

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

1615 H STREET, N.W.
WASHINGTON, D.C. 20062

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

JONATHAN B. BASELICE
DIRECTOR
IMMIGRATION POLICY

April 11, 2017

Samantha Deshommes
Acting Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2020

By electronic submission: www.regulations.gov

RE: EB-5 Immigrant Investor Program Modernization
82 Fed. Reg. 4738 (January 13, 2017)
RIN Number 1615-AC07

Dear Acting Chief Deshommes,

We are writing in response to the Notice of Proposed Rulemaking (NPRM) regarding modernization of the EB-5 immigrant investor program, published in the Federal Register on January 13, 2017, with comments due on or before April 11, 2017. The U.S. Chamber of Commerce (Chamber) is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system. Some of the Chamber's members regularly rely on capital investment from EB-5 immigrants to create jobs for U.S. workers and complete large-scale projects.

The Chamber opposes this proposal because we disagree with the approach proposed by the Department of Homeland Security (hereafter "DHS" or "the Department") concerning investment amounts and redefining targeted employment areas (hereafter "TEA"). The Chamber cannot be supportive of the proposed investment levels and TEA definitions since there are alternatives as well as implications for each, discussed below, which have not been sufficiently analyzed by DHS. Moreover, we dissent from the Department's suggestion to finalize these two key changes without addressing the many other interlocking EB-5 issues that also must be modernized and they should all be addressed through Congressional action.

Shocking the EB-5 program with the proposed dramatic changes to investment levels and the new TEA definitions will conspicuously impact about 60%¹ of all investments and new commercial enterprises in the EB-5 program. This will likely have direct and sizeable negative impacts on Chamber members, as well as to the viability of the EB-5 program as a job-creating engine. Moreover, the Department failed to fulfill its obligation to *quantify* the actual or potential outcomes of these most integral parts (the investment levels and TEA definitions) of the proposed regulation and DHS has not sufficiently considered the consequences. The Chamber therefore requests that until further data collection and analysis can be undertaken, the Department should not move to finalize the proposed rulemaking.²

CONGRESSIONAL ACTION IS NEEDED TO ADDRESS THE PLETHORA OF INTERCONNECTED ISSUES ASSOCIATED WITH EB-5 REFORM

As an initial matter the Chamber wants to unequivocally confirm that it supports modernizing the EB-5 program. The Chamber appreciates and respects that the Department plays a critical role in implementing the statute and has the right to exercise the authority Congress left to the agency. Furthermore, we appreciate the fact that the Department recognizes that there are problems with the program that need to be fixed; on this point, the Chamber agrees with the Department. However, we are puzzled as to why the Department has concluded that pursuing reforms of the investment amounts and TEA definition is a wise or even appropriate undertaking separate from the other interconnected issues (some of which DHS authority to address may be limited or unclear). Legislatively, Congress is considering wide-ranging EB-5 reforms and would not entertain making amendments to solely these two issues without addressing other issues. The fact that simultaneous to the instant NPRM the Department published an Advance Notice of Proposed Rulemaking (ANPRM) posing 43 questions about which feedback was requested from stakeholders on other EB-5 issues³ suggests that the Department is mindful that an across-the-board approach is needed and preferable.

Because of our members' awareness of and commitment to modernizing the panoply of interwoven EB-5 issues, the Chamber has played an extremely active role in EB-5 reform efforts in the last (114th) Congress and in the current (115th) Congress. Based on our visible place in congressional EB-5 activity, we can confirm that the Department's NPRM has altered the course of Hill negotiations as well as conversations among stakeholders. However, it was

¹ See, Table 5 on TEA Metrics in the NPRM, 82 Fed. Reg. 4738, 4759 (Jan. 13, 2017).

² While it may be that the private sector could assist the Department by conducting its own data collection on and analysis of the proposed investment amounts and TEA definition, the Department provided insufficient time to allow this. On March 17, the Chamber filed a request for a 90-day extension of the NPRM's comment period, jointly filed with the American Immigration Lawyers Association, the Real Estate Roundtable, the EB-5 Rural Alliance, and IIUSA (Invest In the USA, an EB-5 trade association), and the EB-5 Investment Coalition (the five leading associations working on EB-5 reforms). The Department never responded to the request for more time.

³ 82 Fed. Reg. 3211 (Jan. 11, 2017).

and remains the Chamber's assessment that the place for resolving these interlocking questions of EB-5 modernization is the legislative branch and not the executive branch.

At a minimum, should DHS proceed with issuing a final regulation concerning investment amounts and TEA definitions the Chamber asks that DHS allow time for Congress to act during the current fiscal year (i.e., DHS should not publish a final regulation until after September 30, 2017, with a significantly delayed effective date following such publication).

UNOBJECTIONABLE TECHNICAL CHANGES INCLUDED IN PROPOSED RULE

The Chamber concurs with the Department's proposal of several technical changes. These include a revised process for the dependents of EB-5 immigrants to file for the removal of conditions on their status, an update to the interview requirement for the removal of conditions so that such interviews are not required to be scheduled near the location of the investor's U.S. commercial enterprise (which may be inconvenient), a revision to the mechanics of obtaining a permanent resident card once conditions have been removed, and various regulatory text changes to comport with current statutory language. These technical changes seem useful and proper updates to the EB-5 program.

WELL-INTENTIONED PROPOSAL REGARDING PRIORITY DATE RETENTION IS PROBLEMATIC FOR STAKEHOLDERS

The Chamber believes there is a lot of merit in allowing an EB-5 immigrant to use the priority date of an approved EB-5 petition for any subsequently filed EB-5 immigrant petition for which the investor qualifies. This has the potential to be a helpful tool to aid immigrant investors deal with various issues outside of their control during the immigration process. Unfortunately, the manner in which the Department proposes to change this regulatory text needlessly injects uncertainty into a situation where it could have easily been avoidable.

The current regulatory text governing priority date determination under the EB-5 program states that the priority date of an immigrant investor is the date upon which the petition is properly filed with USCIS.⁴ The Department's proposed text makes reference to how the priority date of an approved petition will apply to any subsequently-filed petition under the program, how denied petitions do not convey a priority date to a petitioner, and establishes that priority dates are not transferable to other aliens, among other key clarifications that could be useful to stakeholders.⁵ However, the agency failed to include any regulatory text in the NPRM identifying how a priority date is established in the first instance.

⁴ 8 C.F.R. § 204.6(d) currently states that "the priority date of a petition for classification as an alien entrepreneur is the date the petition is properly filed with the Service or, if filed prior to the effective date of these regulations, the date the form I-526 was received at the appropriate Service Center."

⁵ See 82 Fed. Reg. 4738, 4766 (Jan. 13, 2017).

