Rethinking EB-5
Reforms to the Immigrant Investor Program to Encourage Investments in Affordable and Workforce Rental Housing
By John Griffith and Michael Berman | August 2017

At A Glance:

• Since 1990, the EB-5 Immigrant Investor Program has helped eligible foreign nationals attain permanent legal residence in the U.S., so long as they make a sizable job-creating investment in the country. Few investors took advantage of the program in its early years, but the program is now oversubscribed. This provides an opportunity for meaningful reforms, with the dual goals of mitigating fraud and maximizing the social and economic impact of each invested dollar.

• The EB-5 program generally has a poor track record on achieving social and economic impact beyond job creation, and the program has been criticized for supporting luxury real estate and other projects that would otherwise have no trouble attracting private investment capital. However, some mission-driven organizations have shown that it is possible to deploy EB-5 capital toward certain types of impact investments, such as the development of affordable housing. More can and should be done to encourage EB-5 participants to invest in rental housing that is affordable to low- and moderate-income households in areas where there is a demonstrated need.

• In the near term, the Department of Homeland Security (DHS), which oversees the EB-5 program, should establish new rules and incentives that better target underserved communities—including neighborhoods with high levels of rental cost burdens—and encourage EB-5 participants to invest in workforce and affordable rental housing. Specifically, DHS should set a new minimum investment threshold for real estate investments in targeted neighborhoods that meet certain benchmarks for housing affordability, thereby attracting capital to projects that would not otherwise receive funding from conventional sources.

• In the longer term, as Congress considers reauthorization and expansion of the EB-5 program, lawmakers should take steps to strengthen federal oversight and further encourage EB-5 participants to pursue targeted investments in affordable housing and other community assets. Among other changes, Congress should centralize the designation of “targeted employment areas” and update the definition to include areas of concentrated poverty and neighborhoods with significant affordable housing needs. Congress should also provide flexibility on the job-creation requirement if an EB-5 investment achieves social and economic impact beyond job creation—such as the development of affordable or workforce rental housing—and is held for at least 10 or 15 years.

Introduction

The EB-5 Immigrant Investor Program, short for “employment-based fifth preference,” was created in 1990 to expedite visa approvals for foreign nationals who make sizable investments in the U.S. Eligible investments must total at least $1 million—or $500,000 if located in a targeted area—and create at least 10 domestic jobs, among other rules. By law, no more than 10,000 visas can be issued through the EB-5 program annually, and that cap has been reached in each of the past three years.

Throughout the program’s 27-year history, the Department of Homeland Security (DHS), which oversees the EB-5 program, has encouraged EB-5 capital to flow to high-need communities through the designation of “targeted employment areas” (TEAs), defined as regions that are either rural or experiencing high levels of unemployment. Since investments in TEAs are subject to a much lower minimum threshold—$500,000 instead of $1 million under current rules—the vast majority of EB-5 investments are made in those targeted areas, typically through local investment intermediaries known as EB-5 regional centers.

It is difficult to measure the EB-5 program’s economic and social impact over the years, due in part to weak federal reporting requirements for investors and regional centers. A recent study by the Department of Commerce estimated that the EB-5 participants invested a total of $5.8 billion in the two-year period between 2012 and 2013, leading to the creation of more than 174,000 domestic jobs. Those investments were made into a wide range of sectors of the U.S. economy, including the development of new apartment buildings, commercial real estate, retail stores, restaurants and hospitals.

Despite those positive outcomes, the EB-5 program has significant flaws. In recent years the program has been mired by high-profile cases of fraud and abuse, exposing gaps in federal oversight. Critics of the program have also scrutinized the process for identifying high-need communities, citing several examples of EB-5 participants receiving the
TEA designation for investments in luxury apartment buildings in affluent neighborhoods. Because EB-5 capital has proven difficult to leverage for affordable housing and other much-needed community assets under current rules, the vast majority of investments have been made into market-rate projects that likely could have attracted more conventional sources of capital, dampening the overall social and economic impact of the program.

This issue brief lays out several proposals for strengthening the EB-5 program, including recommendations for regulatory and legislative changes. While the brief focuses on reforms that encourage investments in affordable and workforce rental housing, similar policy changes could encourage other forms of impact investments, including targeted investments in small businesses, social enterprises, health centers, charter schools, retail centers and other community assets.

Chart 1: Total EB-5 Visas Issued Each Year, 1992-2014

SOURCE: Bipartisan Policy Center, using DHS data
How EB-5 Regional Centers Can Encourage Affordable Housing under Current Program Rules

While each EB-5 investor is unique, the current rules of the program tend to attract prospective immigrants looking for certain types of investments. A few common characteristics of EB-5 investments include:

- **Geographically targeted.** Because of the streamlined process and lower investment threshold, the vast majority of EB-5 participants invest through regional centers located in TEAs, which are designated by the state based on broad federal guidelines.

