Department of Homeland Security

Office of Inspector General

United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program

OIG-14-19

December 2013

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

December 12, 2013

MEMORANDUM FOR: The Honorable Alejandro Mayorkas
Director
United States Citizenship and Immigration Services

FROM: Charles K. Edwards
Deputy Inspector General

SUBJECT: *United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program*

Attached for your action is our final report, *United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program.* We incorporated the formal comments from the United States Citizenship and Immigration Services in the final report.

The report contains four recommendations aimed at improving the EB-5 Regional Center Program. Your office concurred with three of the recommendations. The OIG considers recommendations 1, 2, and 3 open and unresolved. As prescribed by the *Department of Homeland Security Directive 077-01, Follow-Up and Resolutions for Office of Inspector General Report Recommendations*, within 90 days of the date of this memorandum, please provide our office with a written response that includes your (1) agreement or disagreement, (2) corrective action plan, and (3) target completion date for each recommendation. Also, please include responsible parties and any other supporting documentation necessary to inform us about the current status of the recommendation.

Based on information provided in your response to the draft report, we consider recommendation 4 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendation(s). The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions.

Please email a signed PDF copy of all responses and closeout requests to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to appropriate congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Anne L. Richards, Assistant Inspector General for Audits at (202) 254-4100.

Attachment

Table of Contents

Appendixes

Abbreviations

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
EB-5	Employment-Based Fifth Preference
GAO	Government Accountability Office
iCLAIMS	Interim Linked Application Information Management System
INA	Immigration and Nationality Act
OIG	Office of Inspector General
U.S.	United States
USCIS	U.S. Citizenship and Immigration Services

Executive Summary

In 1990, Congress created the United States Citizenship and Immigration Services' (USCIS) Immigrant Investor Program, also known as the Employment-Based Fifth Preference Program. The program's intent was to stimulate the United States (U.S.) economy through job creation and capital investment by foreign investors. Three years later, the Departments of Commerce, Justice and State, the Judiciary, and *Related Agencies Appropriations Act, 1993* created the regional center pilot program for pooling investor money in a defined industry and geographic area. Our audit objective was to determine whether the USCIS' Employment-Based Fifth Preference regional center program is administered and managed effectively.

Several conditions prevent USCIS from administering and managing the Employment-Based Fifth Preference regional center program effectively. Specifically—

- The laws and regulations governing the program do not give USCIS the authority to deny or terminate a regional center's participation in the Employment-Based Fifth Preference program based on fraud or national security concerns;
- The program extends beyond current USCIS mission to secure America's promise as a nation of immigrants; and
- USCIS is unable to demonstrate the benefits of foreign investment into the U.S. economy.

Additionally, USCIS has difficulty ensuring the integrity of the Employment-Based Fifth Preference regional center program. USCIS does not always ensure that regional centers meet all program eligibility requirements, and USCIS officials differently interpret and apply Code of Federal Regulations and policies. Furthermore, when external parties inquired about program activities USCIS did not always document their decisions and responses to these inquiries, making the Employment-Based Fifth Preference regional center program appear vulnerable to perceptions of internal and external influences.

As a result, USCIS is limited in its ability to prevent fraud or national security threats that could harm the U.S.; and it cannot demonstrate that the program is improving the U.S. economy and creating jobs for U.S. citizens as intended by Congress.

Your office concurred with three of the four recommendations made to assist USCIS' management and administration of the Employment-Based Fifth Preference regional center program. Our recommendations focused on strengthening regulations for oversight authority and consistent program application; better coordination with other Federal entities; comprehensive reviews of the program; and quality assurance procedures for program integrity.

Background

USCIS' mission is to secure America's promise as a nation of immigrants by providing accurate and useful information to its customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the immigration system. In 1990, Congress created the USCIS Immigrant Investor Program, also known as the Employment-Based Fifth Preference (EB-5) Program. The EB-5 Program was created under 203(b)(5) of the *Immigration and Nationality Act (INA) in 1990*, Public Law 101-649, Section 121(a), to stimulate the U.S. economy through job creation and capital investment by foreign investors.

Through the EB-5 Program, foreign investors have the opportunity to obtain lawful, permanent residency in the U.S. for themselves, their spouses, and their minor unmarried children by making a certain level of capital investment and associated job creation or preservation. Three years later, the Departments of Commerce, Justice and State, the Judiciary, and *Related Agencies Appropriations Act, 1993* (The Appropriations Act) created the concept of the regional center pilot program for pooling investor money in a defined industry and geographic area to promote economic growth.[1] U.S. citizens or foreign nationals can operate regional centers, which can be any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation, or increased domestic capital investment. As of October 1, 2013, USCIS reports that there are 325 approved regional centers.

EB-5 Program Requirements

The EB-5 program requires that the foreign investor make a capital investment of either $500,000 or $1 million, depending on whether or not the investment is in a high-unemployment area. The foreign investors must invest the proper amount of capital in a business, called a new commercial enterprise, which will create or preserve at least 10 full-time jobs, for qualifying U.S. workers, within 2 years of receiving conditional permanent residency. Two distinct EB-5 pathways exist for a foreign investor to gain lawful permanent residency; each pathway differs in job creation requirements:

1) The Basic Immigrant Investor Program requires the new commercial enterprise to create or preserve only direct jobs that provide employment opportunities for qualifying U.S. workers by the commercial enterprise in which capital has been directly invested.

[1] On August 3, 2012, Congress removed the word "pilot" from the regional center program's name; however, the program expiration date is currently September 30, 2015.

2) The Regional Center Program, formerly known as the Regional Center Pilot Program, allows the foreign investor to fulfill the job creation requirement through direct jobs or projections of jobs created indirectly. Jobs created indirectly are the job opportunities that are predicted to occur because of investments associated with the regional center.

Application Process

Individuals or entities must file a Form I-924 with USCIS to become an approved regional center or amend a previous approval.[2] Once the application is approved, USCIS requires the regional center to report operational and financial data annually on Form I-924A. The regional center can only operate within a self-defined geographic area and within a self-designated industry. USCIS documents show that regional centers generally collect unregulated management and administrative fees between $25,000 and $50,000 from each foreign investor. These fees include travel and marketing expenses, legal fees, and sales commissions.