The Department must provide stakeholders with certainty in this regard; to undo longstanding precedent as to how USCIS and legacy Immigration and Naturalization Service (hereafter “INS”) initially establish priority dates is foolhardy. The way that DHS currently establishes the priority date for EB-5 petitions is based on date of filing the initial petition on a “first-come, first served” basis, and this should be retained. If the Department finalizes this proposal, language to this effect must be added back into 8 C.F.R. §204.6(d).

The other reason why this provision concerns Chamber members is the way it would interplay with the other provisions in the proposal, namely the raising of the investment levels and the changes in the designation of Targeted Employment Areas. The proposal does not provide stakeholders with a transition period to adjust to these new requirements, which will be discussed further in subsequent sections of this comment, but it is an open question as to how the agency will treat investors who find themselves in a situation where they desire to move their investment dollars from one project to another. The key unanswered questions our members have include:

- If investors want to move their investment dollars to a different qualifying project, what is the amount of money would they need to invest to make use of these provisions during the transition period? Would they be required to invest at the newly proposed increased investment levels, or would they be allowed to reinvest their initial investment level as before, which would likely be \$500,000.
- If investors are allowed to reinvest just their initial \$500,000 and still be able to retain their priority date, would they be able to reinvest that money into a project that was located within a TEA before these new regulatory requirements went into effect, or would they be restricted in any manner, such as they would be allowed to qualify by investing only their initial \$500,000, but only if they do so in a project that is located within a TEA under the new requirements.

If the Department finalizes the priority date retention provisions without further clarifications, these questions need to be answered to provide investors and project developers with the potential ramifications of decisions to move investment dollars from one project to another. This is important because it could result in adverse impacts for current projects that are being developed and the risk of capital flight in the middle of said development could be detrimental to stakeholders, particularly in smaller development projects that you find in less densely populated areas of the country where EB-5 funding makes up a larger portion of the overall capital used in the project.

If investors are allowed to invest the same amount of money (\$500,000) they did prior to these changes, allowing them to be able to avail themselves of investment opportunities in any type of project, regardless of the project’s future TEA status once these changes go into effect, would be preferred by our members. That would allow projects of all types to have

some “runway” before the new rules take effect and there will no adverse incentives for a significant amount of capital flight from one type of project to another. However, if the Department is going to condition the ability of investors to just reinvest their initial investment so long as their reinvestment goes into a project that will remain as a TEA going forward, that will create a perverse incentive for money to flee from ongoing projects that will no longer be located within a TEA into those that will remain in TEAs. In the ongoing legislative debate, this was a significant issue of contention in the negotiations with Congress regarding the ability of project developers to redesignate the TEA designation of their project, specifically changing their project from being located in a high unemployment area to a rural area, as stakeholders of all sizes were concerned about maintaining their current funding levels to be able to move forward with the development of their projects.

The aforementioned concern would be lessened if the new investment levels went into effect immediately, thereby forcing investors who wanted to get into a new project to be required to pay either the new TEA investment level or the new non-TEA investment level. Another, more equitable way that this issue could be addressed would be to provide a grace period of a few months before investors who want to move their money from one project to another be able to do so at the current level, but only within that fixed period of time. A different option could be for the regulatory text to enumerate the specific instances in which investors could make these transfers. The Department states that it is seeking to help investors who invested through a regional center that is being terminated or in a project that is going through some tough times,⁶ and that is a laudable goal, but the proposed regulatory text does not sufficiently define and explain this priority date retention option to investors just in those types of situations, which leaves open the potential for capital flight from ongoing projects.

If the proposed priority date retention scheme were implemented on its own with no other changes being proposed, this would not be a concern for our members. However, because this change is being proposed in tandem with changes to the investment levels and the TEA designation process, the confluence of all of these changes make this problematic. Nevertheless, the Department has several options available to implement this in a way that would not needlessly provide a windfall to one group of developers at the expense of another group. Still, the best way for the Department to avoid these problems would be to let the legislative process move forward, as stakeholders and members of Congress are, in our opinion, closer to consensus on major reforms to the program than they have ever been in the past two years.

CONCERNS REGARDING CHANGES TO MINIMUM INVESTMENT LEVELS

The Chamber’s myriad concerns with the proposed investment levels rule are such that we believe the EB-5 program’s ability to continue to attract foreign direct investment is in

⁶ 82 Fed. Reg. 4738, 4743-4744 (Jan. 13, 2017).

peril. Given that the broader stakeholder community and members of Congress are the closest they have ever been to crafting a legislative package that would address all of the problems currently plaguing the EB-5 program, we implore the agency to provide industry and Congress the time and space to settle our respective differences and make the deal. In the event that no deal is reached, which the Chamber believes is highly unlikely given all of the progress that has been made, the Department needs to reevaluate its position and publish a new NPRM reflecting additional analysis and provide more time for stakeholder feedback before moving forward with a final regulation.

- 1. If the agency seeks to update the investment amounts with an inflation adjustment, such adjustment should not be based on a comparison to the year of enactment, 1990, since the program was not viable until 2008*

The Chamber believes that any effort by DHS to update the investment levels for inflation should compare current dollar values to the year when the EB-5 program first became a sought-after vehicle for foreign investment. Prior years, and the year of initial enactment, do not reflect a price point (investment level) that was, in essence, meeting the statutory goal of attracting foreign investment for the purpose of facilitating job creation in the U.S.

While the earliest years of the EB-5 program were plagued with periodic issues of defining when investors were putting money at risk, and possible abuse, it is clear that even after such issues were addressed, the program only attracted dozens or, at most, hundreds of immigrant investors each year.⁷ FY99 is the first year where legacy INS provided public data on the breakdown between qualifying immigrant investors and the total number of immigrants, including family members, that obtained status through the EB-5 program – the data show that during the five years between FY99 and FY03, there were between 13 and 99 immigrant investors that obtained status through the EB-5 program in those fiscal years.⁸ As DHS pointed out in the NPRM preamble, the EB-5 program generated little interest from immigrant investors prior to FY09 and calendar year 2008.⁹ The Department's discussion¹⁰ focused on the number of petitions received in recent years, and certainly there has been an explosion of such filings recently. The EB-5 cap has been met in FY14, FY15, and FY16 and will undoubtedly be met in FY17, and the State Department's Visa Bulletin indicates long waits for visa availability in the EB-5 category.

Instead of focusing the discussion on investment level adjustments using a simplistic inflation adjustment, or focusing solely on another single criterion, e.g. the number of filings

⁷ See, DHS Office of Immigration Statistics, <https://www.dhs.gov/immigration-statistics/yearbook> (Yearbooks of Immigration Statistics). For FY92-FY98 data from Table 4, FY99-FY04 data from Table 5, for FY05-FY15 from Table 7.

⁸ Id.

⁹ 82 Fed. Reg. 4738, 4743-4744, 4755, and Figure 1 at 4756 (Jan. 13, 2017).