- **Focused on job creation.** When invested through a regional center, EB-5 participants must demonstrate that their investment creates at least 10 jobs over a sustained period of time, including both direct jobs (i.e. retail, hospital, hotel or restaurant workers) and indirect jobs (i.e. full time construction workers).

- **Relatively short investment periods.** EB-5 participants are only required to retain risk in the investment throughout the visa approval process, which tends to take about three to five years.

- **Financial returns are not always the top priority.** Since the primary goal of the investment is to attain a visa, many EB-5 participants are willing to accept a below-market rate of return under certain conditions, so long as they are able to recover their principal at the end of the process.

While the vast majority of EB-5 capital has been allocated to traditional market-rate investments, some regional centers have taken steps to direct capital toward investments that generate measurable social impact alongside a financial return.
For example, the New York-based nonprofit organization Asian Americans for Equality (AAFE) recently used EB-5 capital to finance a mixed-use development in Queens that includes both commercial space and more than 200 units of affordable rental housing. EB-5 investors contributed equity to the project – helping to fill funding gaps not covered by Low-Income Housing Tax Credits or other public sources – with the option to cash out after five years.

Similarly, EB-5 capital helped to build 115 affordable apartments in Seattle’s Stadium Place, a massive mixed-use development located in the rapidly gentrifying neighborhood near the Seahawks stadium. In San Francisco, EB-5 capital supported the redevelopment of Hunters Point Shipyard, which was required to include affordable apartments as part of an agreement with the city. And in 2015, the City of Miami launched a citywide effort to create more affordable and workforce housing in partnership with the city’s EB-5 regional center.

These examples, while promising, represent just a tiny fraction of EB-5 investments in the U.S. each year. While we encourage more EB-5 regional centers across the country to work within the current program rules to encourage more investments in affordable and workforce rental housing, achieving the necessary scale to alleviate the rental housing crisis will require changes to the program itself.

**Recommendations for Regulatory Changes to the EB-5 Program**

In January 2017, the Department of Homeland Security proposed new rules to “modernize” the EB-5 program. Among other changes, the proposed rules would replace the current state-based system of designating TEAs with a more centralized national system, part of a broader effort to eliminate local gerrymandering and better target investments to the highest-need communities. DHS also proposed increasing the minimum investment threshold to $1.35 million for TEAs and $1.8 million for non-TEAs.

Unfortunately, DHS’s proposed rule includes no reforms that would encourage EB-5 participants to pursue other social or economic outcomes beyond job creation, such as the creation of affordable and workforce rental housing. In addition to the much-needed reforms to the process of designating TEAs, we urge DHS to establish a new minimum investment threshold for projects in targeted neighborhoods that meet certain benchmarks for housing affordability.

As an illustrative example, say an EB-5 participant plans to invest in a mixed-use development with commercial space and residential units. If the development is located outside of a TEA, the investor would be subject to the proposed threshold of $1.8 million. If the development is located within a TEA and all residential units are rented out at market rents, the investor would subject to the proposed TEA threshold of $1.35 million. But if the investor agrees to rent a certain percentage of those units to low- or moderate-income households at below-market rents, based on standards set by DHS in consultation with the Department of Housing and Urban Development (HUD) and other agencies, the investor would be subject to the current threshold of $500,000. In addition, DHS could require any EB-5 participant investing at the lower threshold to hold onto their investment for a minimum amount of time, such as 10 or 15 years.

Of course, this is only one possible way that DHS could encourage impact investments through the EB-5 program. But it is worth noting that the Immigration Act of 1990, which created and authorized the EB-5 program, places certain statutory restrictions on the program, including a) the requirement that EB-5 investments meet minimum size and job creation requirements; b) the annual cap on EB-5 visas issued; and c) the general definition of TEAs. Lifting or significantly modifying any of those restrictions would likely require an act of Congress.
Recommendations for Legislative Changes to the EB-5 Program

After a series of short-term extensions, the EB-5 program is scheduled to expire on September 30, 2017. As Congress considers reauthorizing or expanding the program in the coming months, lawmakers should enact much-needed and long-overdue reforms to strengthen federal oversight, enhance reporting requirements and further encourage EB-5 participants to pursue impact investments.

In 2015, bipartisan legislation was introduced in the House and Senate to strengthen administration and oversight of the EB-5 program. Among other things, the bill would have established new financial disclosure requirements for regional centers, increased DHS’ authority to terminate regional centers in cases of fraud and abuse and established a new industry-supported fund to pay for compliance enforcement and other oversight activities. It also would have strengthened the program’s job-creation requirement – including a rule that at least 50 percent of jobs must be created in TEAs – and modestly increased the minimum investment thresholds in both TEAs and non-TEAs.