Each foreign investor must file an individual Form I-526 petition to apply to the EB-5 program. If the Form I-526 petition is approved, the investor obtains conditional permanent residency and has 2 years to fulfill the program requirements of job creation and capital investment. At the end of the 2-year period, the investor must file a Form I-829 petition to demonstrate that the investor has met all of the terms and conditions of the program. When approved, the foreign investor becomes a legal permanent resident of the U.S. and is no longer under the jurisdiction of the EB-5 program. Table 1 describes the forms required for participating in the EB-5 program.

Table 1: EB-5 Forms

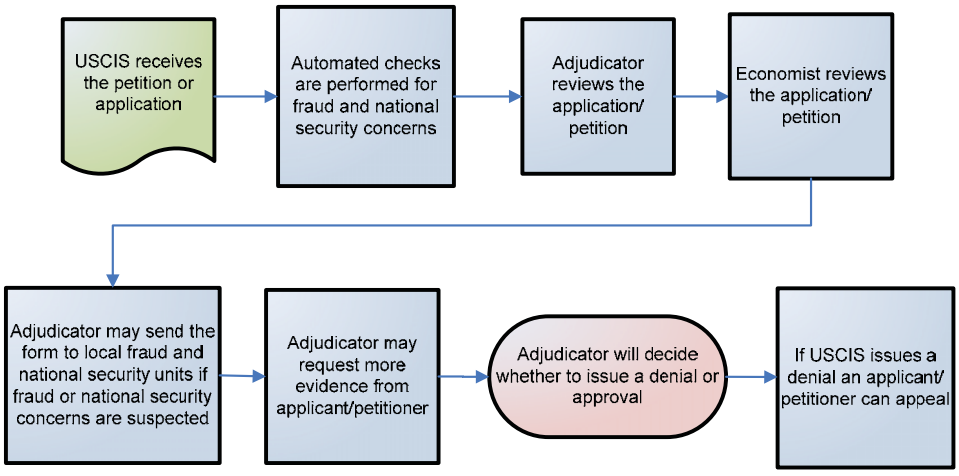
Forms	User	Purpose
I-924	An individual or entity	To request designation of the entity to be a regional center under the Regional Center Program.
I-924A	Approved regional center	To demonstrate continued eligibility for the regional center designation.
I-526	A foreign investor	To petition for status as an immigrant to the U.S. under section INA 203(b)(5) as amended.
I-829	A conditional permanent resident who obtained such status through entrepreneurship	To request U.S. residency.

Source: DHS OIG generated based on USCIS documents.

[2] Prior to 2010, narrative proposals were accepted as requests to be a regional center under the regional center program.

Figure 1 describes the general adjudications process for EB-5 petitions and applications.

Figure 1: EB-5 Adjudications Process



Source: DHS OIG generated based on USCIS documents.

The EB-5 program has been the focus of several reviews and media reports highlighting program concerns:

- The Government Accountability Office (GAO) reported that there was a significant lack of information maintained by USCIS about the EB-5 program, including information on where immigrant investors established their business, the extent to which the businesses remained in the original location, the types of businesses established, the number of jobs created, or the number of immigrant investors who applied for U.S. citizenship.[3]
- The USCIS Ombudsman reported the need to streamline USCIS policy and strengthen the adjudication process for stabilizing the program and making it more attractive to investors.[4]
- The media have reported concerns with the EB-5 program's operations.

Appendix A contains the objective, scope, and methodology of our audit.

[3] Immigrant Investors: *Small Number of Participants Attributed to Pending Regulations and Other Factors*, April 2005, GAO-05-256.
[4] Employment Creation Immigrant Visa (EB-5) Program Recommendations, March 18, 2009.

Results of Audit

Several conditions prevent USCIS from administering and managing the EB-5 regional center program effectively. Specifically:

- The laws and regulations governing the program do not give USCIS the authority to deny or terminate a regional center's participation in the EB-5 program based on fraud or national security concerns;
- The program extends beyond current USCIS mission to secure America's promise as a nation of immigrants; and
- USCIS is unable to demonstrate the benefits of foreign investment into the U.S. economy.

Additionally, USCIS has difficulty ensuring the integrity of the EB-5 regional center program. Specifically, USCIS does not always ensure that regional centers meet all program eligibility requirements, and USCIS officials interpret and apply the Code of Federal Regulations (CFR) and policies differently. USCIS did not always document decisions and responses to external parties who inquired about program activities causing the EB-5 regional center program to appear vulnerable to perceptions of internal and external influences.

As a result, USCIS is limited in its ability to prevent fraud or national security threats that could harm the U.S., and it cannot demonstrate that the EB-5 program is improving the U.S. economy and creating jobs for U.S. citizens as intended by Congress.

The Laws and Regulations

The laws that govern the EB-5 regional center program do not specifically allow USCIS to deny or terminate regional centers based on fraud or national security concerns identified during the adjudication process. The Appropriations Act, as amended, only describes the requirements to approve a regional center that submits a general proposal for the promotion of economic growth. The INA gives USCIS the authority to deny immigrants seeking a benefit or visa who are a national security concern.

However, USCIS has interpreted that because regional centers are pooling funds from investors and not seeking an immigrant benefit or visa, these sections of the INA are not applicable. [5] USCIS has not developed regulations that apply to the regional centers in respect to denying participation in the program when regional center principals are connected with questionable activities that may harm national security.

With stronger legal authority, USCIS would be in a better position to protect national security and U.S. citizens from harmful types of economic activities.

USCIS' Mission Limitations

The EB-5 program extends beyond USCIS' mission to provide immigration and citizenship services. When the EB-5 program was created, lawmakers acknowledged that USCIS did not have all of the expertise needed to implement the program and noted that USCIS should seek assistance from other agencies. Three years later, the Appropriations Act gave USCIS the oversight of the regional center concept, which further extended the EB-5 program from USCIS' mission. For instance, adjudications of regional centers involve different complexities and expertise that align to missions of other departments and agencies, such as the Securities and Exchange Commission and the Departments of Commerce and Labor. Those adjudications involve responsibilities such as reviewing investments, business and economic plans, job creation methodologies, financial statements, funding, and legal agreements.

According to the USCIS Director, the component has coordinated with other government agencies to assist with EB-5 program activities in the past, but acknowledged that more collaboration would help.

Table 2 presents a comparison of the purpose of the EB-5 program to the mission of four government departments or agencies. The underlined text shows language that is applicable to the purpose of the EB-5 program. Because agencies other than USCIS have missions that USCIS could leverage to its advantage for the EB-5 program, USCIS needs to improve coordination and rely on the expertise at these agencies during the adjudication process.