¹⁰ Id.

made, the Department should look at the program more holistically and examine what Congress sought to do in crafting the EB-5 Program. There is broad agreement that Congress did not create the program to be used sparsely. To that end, Congress set aside 3,000 visas out of the 10,000 quota to be used for investments in TEAs.¹¹ It is not unreasonable to conclude that Congress envisioned a program where, at the very least, over 3,000 individuals would be admitted into the U.S. under the EB-5 program in a given fiscal year such that the set-aside they created served its purpose of reserving visas for individuals who were investing in areas where Congress felt deserved some favorable treatment.

Viewed through this prism, a more useful way to assess the program’s viability, at least with regard to setting proper minimum investment levels, would be examining at which point in time of the program’s history the total number of admissions under the EB-5 category was more than 3,000 annually. Not only does this approach use some verifiable data to show what Chamber members believe is a reasonable level of interest in the program, but it is indicative of a level of interest in the program such that the set-aside created by Congress would, at least in the theoretical sense, serve the purpose for which Congress created it. In years when at least 3,000 EB-5 immigrants are admitted, then demand in the program is greater than the level of the set-aside in the statute. The first year in which this happened was FY09. If the Department is intent on using an inflation adjustment to increase the minimum investment levels, FY09 (calendar year 2008) should be the baseline for such adjustment.

The historical data on EB-5 usage shows the following:

Historical EB-5 Usage¹²		
FY	Total	Immigrant Investors¹³
16	Cap met	Not publicly available
15	Cap met	3,590
14	Cap met	3,922
13	8,543	3,102
12	6,628	2,295
11	3,340	1,144
10	2,480	864
09	3,688	1,290
08	1,360	472
07	806	315
06	749	210
05	346	120
04	129	20
03	65	13
02	149	33

¹¹ 8 U.S.C. §1153(b)(5)(B)(i).

¹² DHS Office of Immigration Statistics, <https://www.dhs.gov/immigration-statistics/yearbook> (Yearbooks of Immigration Statistics). For FY99-FY04 data from Table 5, for FY05-FY15 from Table 7; FY99 is the first year where breakdown provided separately showing principal and dependent numbers in EB-5; Complete FY16 data on EB-5 is not yet publicly available.

¹³ Number of immigrant investors (principal applicants), excluding dependents.

Historical EB-5 Usage¹²		
FY	Total	Immigrant Investors¹³
01	193	67
00	226	79
99	286	99

From FY09 to the present, there has been a sustained approval for admission of immigrants under the EB-5 program exceeding 3,000/year except for one year,¹⁴ as compared to FY08 and earlier when there were never more than 1,360 total admissions to the U.S. under this category in a given fiscal year. By way of example, should the reference point for any inflationary update run from 2008, \$1 million in 2008 would equate to \$1.13 million in 2017 dollars for the standard investment amount. Under current law and the 50% discount for TEA investment amounts, this would equate to a required investment minimum of \$565,722 for TEAs or rural areas. Furthermore, taking the proposal offered by the Department in the NPRM where they moved the TEA investment level up to 75% of the standard investment level, that inflation-adjusted investment level would make the required minimum investment in a TEA at \$847,500. The Chamber still believes that using this type of approach is vastly suboptimal, and we once again reiterate the need for DHS to provide Congress and stakeholders the space to craft a legislative fix to address this issue and the many others that are plaguing the EB-5 program.

2. *A mechanism to automatically adjust the minimum investment amounts should be added, but CPI-U should not be utilized as the mechanism*

The Chamber agrees that investment amounts in the EB-5 program should have a methodology for automatic adjustments. The Chamber understands why DHS has suggested applying the Unadjusted CPI-U (Unadjusted Consumer Price Index – All Urban Consumers) to update investment amounts every five years. No one disagrees with this index being a reliable general economic indicator. Unfortunately, DHS is trying to promulgate regulations on a statute that is in dire need of reforms that can only be crafted by Congress.

The Chamber supports the notion that the investment amounts should be updated at some regular interval. However, the Chamber believes that the adjustment methodology should allow required minimum investment levels to go up *and down*¹⁵ over time. Under the current statutory framework within which DHS has to work with, these investment levels can only be *increased*;¹⁶ history shows that markets don't always go up and if the DHS overprices

¹⁴ Recognizing that FY10 admissions under the EB-5 category fell to 2,480 does not dilute the point that this was the point in time where the program became an effective tool to attract foreign investment. Fiscal year 2009 provides the agency with a figurative demarcation line for when the EB-5 program was on a general upward trajectory evidenced by consistent interest and use by immigrant investors.

¹⁵ See, e.g., market escalator provisions for immigration purposes that both rise and fall in S. 153 in the 114th Congress (section 101 regarding H-1B numbers) and in S. 744 in the 113th Congress (section 4101 regarding H-1B numbers and section 4703 regarding a formula and index for a new W-1 visa category).

¹⁶ 8 U.S.C. §1153(b)(5)(C)(i).

the market, they do not possess the legal authority to fix the problem should they create it by finalizing this proposal as is. If DHS wants to put the adjustment of these investment levels on autopilot, it needs to allow these levels to ebb and flow with the markets in both directions. This obviously cannot be done without Congress making these changes, which is yet another reason why the Chamber, along with other groups, implores the agency to provide us with time to craft the right package that balances the interests of all involved parties, which includes the Department.

The Chamber believes that, if provided the opportunity to work with members of Congress, a model that would be preferable to the Department's CPI-U mechanism can be devised in a manner that would satisfy the vast majority of stakeholders, as well as members of Congress and the Administration. The CPI-U index is very broad and captures the expenditures of almost all residents of urban or metropolitan areas. Unfortunately, CPI-U specifically *does not include spending patterns of people living in rural nonmetropolitan areas or farm families*.¹⁷ In the past two years of negotiating over reforms to the EB-5 Program, several members of Congress have indicated a very strong desire to draw more investment dollars into rural areas. As such, it is peculiar that DHS would use a measure for inflation adjustment of these investment levels *that specifically excludes* measuring economic activity in rural areas as a way to encourage, among other things, investment in rural areas. The Chamber believes there are better ways to accomplish the goal of adjusting investment levels that have a more direct relationship to markets for EB-5 investments. However, this would require Congressional action.

The Chamber believes that a preferable model for accomplishing investment adjustment would be a model that is based off of overall demand for EB-5 immigrant visas and also account for differences in demand between investments in TEAs and non-TEAs. Such a model could potentially allow the adjustments mechanisms to increase or decrease the differential between the TEA investment levels and the non-TEA investment levels. The Chamber is working with many stakeholders to develop such a model.¹⁸ While such a model would require legislation to create it, relying merely on CPI-U will not account for all of the complexities of the EB-5 program. The Department's proffered solution is a one-size-fits-all option that, in the Chamber's opinion, is not in tune with the overall EB-5 program such that it would accomplish the goals that members of Congress and the Administration have for the future of the program.

¹⁷ Bureau of Labor Statistics, Consumer Price Index: Frequently Asked Questions, available at <http://www.bls.gov/cpi/cpifaq.htm> (emphasis added).

