations could provide a competitive advantage for valuable federal tax incentives.¹⁹

Federal Designations

The federal government's geography based economic incentive programs include, but are not limited to, eleven Empowerment Zones (eight urban and three rural)²⁰, ninety-five Enterprise Communities (sixty-five urban and thirty rural),²¹ and forty Renewal Communities (twenty-eight urban and twelve rural).²² Urban designations are administered by the Department of Housing and Urban Development (HUD), and rural designations are administered by the Department of Agriculture.²³ Each of the above designations is awarded as a result of a rigorous selection process that weighs size, geography, and poverty level of the nominated areas.²⁴ The process of selection is competitive; for example, HUD selected areas from over 500 applications.²⁵

State Designations

States also have their own enterprise zone designations, which seek to promote economic development and job creation in order to revitalize distressed communities.²⁶ For example, California has forty-two Enterprise Zones as well as three other economic-development designations,²⁷ versus the nine designations it has under the

¹⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13301, 107 Stat. 312, 543.

¹⁸ Enid Beaumont, *Enterprise Zones and Federalism, in Enterprise Zones: New Directions in Economic Development* 41 (Roy E. Green ed., 1991).

¹⁹ *Id.* at 43.

²⁰ I.R.C. §1391(b)(2) (1997). See I.R.C. §1391-1393 for the criteria, designation, and administration of Empowerment Zones and Enterprise Communities. Enterprise Community designation is reserved for areas not selected as Empowerment Zones. See President's Community Enterprise Bd., U.S. Dep't of Agric. & U.S. Dep't of Hous. & Urb. Dev., *Empowerment Zones & Enterprise Communities Application Guide* 8-10 (1994).

²¹ I.R.C. §1391(b)(1).

²² *Id.* §1400. The code section includes the criteria, designation, and administration of Renewal Communities.

²³ *Id.* §1393(a)(1).

²⁴ *Id.* §1392(a).

²⁵ HUD's December Announcement on Urban Empowerment Zones, 95 Tax Notes Today 36-51 (Feb. 3, 1995).

²⁶ Beaumont, *supra* note 17.

²⁷ For a complete list see the California Association of Enterprise Zones.

¹² Arthur Sullivan & Steven M. Sheffrin, *Economics: Principles in Action* 351 (2003).

¹³ W. Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, *J. Urb. & Contemporary L.* 53, 143-170 (1998).

¹⁴ Harrison Bennett, *The Politics and Economics of the Urban Enterprise Zone Proposal: A Critique*, 6 *Int'l J. Urb. & Reg'l Res.* 422 (1986). For further research see Peter Hall, *Enterprise Zones: A Justification*, 6 *Int'l J. Urb. & Reg'l Res.* 416, 418-19 (1982).

¹⁵ Otto A. Davis & Denise DiPasquale, *Enterprise Zones: New Deal, Old Deal, or No Deal?*, 2 *CATO J.* 391-406 (1982), available at <http://www.cato.org/pubs/journal/cj2n2/cj2n2-5.pdf> (last visited Sept. 29, 2009).

¹⁶ H.R. 7240, 96th Cong. (1980).

federal RC/EC/EZ programs. And for California the designations are not the ones you might think of. Designations include areas within San Francisco, San Diego, and Los Angeles.²⁸ State-level designations are too numerous to discuss in this article. Visit a state's economic development office website to find a discussion of its program.

Federal and state economic-incentive definitions offer many benefits over the current TEA definition. For example:

1. **Defined Designation Period:** Ten-year geographic designation based on multiple criteria of economic distress;²⁹
2. **Easy to Locate and Define:** Existing bank of federal areas that can be checked by address (http://egis.hud.gov/egis/cpd/rcezec/ezec_open.htm);³⁰
3. **Weighted Application Criteria:** Federal and state designations earned through uniform application and competitive review;³¹
4. **Integrity and Oversight:** Federal or state agency oversight to insure continuous compliance;³²
5. **Cross Program Economic Incentives:** Areas qualify for broader range of federal tax incentives including New Market and Low-Income Housing Tax Credits. For a complete list of tax incentives available for distressed communities³³ see IRS Publication 954.

²⁸ See a list of federal designations for California on the HUD website at <http://www.hud.gov/offices/cpd/economicdevelopment/programs/rc/tour/ca/index.cfm> (last visited Sept. 29, 2009).

²⁹ I.R.C. §1391(d) (1997). A location's designation as an empowerment zone or as an enterprise community lasts for ten years from the date of designation.

³⁰ The following states have federal EZ/RC/EC designated areas: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. For a complete list of rural and urban Renewal Communities, Enterprise Communities, and Empowerment zones see *EZ/RC/ECs by Round Number* at <http://www.hud.gov/offices/cpd/economicdevelopment/programs/rc/tour/roundnumber.cfm> (last visited Sept. 29, 2009).

³¹ U.S. Department of Housing and Urban Development, Nomination for a Federal Empowerment Zone or an Enterprise Community (July 2008) (Form HUD-40003).

³² See federal and individual state legislation and regulations for specific oversight requirements.

³³ I.R.C. §1392(a)(2).

Most federal designations expire December 31, 2009.³⁴ In his Fiscal Year 2010 budget, President Obama requested that Congress act to extend the EZ and RC designations to December 31, 2010. Congress will have to address the long-term re-authorization of these programs in this Congress. Extending the designations would allow tax relief to remain available. The expiration of the longstanding program coincides with the improvement of the EB-5 law. While USCIS reviews ways to improve EB-5 visa processing, drafters can take advantage of the re-authorization of the RC/EC/EZ program to improve the economic-development/job-creation premise of EB-5.

Proposed Legislative Changes

Congress should expand the current TEA provision, beyond the two alternatives now offered of rural and high unemployment areas, to include all government designated economic development zones. We suggest the following language should be added to the existing TEA provision:

Or, an area that is within the boundaries of a state or federally defined economic development incentive program including, but not limited to, areas defined as Enterprise Zones, Renewal Communities, and Empowerment Zones.

Conclusion

While the EB-5 program is administered by USCIS, we recognize that this is more of an economic-development program focused on job creation than a visa program. Instead of reinventing the wheel, Congress should borrow from other regulations and agencies that have put the same rigor into economic development that USCIS has put into immigration.

There is already support within USCIS for leveraging the expertise of government peers in domestic and economic disciplines. The idea and importance of expertise, cooperation and success was raised by the USCIS Ombudsman in the March 18, 2009, report, in which the office recommended USCIS "form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications."³⁵ The USCIS's response said that it is exploring the creation of such a group.³⁶

³⁴ IRS Publication 954 at 3, 8, and 13.

³⁵ USCIS Office of the Ombudsman *supra* note 9, at 2 (item 5), 15.

³⁶ Michael Aytes, Acting Deputy Director, USCIS, *Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations 3* (June 12, 2009),

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How does the USCIS EB-5 program continue to benefit from the economic-development work of other agencies? Who will monitor the scope and spirit of the TEA? An important task of the advisory group will be to ensure that the EB-5 program use the most current expertise on economic development and proven selection criteria for distressed communities³⁷ that are aligned with the job-creation goals of the EB-5 program. But expanding the TEA definition to include all government-designated economic development zones makes common sense and is a critical first step needed to enhance the overall EB-5 program.

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reprinted at 14 Bender's Immigr. Bull. 835, 868, 870 (App. A) (July 15, 2009), available at http://www.dhs.gov/xlibrary/assets/uscis_response_cisomb_rec_40.pdf (last visited Sept. 29, 2009).

³⁷ I.R.C. §1392.