[5] Senate bill S.744, section 4804 has provisions intended to prevent individuals with national security concerns from participating in the EB-5 regional center program, as part of a substantial overhaul of the EB-5 program. S.744 would give the Secretary of Homeland Security the option to deny or terminate participation in the regional center program based on national security concerns. The bill was proposed on April, 2013, and passed by the Senate on June 27, 2013.

Table 2: Comparison of EB-5 Program Purpose and Departmental Mission Statements

Department and/or Agency	Mission Statement
United States Citizenship and Immigration Services	To secure America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.
Department of Commerce	To promote job creation, economic growth, sustainable development, and improved standards of living for all Americans by working in partnership with business, universities, communities and our nation's workers.
Securities and Exchange Commission	To protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.
Department of Labor, Bureau of Labor Statistics	To measure labor market activity, working conditions, and price changes in the economy. Its mission is to collect, analyze, and disseminate essential economic information to support public and private decision-making.

Source: DHS OIG created from information published on USCIS and U.S. government websites.

In their application package, regional centers are supposed to provide USCIS with predictions of economic growth. To evaluate economic growth predictions, USCIS hired economists to participate in the adjudication process. However, according to the economists, they do not have access to data and systems needed to validate the support for these predictions.

Foreign Investments and Job Creation

USCIS is unable to demonstrate the benefits of foreign investment into the U.S. economy. Although USCIS requires documentation that the foreign funds were invested in the investment pool by the foreign investor, the CFR does not provide USCIS the authority to verify that the foreign funds were invested in companies creating U.S. jobs. Additionally, the CFR allows foreign investors to take credit for jobs created by U.S. investors. As a result, USCIS has limited oversight of regional centers' business structures and financial activities.

USCIS cannot demonstrate that foreign funds were invested in companies creating U.S. jobs. Under the EB-5 Program, 8 CFR 204.6(j) requires a petition to verify that the foreign investor is investing lawfully obtained funds in a new

commercial enterprise to create U.S. jobs.[6] Under the USCIS precedent decision,[7] *Matter of Izummi*, USCIS also allows the creation of jobs by other entities, but as shown elsewhere, USCIS is not given the authority by the CFR to oversee these other entities.[8] Therefore, USCIS cannot verify that the foreign investments lead to the intended creation of jobs.

For example, we identified 12 of 15 regional center files in which USCIS allowed the creation of new commercial enterprises that collected EB-5 capital to make loans to other job-creating entities. USCIS adjudicators confirmed that because the CFR does not give them the authority to oversee these additional job-creating entities, they are unable to inquire or obtain detail that would verify foreign funds are invested in the U.S. economy via a job-creating entity.

Additionally, 8 CFR 204.6(g) allows foreign investors to take credit for jobs created with U.S. funds, making it impossible for USCIS to determine whether the foreign funds actually created U.S. jobs. Consequently, the foreign investors are able to gain eligibility for permanent resident status without proof of U.S. job creation. In one case we reviewed, an EB-5 project received 82 percent of its funding from U.S. investors through a regional center. The regional center was able to claim 100 percent of the projected job growth from the project to apply toward its foreign investors even though the foreign investment was limited to 18 percent of the total investment in the project. Every foreign investor was able to fulfill the job creation requirement even though the project was primarily funded with U.S. capital. When we questioned USCIS about this practice, the officials explained that the EB-5 project would not exist if not for the foreign investment.

We also identified two cases in which foreign investments were loans for completed EB-5 projects. For example, in June 2010 a foreign national invested $500,000 to pay off an existing loan for the construction and operation of a hotel that had opened in December 2009. Total project costs for the hotel were about $28 million, in which foreign investments totaled $4.5 million. Four million of the foreign investments were used to pay off existing loans, and $500,000 was used

[6] A new commercial enterprise is any public or private entity established for the purpose of promoting economic growth through the investment of foreign funds established after November 29, 1990.

[7] Precedent decisions are administrative decisions of the Administrative Appeals Office, the Board of Immigration Appeals, and the Attorney General, which are selected and designated as precedent by the Secretary of the Department of Homeland Security (DHS), the Board of Immigration Appeals, and the Attorney General, respectively.

[8] *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998).

to purchase existing equity. Although 84 percent of the funds were contributed by U.S. investors, the foreign investor was subsequently granted permanent U.S. residency based upon an investment in a project that had already been completed.

The flow of EB-5 foreign investments is a complex process. It starts with the foreign investor sending funds to the investment pool (i.e., the new commercial enterprise). The foreign investor may be required to send administrative fees to either the regional center or the new commercial enterprise for expenses related to managing the investment. The new commercial enterprise then transfers the funds to the job-creating entity for management of the project. At the job-creating entity, the foreign investments are combined with investments from other sources, such as U.S. domestic funds. The numbers of estimated jobs created from that job-creating entity are not allocated among all investors based upon investment percentage, but are only attributed to the foreign investor. Additionally, current regulations do not require USCIS to track and verify that the foreign investment was invested into the job-creating entity.

Recently, USCIS reported that since 1990, more than $6.8 billion has been invested in the U.S. economy through the EB-5 program, and a minimum of 49,000 jobs have been created. We attempted to validate these statistics and requested the supporting information. USCIS was not able to provide support for the statistics reported. USCIS officials said that they had to estimate these figures and assumed the minimum requirements of the program had been met. As a result, USCIS was only able to speculate about how foreign investments are affecting the U.S. economy and whether the program is creating U.S. jobs as intended.

Program Integrity

USCIS has difficulty ensuring the integrity of the EB-5 regional center program. Specifically, USCIS does not always ensure that regional centers meet all eligibility requirements for the program. USCIS officials interpret the CFR and USCIS policies differently. USCIS does not apply the regulations effectively to the regional center program. Additionally, the EB-5 regional center program appears to be vulnerable to perceptions of internal and external influences when there is not adequate documentation that supports decisions made by USCIS.

Regional Center Accountability

Although USCIS adopted 8 CFR 204.6(m) in 1994 to assist its efforts in implementing the Appropriations Act, as amended, it has not always held regional centers accountable to the CFR requirements. Specifically, 204.6(m) requires regional centers to submit business plans with verifiable detail on how jobs will be created, yet regional centers continue to provide general concepts with some applications. After 8 CFR 204.6(m) was created, Congress amended the Appropriations Act in 2002 to allow regional centers to submit a general proposal. In 2013, 20 years after the creation of the regional center concept, USCIS officials have indicated that there is obvious tension evident in the regulatory language requiring "verifiable detail" and the statutory language which allows for the proposal to be based on "general predictions." Because of this language difference, it appears that USCIS may not always apply its CFR requirements to the regional centers.