¹⁸ See supra footnote 2, as the list of signatories to that letter consists of the groups that the Chamber is working with to craft this model to be included in legislation.

3. *Immigrant investor programs of other countries need to be more robustly reviewed if they are to serve as a useful comparison mechanism for how to set EB-5 investment levels*

In the NPRM, DHS references in a footnote the immigrant investor visas in four English-speaking countries, the United Kingdom, Australia, Canada, and New Zealand, and cites to certain programs in these countries that have higher investment thresholds than the United States.¹⁹ The Department concluded that its proposed new investment levels meant that “the EB-5 program would remain extremely competitive with other countries’ investor visa programs, which typically require higher investment thresholds.”²⁰ This footnote is clearly not a probing study of the investor visa programs that compete with the EB-5 program for investment dollars. Even a cursory review of other countries’ immigrant investor programs suggests to the Chamber the opposite conclusion as that reached by DHS. It appears that raising the minimum investment levels along the lines proposed by DHS might place the United States in a disadvantage in comparison to the competition.

First, the Canadian program mentioned in DHS’s footnote is closed for participation.²¹ The only Canadian immigrant investor program that appears available for foreign nationals to obtain permanent resident status is the Quebec program that requires far lower minimums than the program to which DHS cited. The Quebec program mandates an investment of the equivalent of \$597,378 USD (C \$800,000) where the immigrant investor can document a net worth of at least \$1,194,382 USD (C \$1.6 million) and business experience.

Importantly, the British, Australian, Canadian, and New Zealand programs do not require an investor to prove that their investment has created jobs for the residents of their respective countries. In fact, the only programs that are somewhat similar to the U.S. investor visa programs are the programs in Portugal and St. Lucia, and even in those countries, job creation is merely one of several options available to putative investors seeking to use those country’s investment programs.²² If an investor is seeking to obtain a green card through the EB-5 program, that investor has no choice but to create 10 jobs with his or her investment. Due to that fact, this job creation requirement necessitates significantly more documentation and a much more complex adjudicative process.

In addition, there are many other immigrant investor programs beyond those remarked on by DHS’s brief reference to the competition. For example, the following countries not

¹⁹ 82 Fed. Reg. 4738, 4745 (Jan. 13, 2017).

²⁰ Id.

²¹ See Investor Immigration Canada, <http://www.investorimmigrationcanada.com/venture-capital.php>.

²² See <http://goldenvisa-portugal.com/FAQ.html> for information on the Portugal program and <http://www.caribbeanandco.com/saint-lucia-launches-citizenship-by-investment-program/> for information on the program in St. Lucia. In both cases, there are options for investors to use that have a job creation requirement, but there are other options under their respective programs whereby they do not need to create any jobs yet they would still qualify for the visa. Under EB-5, all of the avenues to ascertaining an immigrant visa through the program require that the investment has created 10 jobs for American workers.

mentioned by DHS have programs that should be considered competition to the EB-5 program: Antigua and Barbuda, Austria, Belgium, Cayman Islands, Cyprus, Dominica, Grenada, Hong Kong, Ireland, Jersey, Malaysia, Malta, Monaco, Portugal, and Singapore, among others. These programs have investment requirements that appear to range from about \$40,000 USD to \$1.8 million USD.

Lastly, one significant use of the EB-5 program is to provide a mechanism for foreign individuals to help support the creation of jobs in the United States in apparent exchange for an avenue to improve the health, education, and environment for the investor's *family*, especially the investor's children. It is well-established over the course of the EB-5 program that for each immigrant investor there is approximately two family members obtaining status annually.²³

Interestingly, the EB-5 program is unique among the non-family grounds for obtaining LPR status in the United States in the high number of dependents obtaining status. The ratio of dependents in other employment-based immigrant categories where principal applicants are selected based on their work and skill set (the First, Second, and Third Preferences in the Employment-Based preferences) averages a little more than one dependent for each worker.²⁴ It appears that a major driver of EB-5 demand is the interest in securing status in the United States for dependents, such that parents that are very established are pursuing immigrant investor classification for the benefit of their children. This may be an important feature to be assessed in comparing the EB-5 program to immigrant investor programs in other countries. If immigrant investors are looking to protect or create opportunities for family members this might suggest that other countries with lower investment requirements, easier processes, or programs that do not require the complicated evidence and adjudications related to job creation can quickly become more desirable.

The Chamber's conclusion from this analysis is that the EB-5 program is somewhat distinctive among those countries with an immigrant investor program. Certainly, the fact that the four English-speaking countries mentioned in the Department's NPRM have some visa programs with higher minimum investment amounts is wildly insufficient to justify the 80% increase in investment levels for non-TEA projects and 170% increase in investment levels for TEA projects.

²³ See, Brookings Institution "Improving the EB-5 Immigrant Investor Program," by Audrey Singer and Camille Galdes (February 2014), at Figure 3 on p. 8 ("Figure 3 shows that, on average, for every investor, approximately two family members have been granted conditional visas. This ratio has remained fairly consistent throughout the program's history, and has held even in recent peak years. In total, 8,580 visas have been granted to investors and the remainder (16,582) has gone to family members."). The Brookings article covered data FY92-FY12, and the dependent ratio has continued to hover just under 2.0 in more recent years as well. See, DHS Yearbooks of Immigration Statistics FY13-FY15 at Table 7, <https://www.dhs.gov/immigration-statistics/yearbook>. Complete FY16 data on EB-5 is not yet publicly available.

²⁴ See, DHS Yearbooks of Immigration Statistics at Table 7, <https://www.dhs.gov/immigration-statistics/yearbook>.

4. *Differential between standard minimum investment and investment in rural area or targeted employment area needs to be carefully evaluated in conjunction with possible changes to the designation standard for a targeted employment area*

In the NPRM’s preamble, the Department identifies complications revolving around the investment amount differential between investments in TEAs and those not in TEAs:

“DHS has determined that the large differential between the standard and reduced investment amounts has failed to strike the balance that Congress appears to have intended by creating a multi-leveled investment framework in the EB-5 program. Moreover, based on its 25-year history implementing the program, DHS believes the differential – and the sizable monetary incentive it presents – has the potential of distorting general market forces and the business decisions that follow from such forces to an unintended degree. To strike a better balance between investments at the standard and reduced thresholds, and to reduce the degree to which the differential between the thresholds affects investment decisions, DHS is proposing to reduce the difference between the two investment thresholds.”²⁵

The Chamber agrees with the Department’s statement of the problem. However, the analysis of the problem and possible solutions provided by DHS is paltry and hollow. It may be the case that two investment levels that are very close to each other, including possibly even closer in percentage and dollar value than what DHS proposed, might be the best way to go, but careful analysis needs to be completed. DHS does not appear to have given any thought to the impact of its proposed solution (setting the TEA minimum investment as 75% of the standard investment amount) is workable given either (a) the very significant decrease in access to TEA designation for existing projects and investments, or (b) the large number of existing fundraising efforts and project development that is underway conditioned on qualifying under the current rules regarding TEA designation.