In addition to these important reforms – which were proposed in 2015 but are not yet enacted – Congress should take further steps to strengthen the EB-5 program as part of any reauthorization or expansion, including:

- Federalize the process of designating TEAs to limit the ability to gerrymander at the local level, with the opportunity for states and cities to appeal with additional evidence.

- Update the definition of TEAs to include census tracts that are either: a) a federally designated area of concentrated poverty, meaning at least 40 percent of residents earn below the poverty line; or c) in an area with high affordable housing needs, meaning that more than one-third of renters pay more than half of their monthly income on housing.

- Provide flexibility on the either the minimum investment threshold or the job-creation requirement – or both – if the investor provides workforce or affordable rental housing in the development. All affordability standards should be set by DHS in consultation with HUD and other relevant agencies, and the EB-5 investor should be required to holds the investment for at least 10 or 15 years.

- Require that a minimum percentage of EB-5 visas are issued in TEAs meeting the above definition. Alternatively, Congress could exempt any TEA investment that meets minimum rental affordability standards from the annual cap on visas issued through the program.

Next Steps

With a few modest reforms, the EB-5 Immigrant Investor Program can become a powerful tool for impact investing in the U.S. Some of the necessary changes can be made immediately under existing authority – such as creating a new minimum threshold for investments in affordable and workforce rental housing – but more substantive changes to the program will likely require legislation.

In recent months, members of Congress and the Trump administration have made numerous statements about the need to reform our country’s immigration laws and protocols. That broader debate, along with the program’s impending expiration, provides an opportunity for meaningful reforms to the EB-5 program, with the dual goals of mitigating fraud and maximizing the social and economic impact of each invested dollar. We hope that the above recommendations help to guide and focus that discussion.
About the Authors

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About the Accelerating Impact Investing Initiative (AI3)

This issue brief is a product of the Accelerating Impact Investing Initiative (AI3). The AI3 was launched in 2013 to spark a national conversation about the federal government’s role in improving and expanding the market for impact investments, which are made with the intention to generate measurable social or environmental impact alongside a financial return. The AI3 is co-led by Enterprise Community Partners and Pacific Community Ventures with research support from the Initiative for Responsible Investment at Harvard University. Learn more at www.AcceleratingImpactInvesting.org.
REFERENCES

1. Due in part to the job-creation requirement, one could argue that EB-5 is one of the earliest examples of federal policy to expand impact investments, which are made with the intention to generate measurable social or environmental impact alongside a financial return. But it is worth noting that the term “impact investing” wasn’t coined until 2008, nearly two decades after the EB-5 program was created. To learn more about impact investing, visit https://thegiin.org/impact-investing.

2. Throughout the first two decades of the program’s existence far fewer than 10,000 EB-5 visas were issued each year. However, due to increased demand in recent years the cap has been reached each year since 2014.

3. For purposes of designating a TEA, “high-unemployment” means the local unemployment rate is at least 150 percent of the national average. Despite this general rule, TEAs are typically designated at the state level, which in some cases has led to TEA “gerrymandering.” For more on that issue see: http://www.citylab.com/politics/2017/01/how-to-fix-the-broken-eb5-cash-for-visas-immigration-program-trump/511265.

4. In 2014, 95 percent of EB-5 investments were made in TEAs, while 97 percent were made through Regional Centers. For more, see: https://bipartisanpolicy.org/wp-content/uploads/2015/09/BPC-Immigration-EB5-Visa-Program.pdf.


7. For a few examples of EB-5 related fraud cases, see: http://cis.org/EB5-Investor-Visa-Fraud-Map.


18. To learn more about the Miami initiative, see: http://www.miamigov.com/eb5/article.html.


20. For more on our recommendations to DHS, see our comment letter at: http://www.enterprisecommunity.org/resources/comment-letter-dept-homeland-security-dhs-eb-5-program-19534.

21. The Senate bill was called the American Job Creation and Investment Promotion Reform Act of 2015, introduced by Sens. Grassley (R-IA) and Leahy (D-VT). The House bill was called the American Entrepreneurship and Investment Act, introduced by Reps. Amodei (R-NV) and Polis (D-CO).

22. Nationwide about one in four renters in the U.S. — 11.4 million renter households total — pay more than half of their monthly income on housing. For more information on America’s growing rental housing crisis, see: http://www.enterprisecommunity.org/resources/investment-opportunity-bold-new-vision-housing-policy-us-13370.