For example, the USCIS California Service Center asked regional center officials to provide additional information related to one proposed business plan. Center officials responded that they did not need to submit a detailed business plan according to the Appropriations Act. Subsequently, the USCIS California Service Center approved the regional center's application without obtaining verifiable detail that complies with the CFR. As a result, there is no assurance that regional centers meet the qualifications to participate in the program.

USCIS Regulations and Policy

USCIS officials interpret the CFR and USCIS policies differently, which prevents adjudicators from evaluating regional center applications and related petitions effectively. For example, an adjudicator requested additional evidence from a regional center applicant. According to 8 CFR 103.2(b)(8), the regional center application should have been denied for not responding in the mandated 12 weeks. However, the denial letter was refused by the USCIS legal department, stating that there is no language that provides the ability to go straight to denial.

In another example, to generate a favorable decision, USCIS requested a regional center applicant to omit information from its application because the language was not in compliance with a USCIS precedent decision. By advising applicants to remove information because it may delay or prevent approval, USCIS may be circumventing measures in place to ensure applicant eligibility. An adjudicator must deny an application if the evidence establishes ineligibility.

Another example is the designation of high-unemployment areas by state governments. The regulations provide for state governments to designate high-unemployment areas for determining whether the EB-5 regional center project qualifies for the lower foreign investment of $500,000. However, the regulations do not instruct the states on how to make the designation. Because of how the regulations are written, USCIS adjudicators said that they must accept what the state designates as a high-unemployment area without validation even when it appears as if these designations are areas of low unemployment. For example, a regional center provided USCIS a letter from its state agency designating that one EB-5 project being built in a prosperous area qualified as being in a high-unemployment area. The letter explained that employment data for the requested combination of areas did not qualify for the designation but provided an alternative combination of areas for the project to qualify. The area where the project was being built is included in both combinations. This places doubts on whether program requirements are met, and it allows the foreign investors to invest only $500,000 instead of $1 million to qualify for permanent residency.

As a result of USCIS' unclear regulations and policy, USCIS is unable to hold regional centers and foreign investors to a consistent standard, and adjudicators may approve applicants and petitioners that do not meet eligibility requirements.

Internal and External Influence

USCIS did not always document decision making and responses to external parties who inquired about EB-5 activities. Outside influence may require USCIS senior leadership to become involved in the EB-5 adjudication process, thereby creating the perception of special treatment and internal influence by senior managers. While the files we reviewed were not well organized and comprehensive, they appeared to contain sufficient evidence to support the final adjudication decision. However, USCIS employees provided supplemental emails that suggest internal and external parties may have influenced the adjudication of EB-5 regional center applications and petitions. Some parties may have compelling reasons for influencing decisions made regarding EB-5 participation. For example—

- The estimated job creation and economic improvements to local economies are convincing and important reasons for lawmakers and citizens to have an interest in advocating the EB-5 program.
- USCIS documents show that regional centers generally obtain between $25,000 and $50,000 in unregulated fees from foreign investors, and as such,

we believe that may contribute to them losing sight of the integrity of the EB-5 program in the interest of making money.

USCIS did not have protocols to document all inquiries and decisions made during the adjudication process. During the course of the audit, we obtained records showing email communications from external parties who were contacting USCIS senior leaders with inquiries pertaining to specific EB-5 adjudications. The emails requested private discussions about regional center applications or expressed dissatisfaction with the time USCIS was taking for adjudication decisions. Based solely on the correspondence, we were unable to determine whether USCIS honored the requests. These emails referenced 3 of the 15 regional centers in our case file review along with other regional centers not covered in the scope of our review. The case files we reviewed did not contain evidence of the external or internal inquiries, whether the inquiries were addressed, or if anyone from USCIS ever met with or responded to the external parties.

One set of emails contained inquiries about unwarranted delays and denials in processing applications. The regional center was amending its application to increase its area of operations. This amendment was denied by the USCIS California Service Center. The emails also discuss I-526 petitions that had been held awaiting the outcome of the Administrative Appeals Office. The emails discuss scheduling a meeting with a senior official and others at USCIS to discuss the inquiries and the decision of the Administrative Appeals Office. The emails do not discuss the outcome of this issue.

In another email, a Congressman attached a letter asking a USCIS senior official to withdraw a request for evidence that USCIS sent to a regional center. In the same letter, the Congressman thanked the senior USCIS official for discussing the request for evidence with him. In the draft letter, the senior official responded to the Congressman saying that some items in the request for evidence were appropriate and some were not, and promises to clarify some of the issues in forthcoming EB-5 policy guidance. The emails do not discuss the outcome of this issue.

One set of documents showed a president of a regional center emailed a senior USCIS official threatening a Federal lawsuit because a previously approved regional center project was in the process of being terminated by USCIS. The president of the regional center then asked to speak to the senior USCIS official personally. The emails do not discuss the outcome of this issue.

In another example, there is indication of USCIS senior leadership with no direct involvement overturning an adjudicator's decision to deny a foreign investor's petition associated with a regional center. Senior management stated that the adjudicator did not give proper consideration to previous decisions made on other investor petitions associated with the same regional center. Consequently, the petition was approved even though the adjudicator had concerns that the proposed project would not meet the requirements of the EB-5 regional center program. USCIS senior managers reported that they were not making an adjudicative decision legally; however, they noted that functionally, the adjudicator must make decisions based on senior management's guidance.

Other examples of regional center advocates that may attempt to influence the adjudication process to benefit their own interest included a newspaper article, which reported that a lawmaker pushed for an adjudicative approval to be made within 15 days, while the regional center was approaching bankruptcy. We provided that information to our Office of Investigations for further review.

As a result, USCIS decisions regarding the EB-5 regional center program may be questioned due to the perception of internal and external influences. USCIS needs to establish protocols to ensure all correspondence and discussions between external interested parties and USCIS leadership are documented and shared for transparency and accountability.