In the discussion section of the NPRM, the Department refers to the current \$1 million dollar investment level as the “standard minimum investment amount.”²⁶ The fact that Congress set this level to be the “standard” level indicates Congress did not intend for all investments to be made in TEAs, but the reality of the current situation is that the current law has created a situation, and the agency acknowledges this very point, where approximately 97% of all EB-5 investments are made in TEAs at the current level of \$500,000.²⁷ To that end, the agency admits that \$500,000 is the “de facto standard threshold.”²⁸ Given this acknowledgement, it is peculiar as to why the Department treats much of its calculations as if the non-TEA investment level is the standard investment level that the vast majority of investors are using currently.

²⁵ 82 Fed. Reg. 4738, 4746 (Jan. 13, 2017).

²⁶ 82 Fed. Reg. 4738, 4744 (Jan. 13, 2017).

²⁷ 82 Fed. Reg. 4738, 4746 (Jan. 13, 2017).

²⁸ *Id.*

For example, the Department states that under the new framework, investing in a TEA will only give a putative investor a 25% price reduction. Viewing these changes in this manner does not take into account the true impact of what the agency is proposing to do, as practically everyone involved in the EB-5 program is investing at the lower level today. If you are a business that will no longer be located in a TEA and you will have to compete against investment opportunities in TEAs, that business will be forced to market their project at a 33% premium against an investment in a TEA. More importantly, for those businesses currently operating in TEAs, going from \$500,000 to \$1.8 million represents a 260% increase in the minimum investment level for that project. These steep increases could devastate the ability of the program to continue to draw in foreign investment.

Lastly, we agree with the Department that the current percentage difference between the two investment levels today has failed to strike the balance that Congress sought to create. Unfortunately, the proposed solution to this problem would substitute one static differential for another, which is not nearly as market driven as what the Chamber would propose to be implemented. We understand that the current statutory text limits what the Department can do, but it bears repeating that if DHS provides the space for the ongoing negotiation process on Capitol Hill to continue, the Chamber and various other stakeholders will be able to craft a proposal that is more market-driven and more along the lines of what was discussed earlier regarding a market-based adjustment process that would not only allow minimum investment levels to change, but also the difference between the two levels. The Chamber acknowledges that this requires legislation and we would hope that the Department would encourage legislative solutions, as it allows all stakeholders to address many more issues in the EB-5 program than this NPRM does and it would be much more effective in improving the program's reputation and operability.

5. Consultation with the Departments of Labor and State as a prerequisite to raising minimum investment levels remains unnecessarily opaque

The NPRM gives lip service to the statutory requirement that DHS consult with the Departments of Labor and State.²⁹ The Chamber is surprised that the scope and nature of this consultation is not described in some detail. In other situations, such as in the issuance of the Interim Final Rule governing the H-2B program, the statute requires DHS to consult with another executive branch department, DHS concluded that it must engage in joint rulemaking with the department playing a consulting role to quantify the nature of the consultation. The Department's mere mention of the State Department and Labor Department in passing does not rise to the level of sufficiency needed for DHS to raise the minimum investment levels in the manner that they have done and to the levels that they have proposed.

²⁹ 82 Fed. Reg. 4738, 4744 (Jan. 13, 2017).

6. *Transition rules needed to be included for new investment levels including grandfathering*

We join the multiple commenters responding to the NPRM that focused on the need to “grandfather” or “transition” existing projects, including such comments from State agencies responsible for facilitating foreign investment. Adjustments to investment amounts need to take into account the large number of investors and their families already waiting in the EB-5 backlog, and appropriately quantify the impacts of the new investment levels to ongoing and proposed projects and associated projects. The Department’s NPRM is wholly lacking in explaining how its proposed new investment levels would be phased-in and applied. This is a serious issue that must be fully addressed in any final regulation.

CONCERNS REGARDING PROPOSED CHANGES TO THE DESIGNATION OF TARGETED EMPLOYMENT AREAS

The Chamber has four areas of concern with the proposed changes to the TEA designation process that necessitate the reevaluation of these provisions and that a new NPRM be issued. This new NPRM would reflect the additional analysis performed by the Department and provide stakeholders with an opportunity to comment before DHS would move forward with a final regulation.

1. *TEA designation should be based on compliance with all three factors for New Markets Tax Credits in urban distressed areas, or two of the three factors for a rural distressed area, but such an approach would require congressional action*

The Chamber believes that a better approach to defining TEAs would be to utilize the criteria established under the New Markets Tax Credit (hereafter NMTC) program. This program was created by Congress in 2000 to encourage investment in and job creation for residents of low income urban neighborhoods and rural communities.³⁰ NMTCs may be applied for based on three criteria: (1) median income levels of either the urban distressed or rural area, (2) poverty rate of the area, and (3) unemployment rate of the area. Because NMTCs do not focus solely on the unemployment rates, the lone statutory criteria for TEA designation in the current statute that allows non-rural areas to qualify, Congress would have to act in order to recognize the NMTC criteria as the new yardstick for determining a non-rural area as a TEA. Furthermore, if Congress were to act in this fashion, it would be implementing an economic distress test upon rural areas for the first time, which is the optimal policy for the program moving forward in the Chamber’s view.

Chamber members have projects in varied geographical settings. They have expressed to us their willingness for the EB-5 program to utilize a distress test in qualifying either an

³⁰ The New Markets Tax Credits program was created by the Community Renewal Tax Relief Act of 2000 (Pub. L. No. 106-554).

urban or rural area as a TEA, with an easier distress test for rural areas. Of equal importance is the openness on the part of rural stakeholders, including those that are not Chamber members, who are willing to impose some sort of distress test upon rural areas. The level of industry unity around the idea of a distress test in both urban and rural areas is encouraging for Congressional action, as stakeholders from all different parts of the country recognize that Barbourville, Kentucky, which is a distressed area in Appalachia, is different than Jackson Hole, Wyoming, which is not distressed, according to available data, and is a well-known vacation area for the wealthy and well-to-do.³¹ From a policy standpoint, if places like Barbourville should not have to compete at the same investment level as that of downtown New York City or San Francisco, that same line of reasoning follows that they should not have to compete at the same investment level in places like Jackson Hole. The fact that industry broadly supports the notion of applying a distress test to both urban and rural areas is one of the many reasons the Chamber is confident that a legislative solution can be reached in Congress; the Chamber hopes that DHS can play a constructive role in allowing those negotiations to move forward.

At the same time, the Department must understand the limitations of its TEA proposal using just one variable in urban areas to determine TEA eligibility. In the ongoing legislative debate, much has been made by some in Congress that they want reforms to prevent development projects in downtown business districts of major metropolitan areas from being able to qualify at the lower investment level. This is a perfectly legitimate opinion to have, but if you look at how the Department's proposal would likely operate in reality, their TEA designation provisions would not accomplish this goal and you would still see gerrymandering taking place under the proposed framework. The reason for this is because the Department is hamstrung by the statutory text, which only allows the agency to designate TEA eligibility based upon one variable, the unemployment rate. While the Department claims that its proposal would "remove the possibility of gerrymandering,"³² the Chamber is skeptical of the agency's ability to accomplish this, and the available data would suggest that the Department's proposed solution will fall far short of its stated goal.

Examining the available data,³³ the following areas would qualify as a TEA under the Department's proposal using just the unemployment rate as the single determining factor for TEA eligibility: Times Square in New York City, Madison Square Garden in New York City, the Miami Beach Convention Center, oceanfront property in Miami Beach off of Collins Avenue, and the Palmer House Hotel in Chicago. Certainly, these are not "economically distressed" areas. These types of anomalies are present in many other areas of the U.S., but these examples illustrate a much broader point. Not only will these census tracts qualify as a

³¹ In order to examine different areas of the country, the following website was used in order to examine the level of distress for the aforementioned areas. <https://www.novoco.com/resource-centers/new-markets-tax-credits/data-tools/nmtc-mapping-tool>

³² 82 Fed. Reg. 4738, 4750 (Jan. 13, 2017).

³³ Using the following website and applying the unemployment rate filter provided the Chamber with the above results. <https://www.novoco.com/resource-centers/new-markets-tax-credits/data-tools/nmtc-mapping-tool>

TEA and the lower investment level under the Department's proposal, but areas where data indicates a complete lack of economic distress could nevertheless qualify as a TEA and the lower investment level using the method provided by the Department.³⁴ While it might be a different type of gerrymandering than is experienced today, it is still gerrymandering.

The most interesting aspect of analyzing the Department's proposal on TEAs is that if one were to analyze all of the aforementioned examples using the NMTC criteria in the way that the Chamber and other stakeholders have suggested, that methodology would be significantly more effective in preventing the areas in which these landmarks are located, and the surrounding areas, from qualifying as a TEA. This is because the additional criteria provide a clearer picture of the socioeconomic status of these areas, which in the above cases are not distressed. Now, in order to fully effectuate this policy, Congress needs to pass legislation, and the Chamber is hopeful that the Department encourages Congress to craft legislation that would accomplish this goal, as it would be preferable to Chamber members as well as many other stakeholders interested in the future of the EB-5 program.

2. DHS failed to consider various existing programs that overlap with the EB-5 program's potential role in rural or economically depressed areas

To the extent that the Department's proposal on TEAs reflects a concern about encouraging investment in rural or economically depressed areas, the Department's lack of knowledge about existing programs seems relevant. In the NPRM, the Department requested information from stakeholders concerning overlapping or duplicative programs.³⁵ The Chamber wants to direct the Department's attention to the following programs, none of which seems to have been considered in developing the new TEA definition:

- Funding from Community Reinvestment Act.
- Funding from Hope VI Revitalization Grants.
- Funding directly through the awarding of tax credits through the NMTC program.
- Loans from U.S. Department of Agriculture Rural Development Office.

³⁴ 82 Fed. Reg. 4738, 4766, states in relevant part, that the designation of a high unemployment area TEA must consist of the "census tract or contiguous census tracts where the NCE is principally doing business, and may include **any or all** census tracts contiguous to such census tract(s)." (Jan. 13, 2017). Given this choice of language, the Department isn't requiring that each of these TEAs be shaped like oddly-shaped donuts in the image seen on 82 Fed. Reg. 4748; it could constitute 2 or 3 contiguous census tracts wherein the weighted average of the unemployment rate is above 150% of the national average. This deficiency in the Department's policy prescription should give anyone who is sincere about eliminating "gerrymandering" in the EB-5 program cause for concern, as the Department would fall far short of reaching its stated goal.

³⁵ 82 Fed. Reg. 4738, 4764 (Jan. 13, 2017).

3. *DHS considered and rejected a commuting patterns option but the concept of commuting patterns should be reevaluated*

The Chamber appreciates that whatever standard controls for TEA designation must be administrable by DHS and that a standard selected directly by DHS, as opposed to Congress, must be defensible by DHS as not only rational, but supported by the statutory text. As a first principle, for example, we understand that any recognition of commuting patterns as part of TEA designation could not rely solely on one measure to be applied throughout the country.

However, commuting ties should not be discarded altogether as part of the TEA definition. The Census Bureau and OMB establish boundaries of Metropolitan Statistical Areas to include adjacent counties connected to the area's high population inner core "as measured through commuting ties."³⁶ In turn, for EB-5 purposes, DHS uses MSAs as the key geographic unit to underpin what areas qualify as "rural."³⁷ As a result, the proposed rule inherently depends on commuter tie considerations for its suggested rural TEA construct. We believe such commuter ties are also relevant to urban TEAs and that the use of commuting patterns could be used to craft a methodology for determining TEAs that would better reflect the economic realities of various locales across the country.

4. *Transition rules for new TEA definition including grandfathering*

The Department has proposed a new TEA definition that DHS predicts will disqualify about 60% of current investments and NCEs from TEA eligibility,³⁸ yet has provided no specifics or explanation as to what the timing would be on implementing the new TEA definition, whether certain projects or investments at certain markers would be exempt and thus left unaffected, or if fundraising efforts or project development efforts could still request to utilize a phased-in TEA definition, after specific showings. If approximately 60% of the type of investments and NCEs that currently utilize the EB-5 program would be required to utilize the standard investment levels, that means that 60% of program users would be subjected to a 260% increase in required investment (from \$500,000 to \$1.8 million).

The practical impact of such a massive shift in TEA policy injects a substantial level of uncertainty for all sorts of stakeholders. Various projects will have difficulty maintaining access to needed funding streams to finish developing projects that are being built as the

³⁶ 76 Fed. Reg. 53030, 53042 (Aug. 24, 2011) (Department of Commerce, Census Bureau, Notice on "Urban Area Criteria for the 2010 Census").

³⁷ 82 Fed. Reg. 4738, 4748 (Jan. 13, 2017). DHS explained that it was "proposing to amend the definition of 'rural area' to mean any area other than an area within a Metropolitan Statistical Area (as designated by the Office of Management and Budget (OMB))" and that "because cities and towns fall between counties and MSAs on the one hand, and geographic or political subdivisions within counties and MSAs on the other, DHS believes it is appropriate to include them as an area that could independently qualify as a TEA."

³⁸ See *supra* footnote 1.

Chamber is crafting these comments. To that end, the effects are going to be most dire not on very large development projects, but smaller projects in less well-to-do areas of the nation where oftentimes the EB-5 portion of the funding makes up a very large portion of the project's capital stack.