Conclusion

Currently, USCIS cannot administer and manage the EB-5 regional center program effectively. The legislation establishing the regional center program did not give USCIS the necessary authority to prevent fraud and national security threats that could harm the U.S., and it assigned responsibility to USCIS for a program with mission areas outside USCIS' immigration mission. Also, regulations were not always enforced, and USCIS did not always enforce its own regulations and procedures established to assist with managing the regional center program. To improve upon the administration and management of the program, USCIS needs to revise the regulations governing the EB-5 regional center program. USCIS also needs to execute memoranda of understanding with other agencies.

Until improvements are made, USCIS is unable to prevent fraud and national security threats, and it cannot report the results of the program accurately or ensure the EB-5 program is benefiting the U.S. economy and creating jobs for U.S. citizens as intended by Congress.

Recommendations

We recommend that the Director of the U.S. Citizenship and Immigration Services:

Recommendation #1:

Update and clarify the Federal regulations to —

- provide the U.S. Citizenship and Immigration Services with the authority to deny or terminate EB-5 regional center participants at any phase of the process when identifying known connections to national security and/or fraud risks without compromising any ongoing or potential investigation;
- make explicit that fraud and national security concerns can constitute cause for revocation of regional center status under 8 CFR § 205.2;
- give the U.S. Citizenship and Immigration Services the authority to verify that the foreign funds were invested in companies creating U.S. jobs; and
- ensure requirements for the EB-5 regional center program are applied consistently to all participants.

Recommendation #2:

Develop memoranda of understanding with the Departments of Commerce and Labor and the Securities and Exchange Commission to provide expertise and involvement in the adjudication of applications and petitions for the EB-5 regional center program.

Recommendation #3:

Conduct comprehensive reviews to determine how EB-5 funds have actually stimulated growth in the U.S. economy in accordance with the intent of the program. If necessary, employ other specialists or work with other Federal agencies to assist and confirm the results.

Recommendation #4:

Establish quality assurance steps to promote program integrity and ensure that regional centers comply with the Code of Federal Regulations requirements.

Management Comments and OIG Analysis

USCIS agreed with three of the four recommendations. USCIS acknowledged that additional statutory authorities would strengthen the program. USCIS also acknowledged concerns with the consistency in EB-5 adjudications, the lack of clarity regarding program rules and serious fraud and national security issues within the program. In USCIS' management response, the Component indicated that it recently completed a transformation of how they administer the EB-5 Program. Our audit focus was limited to regional center applications as of November 29, 2012, which was before details of the transformation were announced. We will evaluate management's reported changes as part of the audit recommendation follow-up process.

USCIS noted that they previously had no meaningful economic expertise to conduct independent and thorough reviews of economic models, but had hired economists and corporate attorneys to support the EB-5 program. Our report recognizes that USCIS hired economists to participate in the adjudication process. At the beginning of our fieldwork, USCIS provided an organizational chart that showed the EB-5 program had seven economists. During our audit, we validated that two additional economists were hired. We did not audit program changes completed after our audit fieldwork. During fieldwork, five USCIS economists expressed concern that their expertise was not being used in the adjudication process because they did not perform any substantive analysis of economic plans or predictions. Instead they prepared checklist summaries of answers to a series of canned questions.

USCIS' response indicated that it reviewed each of the 22 regional center cases mentioned in our report and believed that all were adjudicated properly. Our conclusions are based on our analysis of documentary and physical evidence supported by corroborating testimonial evidence that showed limitations of the legislation for denying applications and consistency in EB-5 adjudications, which USCIS has also acknowledged. We did not make recommendations specific to the regional center cases identified. Our report does not make conclusions on whether cases had been decided properly or whether we concur with the statute, regulations, or policy.

In its response, USCIS stated that the report suggests Component officials improperly urged an applicant to omit information from an application in contravention of the regulations and is incorrect. We provided the facts based on our review of documentation which showed that USCIS specifically requested removal of language to ensure that the regional center would meet eligibility requirements.

USCIS responded that they are not in a position to quantify the impact of the EB-5 Program on the U.S. economy. They also believe they are not charged with conducting a broader assessment of the program's impact, something which has been the subject of both congressional hearings and private studies over the years. We disagree with USCIS' position that it should not attempt to monitor or measure the performance of the EB-5 program. One of USCIS' strategic objectives is to ensure the integrity, effectiveness, and responsiveness of its programs. The USCIS Strategic Plan provides integrated planning context for other USCIS initiatives, such as the business transformation plan, human capital strategy, management improvement plans, and the development of new immigration programs.

USCIS defended its policy of deferring to prior agency decisions involving the same investment project, and believed our criticism was misplaced. USCIS indicated that an important element of consistency is that the agency must not upend settled and responsible business expectations by issuing contradictory decisions relating to the same investment projects. It disserves the public, undermines program integrity, and is fundamentally unfair to USCIS to approve a project, have developers and investors act in reliance on the approval, and then subsequently reverse course by determining that the agency's initial approval was in error.

USCIS provided technical comments to the draft report. When appropriate, we incorporated those changes into the report. A summary and analysis of the Component's response to each recommendation follows.

USCIS' Response to Recommendation #1: USCIS concurred with the recommendation. USCIS will update regulations to provide greater clarity regarding the requirements for establishing eligibility under the program. In particular, revised regulations will more clearly delineate the evidentiary requirements applicable to stand-alone EB-5 petitions versus regional center-based applications and petitions. A revised rule will be drafted for interagency clearance within 9 months of the report.

OIG Analysis: Although USCIS concurred with the recommendation, the planned corrective action does not fully address the recommendation. This recommendation will remain open and unresolved until USCIS provides specific corrective actions and milestones to address the recommendation in its entirety. We need to review and analyze the corrective actions plans and evidence of their implementation. We need USCIS to provide actions taken to proactively address fraud or national security concerns by participants; verify funding and job-creation results; and ensure consistent application of the program.

USCIS' Response to Recommendation #2: USCIS concurred with the recommendation. Within 6 months of the report, USCIS will develop and implement an interagency collaboration plan outlining liaison and collaboration roles and responsibilities among key Federal partners. This will include collaboration with the Department of Commerce and the Securities and Exchange Commission.

OIG Analysis: USCIS' corrective action plan should resolve this recommendation. However, more details of the memoranda of understanding are necessary. This recommendation will remain open and unresolved until we have more information on the memoranda of understanding and have reviewed documentation of the interagency collaboration plan.