Over the past two years in negotiations with Congress, one retort that was frequently delivered to us was that "these projects you are describing would be able to obtain development capital even without EB-5 funding streams." The Chamber is in no position to pontificate on these presumptuous assertions, nor are the people who would claim to be able to forecast that markets would adjust in a certain way in the absence of particular funding sources. However, what the Chamber can say is that the types of stakeholders who will be under the most pressure under these new rules are not the developers of marquee projects that some members of Congress might find distasteful. The small-scale developers who use EB-5 to help fund the construction of a La Quinta Inn & Suites in Houma, Louisiana, the building of an assisted living center for senior citizens in Sarasota, Florida, or the development of charter schools in Sunrise and Cooper City, Florida, will be the ones who are likely to be hurt the most by these changes. The Department needs to be mindful of these practical impacts if they move forward to finalize this proposal.

For these reasons, we believe that one of the most important complexities created by the Department's proposal is how to transition to a new TEA definition along the lines of what DHS proposed. Currently, there is no text in the proposal that would phase in these new TEA provisions. If the Department wants to avoid unnecessary disruption and upheaval of several projects across the country, the Department should propose a meaningful transition period that allows stakeholders some time to wind down their business dealings under the old legal framework and make the necessary changes in their operations to survive going forward.

THE DEPARTMENT DID NOT PROVIDE SUFFICIENT ANALYSIS OF ITS PROPOSAL TO STAKEHOLDERS

The Chamber takes issue with the Department's analysis on several grounds. Simply put, DHS did not conduct an adequate examination of alternative proposals and actual cost impacts to businesses, thus they have failed in their duty to properly apprise the public of the impacts of their proposal.

1. DHS failed to comply with Executive Orders 12866 and 13563

As the Department is well-aware, there are binding Executive Orders governing the notice and comment rulemaking process. Executive Orders 12866 and 13563 require every executive branch agency engaging in notice and comment rulemaking to do the following before issuing a regulation:

- Clearly define the problem that occasions the need for regulation;

- Consider and compare the costs and benefits of each alternative approach of the regulation (including the alternative of no new regulation); and
- Select the regulatory approach that minimizes costs relative to benefits.

DHS has no basis to claim it has complied with these requirements with regard to the proposed regulation on either investment levels or the TEA definition, unless it believes it is sufficient to rely on a form-over-substance presentation.

The DHS explanation of the proposed rule indicates that the two most substantial problems it is attempting to resolve are investment levels that have not kept up with inflation since the program was first enacted, and the gerrymandering of high unemployment area TEAs by state governments. This statement of the problems is itself superficial. For example, while DHS provides some framework for its new investment amount policy by mentioning historical numbers of the EB-5 program and the possible relevance of competition with investor programs of other countries, it either did not consider – or did not share with stakeholders – how these factors might recast the investment level question. Is a comparison to 1990 dollars for the inflation gauge wise, relevant, or even defensible to use when the EB-5 program was *not* an effective vehicle for job-creation on any significant scale until 2008? Is the only comparison factor between EB-5 and the immigrant investor programs of other countries the investment amount? Are the only relevant countries other English-speaking nations? With regard to the TEA definition, the NPRM is unclear as to what steps DHS took to focus-in on defining the problem to be solved. Is eliminating gerrymandering the top priority for TEA designation regardless of the possible negative impact on job-creation, the congressionally-stated goal of the program? Should the primary consideration in developing the TEA definition be to tie TEA designation to job-creation for those most in need of jobs? Is the crux of the problem that gerrymandering dilutes incentives to invest in rural areas?

Even if the Department believes that it has sufficiently defined the problems it seeks to solve, our above discussion of Chamber concerns shows that Department's analysis amounts to little more than an incomplete review of different approaches to solve these problems. For example, in the preamble the Department touches on the interplay between raising the standard investment level by 80% simultaneous with reducing by 25% the discount to the TEA investment level.³⁹ But, DHS did not mention, much less discuss or account for, the fact that in the marketplace not just the TEA discount percentage drives investors to TEA investments, but the actual dollar value associated with the required minimum investment.⁴⁰ Likewise, when explaining how it selected the TEA discount ratio DHS did not mention, or

³⁹ “DHS determined that due to the other proposed changes to the standard minimum investment amount in this rulemaking, the impact of a 25 percent reduction for TEA investments would initially be softened by the fact that the difference between the standard amount and the TEA investment amount, in terms of dollars, would remain roughly the same (changing from \$500,000 to \$450,000.” 82 Fed. Reg. 4738, 4747 (Jan. 13, 2017).

⁴⁰ In other words, it is not just a 50% discount and a \$500,000 differential that encourages TEA investment, but the \$500,000 investment level itself.

discuss, how a new TEA definition, or the specific new TEA definition DHS was proposing, should, or could, be related to the setting of the TEA discount.⁴¹

Most fundamentally, the Department did not *calculate* an expected cost to stakeholders or to the EB-5 program goals should the proposed investment level and TEA definition be implemented, and thus was unable to satisfy its obligation to identify – much less select – a regulatory approach that minimizes cost relative to benefit. DHS itself explained that it “has determined that due to the data limitations and the complexity of EB-5 investment structures, which typically involve multiple layers of investment, finance, development, and legal business entities, it is *difficult to quantify and monetize the costs and benefits* of the proposed provisions”⁴² regarding changes to investment amounts and TEA designation. Faced with this difficulty, DHS nevertheless did not review the extensive documentation it has at the Immigrant Investor Program Office (what USCIS refers to as IPO) on each regional center, NCE, and JCE. From this review, the Department could have developed methods for quantifying both costs and benefits using the in-house economists at IPO as well as economists in the USCIS Regulatory Coordination Division. While this might be cumbersome since IPO does not have electronic or digitized records, the Department is actually the best source for extensive data on the EB-5 program. Instead, DHS offers only “qualitative discussions” on the potential costs and benefits.⁴³

The increases in investment amounts seem puzzling at best (and misleading at worst). DHS ignored the possibility of a comprehensive review of the extensive documentation IPO has on file and instead found it “has no way to assess the potential reduction in investments either in terms of past activity or forecasted activity.”⁴⁴ Strikingly, despite the Department’s conclusion that it cannot “estimate any impacts concerning job creation, losses or other downstream economic impacts” driven by the increases in investment amounts, it nevertheless feels comfortable in concluding without reservation that “DHS believes [the increased investment amounts] would increase the integrity, effectiveness, and economic impact of the program positively, stimulating investment in areas where it is needed most and generating jobs.”⁴⁵

The Chamber has concluded otherwise. If given enough time, the Chamber was willing to work with its members to quantify the impacts of the new investment levels to ongoing and proposed projects and associated projects. The Department was not sufficiently

⁴¹ In other words, setting the TEA definition in such a way that it eliminates about 60% of current TEA-designated projects should be a critical factor in deciding the relative value of the required TEA investment level in relation to the standard investment level.

⁴² 82 Fed. Reg. 4738, 4740 (Jan. 13, 2017) (emphasis added).