USCIS' Response to Recommendation #3: USCIS did not concur with the recommendation. USCIS stated that its mandate is to adjudicate EB-5 cases according to the eligibility criteria, including the statutory job creation requirements. USCIS responded that the Component is not charged with conducting a broader assessment of the program's impact. While the Component agreed that an assessment may be beneficial, it did not believe USCIS, as the administering benefits agency, is best positioned to conduct a study.

OIG Analysis: This recommendation will remain open and unresolved until USCIS provides an action plan and evidence of comprehensive reviews scheduled to validate how EB-5 funds have actually stimulated growth in the U.S. economy. Because program results and integrity assurance may be compromised and we identified concerns within the program, our recommendation included the option for USCIS to employ specialists or other Federal agencies to confirm the results of the EB-5 Program. We realize USCIS is facing challenges to ensure the program is meeting its goals and needs assistance and an assessment by internal groups or external specialists.

USCIS' Response to Recommendation #4: USCIS concurred with the recommendation. Within 6 months, USCIS will establish quality assurance steps to promote program integrity and ensure regulatory compliance.

OIG Analysis: USCIS' corrective action plan should resolve this recommendation. This recommendation is resolved, but will remain open until we have reviewed documentation of the implemented quality assurance steps.

Appendix A
Objectives, Scope, and Methodology

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

This report provides the results of our work to determine whether USCIS administered and managed the EB-5 Regional Center Program (regional center program) effectively. We reviewed the INA; the Departments of Commerce, Justice and State, the Judiciary, *and Related Agencies Appropriations Act, 1993*; and other legislation to renew the pilot program. We also reviewed USCIS regulations, management policies, procedures, and other memoranda related to the EB-5 program and Fraud Detection and Nationality Security.

We interviewed USCIS management and staff responsible for the administration of the EB-5 program at both USCIS Headquarters and the California Service Center. Our interviews included representatives from the Branches of Service Center Operations; Fraud Detection and National Security; Policy and Strategy; and the Office of Chief Counsel.

We identified 336 I-924 regional centers with applications or amendments submitted during fiscal years 2010, 2011, and 2012. Our selection of regional center application files to review was based on the most foreign investor petitions filed as reported in the Interim Linked Application Information Management System (iCLAIMS) as of November 29, 2012. USCIS began using iCLAIMS in fiscal year 2010 as a database to store information related to EB-5 Regional Centers. The iCLAIMS database is updated manually when regional center applications, amendments, or annual updates are received on forms I-924 or I-924A by the California Service Center. The immigrant investor applications and petitions for permanent residency, forms I-526 and I-829, are maintained in other USCIS systems and transferred to iCLAIMS. We did not verify the reliability of the iCLAIMS system and do not draw any conclusions from its data. We used the National File Transfer System to identify the location of immigrant investor files related to the regional centers.

We visited the California Service Center and reviewed 15 Regional Center application files and 6 immigrant files, either form I-526 or I-829, associated with the regional centers. Our selection was based on the location of the files and the timeframes needed

for review. We evaluated internal controls to the extent necessary to address the audit objective.

We conducted this performance audit between September 2012 and June 2013 pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objective.

Appendix B
Management Comments to the Draft Report

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

NOV 4 2013

Memorandum

TO: Charles K. Edwards
Deputy Inspector General

FROM: Alejandro N. Mayorkas
Director, U.S. Citizenship and Immigration Services

SUBJECT: Official Comments to the Draft Report Recommendations on *U.S. Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program* – For Official Use Only (OIG-12-166)

U.S. Citizenship and Immigration Services (USCIS) thanks the Office of the Inspector General (OIG) for the opportunity to review and comment on its draft report on the EB-5 program.

The draft report cites concerns regarding USCIS's administration of the program, and other concerns best directed at Congress given its sole authority over the program's statutory framework. Whether the EB-5 statutes vest USCIS with sufficient authority to ensure the program's integrity is an important question, and one which we have worked closely with Congress in recent years to address. We agree with the OIG that additional statutory authorities would strengthen the program.

The EB-5 caseload is, by far, the most complex that USCIS oversees, and involves decisions on issues – such as the evaluation of business plans and econometric employment modeling – more typically associated with other U.S. government agencies than with USCIS. We appreciate that the OIG shares our concerns regarding consistency in EB-5 adjudications, the lack of clarity regarding program rules, and serious fraud and national security issues in the program. It is precisely these concerns that have driven USCIS over the past several years to undertake a complete transformation of how we administer the EB-5 program.

This work is progressing rapidly; indeed, just as the OIG was wrapping up its work on this audit in June 2013, USCIS was implementing several fundamental, long-planned steps to improve the EB-5 process. We have strong confidence that our overhaul of the program, already well underway, will translate to improved consistency, integrity, timeliness, and adherence to law. We are, in other words, already in the process of addressing the issues raised in the OIG's audit that are within the agency's power to resolve.

In particular, we have taken the following concrete steps to improve our administration of this program:

- **USCIS announced its plans to realign the EB-5 program into a new office in December of 2012, to be staffed with the expertise needed to effectively manage the program in-house. In May 2013, USCIS stood up the new program office – the Immigrant Investor Program Office – in Headquarters.** Previously, and essentially through the end of the OIG's audit work, the EB-5 program was based at the USCIS California Service Center, in the same facility as more traditional immigration casework involving, for example, family-based immigration petitions, and handled by generalists who did not necessarily have the needed national security, economic, business, and legal expertise. The needs of the EB-5 program are unique, from an eligibility perspective as well as a security perspective, and the program warrants dedicated infrastructure and leadership. The new program office opened in May 2013 just before the OIG audit work was completed in June 2013.

  The new program office is led by a singularly-focused SES-level Chief and consists of professional economists with prior federal and commercial experience, corporate and immigration attorneys, and experienced adjudicators. For the first time in the agency's history, the office is also staffed full time by fraud and national security specialists from the headquarters staff of the Fraud Detection and National Security (FDNS) directorate. By locating the office in Washington, DC, we have ensured that FDNS will be better situated to coordinate directly with critical enforcement and intelligence partners at other agencies in the adjudication of EB-5 applications.

  Within the next six months, all EB-5 work will transition away from the California Service Center structure reviewed by the OIG and to the new structure at Headquarters.

- **On May 30, 2013, USCIS issued a comprehensive EB-5 policy memorandum for the first time in the program's history.** Previously, there were several separate policy documents that applied to EB-5 adjudications and these documents failed to address a wide range of critical issues that typically arise in EB-5 cases, leaving adjudicators without formal guidance on an array of complex questions. This was unacceptable and, predictably, it undermined consistency, timeliness of adjudications, and adherence to law. The comprehensive policy memorandum was subject to several rounds of public comment before it was finalized, and it now gives agency officials as well as the public the predictability and guidance they need.

- **USCIS has fortified the program with advanced expertise.** EB-5 cases involve evaluation of business plans, econometric job creation models, and international financial flows. For too long, USCIS failed its adjudicators by not supporting them with the expertise needed to contend properly with these issues. That has now changed. In 2011, USCIS began hiring full time federal economists and transactional attorneys to work the

EB-5 caseload. In the new program office, we will for the first time have economists who actually serve as adjudicators (as opposed to simply consulting with adjudicators).

- **USCIS, in close consultation with other enforcement and intelligence agencies, has bolstered fraud and national security safeguards in the program.** Historically, USCIS treated EB-5 like its other immigration programs when it came to fraud and national security. The consequence was a security infrastructure that was not properly tailored for the unique needs of this program. In recent years, USCIS has implemented important and substantial EB-5 integrity enhancements. For the first time, the agency now conducts security checks on regional center businesses and certain executives (instead of only potential investors), collaborates closely with partner agencies on program-level issues, conducts enhanced security checks leveraging a range of holdings from across the U.S. government, terminates regional centers where fraud is detected, and refers substantial numbers of EB-5 cases to our interagency enforcement partners. Also for the first time, beginning in 2010, the agency began requiring use of a standard form by all regional center applicants, and in 2011 began requiring all regional centers to file an annual disclosure update to USCIS detailing regional center activities on a continuing basis. All of these are new developments. We are fully leveraging the range of statutory authorities we have at our disposal. The progress on the fraud and security front has been substantial. The program is, unquestionably, more secure now than it has ever been.

As we have before, we invite the OIG to review our new operations. We believe our new model addresses the deficiencies in the legacy program that the OIG reviewed, and would welcome an audit of the new structure. Unfortunately, because of the ongoing changes, the present audit does not accurately describe the current state of the program.

We remain disappointed that the OIG did not interact more fully with the senior career leaders who manage the EB-5 program and are responsible for its integrity. Over the course of its ten month audit period, the OIG interviewed the Chief of the EB-5 Program for just one hour, and only upon our express request that it do so after the OIG had already conveyed to us its initial audit findings. The OIG interviewed the Associate Director for Fraud Detection and National Security just once, and only at the beginning of the audit process. We do not believe the audit of such a complex program should conclude on these terms.

We respond to the draft report's findings and recommendations below. While we believe the draft report has a number of inaccuracies and mischaracterizations as to how the program operates, we have focused our response on the high-level points that we believe are most critical from the perspectives of program integrity, efficiency, and effectiveness.

The Laws and Regulations

We agree in significant part with the OIG's concern that the "laws and regulations governing the program do not give USCIS the authority to deny or terminate a regional center's participation in the EB-5 program based on fraud or national security concerns," which is why last year, USCIS

offered extensive legislative proposals to Congress to close these gaps, and to equip USCIS with important authorities to enhance EB-5 program integrity. USCIS already has authority to deny or terminate a regional center based on fraud or misrepresentation,[1] but the statutory framework leaves other significant gaps in USCIS authorities, especially with regard to national security.

In anticipation of the regional center program's reauthorization, in June of 2012 USCIS proposed to the Chairman and Ranking Member of the Senate Judiciary Committee specific statutory language that would, for example: (1) grant USCIS authority to deny or terminate EB-5 cases on a discretionary basis; (2) require regional centers to certify their compliance with the U.S. securities laws; (3) permit USCIS to run security checks on a broader range of regional center participants than is currently authorized under existing statutes; (4) permit USCIS to exclude from regional center participation individuals with prior records of crime or fraud; and, (5) broaden USCIS authorities to conduct oversight over job-creating businesses associated with regional centers.[2]

The draft report recommends that USCIS promulgate regulations that would allow the agency "to deny or terminate EB-5 regional center participants at any phase of the process when identifying known connections to national security and/or fraud risks without compromising any ongoing or potential investigation," and to "[m]ake explicit that fraud and national security concerns can constitute cause for revocation of regional center status under 8 CFR § 205.2."[3] In principle USCIS agrees that explicit authority to terminate a regional center based upon fraud and national security concerns is needed, but USCIS lacks authority to promulgate such regulations under current law. Statutory change is required, which is why USCIS over a year ago proactively proposed legislative language to Congress to secure these authorities and others. USCIS appreciates OIG's support for this effort.

However, USCIS has taken substantial administrative measures to ensure EB-5 program security to the fullest extent permitted under existing law. The draft report focuses on legal authorities, and does not address many of the operational steps – some transformative – that USCIS has taken in recent years to counter fraud and national security risks in the EB-5 program with the limited authority that USCIS already possesses. We are concerned that this omission may leave readers with the misimpression that USCIS has done little to leverage the tools it already has, when in fact quite the opposite is true:

- USCIS has expanded its background vetting to include regional center entities and key executives, for the first time in the program's history.

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[1] *See Matter of CHAWATHE*, 25 I&N Dec. 369, 376 (AAO 2010).
[2] USCIS notes, as does the draft report, that the Senate earlier this year passed legislation (S. 744) that would significantly improve EB-5 authorities in line with the recommendations that USCIS offered.
[3] 8 C.F.R. § 205.2 establishes procedures for exercising the Secretary's authority pursuant to section 205 of the Immigration and Nationality Act (INA) to revoke approval of any petition approved under INA § 204. Specifically, 8 C.F.R. § 205.2(a) states "[a]ny Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition . . . ." USCIS designates regional centers pursuant to the Appropriations Act, as amended, and not under section 204 of the INA.

- USCIS has required all regional centers to file annual disclosures on their business activities and ownership and management changes, for the first time in the program's history.
- USCIS has dramatically enhanced collaboration with key government partners, including ICE, CBP, the FBI, the Securities and Exchange Commission (SEC), the Treasury Department, and the intelligence community, on specific EB-5 cases as well as programmatic issues.
- USCIS has created a new EB-5 program office at headquarters with embedded FDNS officers, who have the authority to liaise directly with other U.S. government agencies, for the first time in the program's history.
- Where USCIS develops concerns in EB-5 cases, it leverages its regulatory authority to withhold adjudication of those cases until it has fully coordinated its approach with enforcement and intelligence partners. *See* 8 C.F.R. § 103.2(b)(18).