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

interested in such analysis to provide an extension of time⁴⁶ that might have afforded the opportunity for at least an initial foray into this review by the Chamber.

With respect to the option of pursuing no new regulatory action, the NPRM indicates that DHS did not evaluate whether despite the need for reform it was necessary for the Department to work with Congress instead of pursuing partial reforms through regulation. DHS did not weigh whether its effort to propose regulatory revisions to two vital components of the EB-5 program would be counterproductive to the goals of the program to create jobs or contraindicated by the complex interconnectedness of various aspects of the program DHS was not proposing to revise in the same NPRM, or had no authority to revise. As discussed above, the Chamber believes that because of the complexity of this program, the many issues that need to be modernized, and the ongoing congressional negotiations to reform the program, DHS should withhold from acting to issue proposed rules in this space. In order to comply with Executive Orders 12866 and 13563, DHS must share with stakeholders what its considered view is on the important question on whether to regulate at all and document that it at least gauged the pros and cons of choosing not to propose new regulations at this juncture. Unfortunately, the Department failed to fulfill its obligations in this regard.

2. DHS failed to comply with the Regulatory Flexibility Act

The Department recognizes that it must comply with the Regulatory Flexibility Act and it has endeavored to complete an Initial Regulatory Flexibility Analysis to meet that obligation. Unfortunately, for the many reasons stated below, the Chamber believes the analysis proffered by the Department is woefully insufficient to fulfill its obligations under the Regulatory Flexibility Act.

The Regulatory Flexibility Act requires that a final analysis contain the following:

- a succinct statement of the need for, and objectives of, the rule;
- a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of

⁴⁶ See supra footnote 2.

applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.⁴⁷

Although the agency has acknowledged its responsibilities under the Regulatory Flexibility Act, much of the agency's analysis is incomplete in that among other things, it relies on the absence of data, or an inability to reliably identify the number of small entities participating in the EB-5 program, to justify the skeletal Initial Regulatory Flexibility Analysis it provided.

We recognize, as the Department pointed out in the NPRM, that the Form I-924A for Annual Certification of regional center does not request information *on the form* confirming the number of employees or revenue levels.⁴⁸ However, our members informed us of the massive amounts of paper filed with each year's I-924A generally include revenue and employee numbers for each designated regional center and the NCEs and JCEs established by the regional centers. We see that DHS went to great lengths to try to utilize subscription and publicly available resources to establish whether and how many regional centers are small entities, and was unsuccessful in doing so,⁴⁹ but made no effort to utilize its own extensive treasure trove of detailed information on regional centers, NCEs, and JCEs.

With regard to regional centers, it seems quite doable to classify the appropriate industry. While combing through IPO annual report records filed by regional centers to locate the employee and revenue information might be time consuming for DHS, this would not appear to be significantly more time consuming than attempting to comb through subscription and publicly available data sources. Our members have informed us that regional centers typically are classified under NAICS code subsector 523. As can be seen from the below excerpt from the Small Business Administration's (SBA) size standard list for small businesses, a business in sector 523 is identified as a small entity based on a revenue level of \$38.5 million or less as the standard for a small entity. Therefore, regional centers would likely be best coded as either 523999 for an entity engaged in miscellaneous investment activities or 523910 for an entity engaged in miscellaneous intermediation. We have been informed by our members that virtually all designated regional centers would be qualifying small businesses under the SBA's system based on the revenue level of regional centers.

⁴⁷ 5 U.S.C. § 604(a) as cited in Ranchers Cattlemen Action Legal Fund vs. U.S. Department of Agriculture, 415 F. 3d 1078, 1100 (9th Cir., 2005); also see Grand Canyon Air Tour Coalition vs. Federal Aviation Administration, 154 F.3d 455,470 (D.C. Cir., 1998) (recognizing that the FAA "did a lengthy analysis of the economic impact of the proposed rule on small businesses, as required by the Regulatory Flexibility Act, and responded to comments submitted by the Small Business Administration and other commenters," as well as considered alternatives to the rule), and National Women, Infants, and Children Grocers Association v. Food and Nutrition Services, 416 F. Supp. 2d 92, 107 (D.C. District Court, 2006) ("Under the RFA, an agency describes the effect of the proposed rule on small businesses and discusses alternatives that might minimize adverse economic consequences.")

⁴⁸ 82 Fed. Reg. 4738, 4763 (Jan 13, 2017).

⁴⁹ Id.

NAICS Codes	NAICS Industry Description	Size Standards in millions of dollars	Size standards in number of employees
Subsector 523 – Financial Investments and Related Activities			
523110	Investment Banking and Securities Dealing	\$38.5	
523120	Securities Brokerage	\$38.5	
523130	Commodity Contracts Dealing	\$38.5	
523140	Commodity Contracts Brokerage	\$38.5	
523210	Securities and Commodity Exchanges	\$38.5	
523910	Miscellaneous Intermediation	\$38.5	
523920	Portfolio Management	\$38.5	
523930	Investment Advice	\$38.5	
523991	Trust, Fiduciary and Custody Activities	\$38.5	
523999	Miscellaneous Financial Investment Activities	\$38.5	
Subsector 524 – Insurance Carriers and Related Activities			

Given that an estimated 90% of the EB-5 program presently runs through regional centers,⁵⁰ if almost all regional centers are small businesses, then DHS has a weighty analysis it has not yet performed that could substantially change the course of the regulatory process. It is also our understanding from Chamber members that most NCEs and JCEs pursue projects in just a few industries. If that is correct, it would not be overly burdensome for the Department to review IPO annual report information to make some economically sound conclusions as to the NAICS codes for a majority of NCEs and JCEs in the EB-5 program. DHS would then be in a position to apply the controlling size standard from the Small Business Administration, in terms of either revenue or number of employees.

CONCLUSION

While addressing important issues, we respectfully disagree with the Department’s approach and underlying analysis taken in this rulemaking. We understand and value the importance of the Department’s mission to ensure the EB-5 regional center program runs effectively, we believe that this proposal requires significant further reevaluation. We hope the Department will carefully consider our critique of this proposal and our requests to halt any efforts to finalize the proposed rulemaking not only to complete the necessary data-based analysis, but also to provide the time and space for a legislative solution to be reached.

⁵⁰ In the NPRM, DHS explained that it estimated 91% of all submitted I-526 petitions by immigrant investors (Form I-526 Immigrant Petition by Alien Entrepreneur) were based on regional center investments. 82 Fed. Reg. 4738, 4755 (Jan. 13, 2017).

Department of Homeland Security
U.S. Citizenship and Immigration Services
Proposed Rule on EB-5 Immigrant Investor Program Modernization, RIN 1615-AC07
April 11, 2017
Page 24

The Chamber appreciates the opportunity to share our observations with the Department and hopes these comments are useful. Thank you for your consideration of our views.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits



Jonathan B. Baselice
Director
Immigration Policy