A fuller summary of steps USCIS has taken to ensure EB-5 program integrity is attached as **Exhibit A**, which is marked *For Official Use Only – Law Enforcement Sensitive*.

Finally, we note the draft report's reference to a specific EB-5 case involving national security concerns. The OIG's conclusion is premature and inaccurate. The OIG's conclusion that the referenced regional center poses a national security threat, and that the primary reason the regional center has not been terminated is a legal belief held by USCIS, is simply not supported by the record. The matter remains under law enforcement investigation and USCIS continues to closely coordinate with the lead law enforcement agency, and will coordinate any adjudicative action, as appropriate. The OIG bases its case assessment on input from "one USCIS official" despite USCIS's detailed comments to the OIG delineating where OIG's case record was lacking. The OIG has not sought to discuss the matter with key USCIS national security officers responsible for handling the matter, despite USCIS's notice to the OIG that these officials have relevant information. Further, to the best of USCIS's knowledge, the OIG did not seek input from the law enforcement agency involved in investigating the matter. Our detailed summary of concerns on this issue is being transmitted under separate cover given the law enforcement sensitivities.

The EB-5 Program and the USCIS Mission

We note the draft report's conclusion that the EB-5 program "extends beyond USCIS's mission to provide immigration and citizenship services," and its observation that other agencies have mission statements closely aligned with the program's goals. USCIS (and its predecessor, the Immigration and Naturalization Service (INS) under the Department of Justice,) has been charged by Congress with administering the EB-5 program since the program's inception in 1990. USCIS operates and will continue to operate the program as it is required to do by law unless Congress changes this mandate.

We agree with the draft report that USCIS can benefit from collaboration with other U.S. government agencies in administering the EB-5 program. A few years ago, the USCIS Director proposed to the Department of Commerce that the agencies explore possibilities for Commerce to take on a significant role in EB-5 adjudications. Since that time, USCIS and Commerce have partnered successfully on a number of discrete issues in the EB-5 program, and we continue to discuss the optimal level of collaboration in the program.
In support of its goal to reduce fraud, USCIS has also forged a highly successful partnership with the SEC in recent years. The agencies have conducted a joint public engagement, jointly issued an EB-5 investor alert to the investing public, and collaborated on investigation and enforcement action in particular EB-5 cases. USCIS has also collaborated with SEC staff in the development of technical assistance to Congress that would enhance securities law compliance and investor protection within the EB-5 program.

We believe the OIG should have assessed the wide range of initiatives on which we are currently engaged with the Department of Commerce and the SEC. We appreciate the OIG's general recommendation that USCIS execute memoranda of understanding with these agencies, but a memorandum is simply a procedural vehicle and not a substantive strategy for how to enhance collaboration. We welcome specific suggestions, as we are focused on this goal.

We ultimately defer to Congress as to whether the program is properly housed at USCIS or another agency. We have taken tremendous strides to develop in-house expertise and to ensure that the program has all necessary resources to properly and effectively handle EB-5 cases. Historically, USCIS had no significant economic or corporate transactional expertise on hand to manage this complex casework. Culminating in the creation and ongoing staffing of the new program office, we now have 22 economists[4] on staff as well as business analysts and corporate attorneys to review the business and economic questions that EB-5 cases typically present. We continue to build up these resources in the new EB-5 program office and are committed to providing our team with all the resources and expertise they need to administer the program.

Measurement of Overall Program Impact

We note the draft report's finding that USCIS is not in a position to quantify the impact of the EB-5 program on the U.S. economy. We agree. USCIS administers a number of business visa programs that were designed by Congress to foster economic prosperity, but we do not attempt to measure the broader economic impact of any of those programs, including EB-5. USCIS's mandate is to adjudicate EB-5 cases according to the eligibility criteria, including the statutory job creation requirements. USCIS is not charged with conducting a broader assessment of the program's impact, something which has been the subject of both congressional hearings and private studies over the years.

[4] The draft report criticizes USCIS for not providing its economists with access to needed systems and data. We have worked closely with our economists to ensure they are equipped to handle the workload and were surprised by this finding. Our economists have received access to the IMPLAN econometric planning tool and other resources. If the OIG believes additional tools are needed, it would be helpful to specify which ones.

USCIS therefore agrees with the OIG's recommendation to the extent that further study of the EB-5 program's impact may be warranted, but we do not believe USCIS, as the administering benefits agency, is best positioned to conduct those studies. We stand ready to provide any appropriate assistance to Congress and to U.S. government agencies that specialize in measurement of economic impacts in this regard.

Verification of Job Creation

The draft report observes, correctly, that it is often impossible for USCIS to conclusively verify job creation in EB-5 cases. This is a direct result of the statutory design of the EB-5 program, which permits immigrant investors to use economic modeling to predict "indirect" job creation that will likely result from the regional center's economic activity. The legislation creating the regional center program provides that USCIS shall permit immigrant investors to rely upon "reasonable methodologies for determining the number of jobs created . . . including such jobs which are estimated to have been created indirectly."[5] By definition, these indirect jobs cannot each be verified, as they are products of an economic model. Economists broadly accept the use of these models (some of which are developed by the Department of Commerce), and Congress has mandated that USCIS accept them as evidence. *Id.* Moreover, because the statute permits regional center applications (Form I-924) and initial investor petitions (Form I-526) to be filed ***before*** the economic activity has been undertaken and the jobs have been created, these processes necessarily involve ***estimates*** of likely job creation, and not a backward-looking counting of jobs already in existence.

We emphasize that USCIS is rigorous in its review of each case before it, applying economic expertise to determine whether each economic model presented to the agency is a reasonable approximation of how many jobs are likely to be created. USCIS conducts independent and thorough reviews of the submitted economic models before concluding they are reasonable in their assumptions and predictions. Where the agency previously had no meaningful economic expertise on hand to conduct this work, we have in recent years hired and continue to hire economists and corporate attorneys to ensure the work is done properly and consistent with widely accepted standards in the field. USCIS regularly denies cases for failure to meet the job creation requirements. In FY 2012, for example, USCIS denied 63 regional center applications for failure to satisfy the job creation or other eligibility requirements and approved 35 regional center applications.

USCIS agrees with the draft report's finding that USCIS would benefit from additional authorities to oversee job creation in enterprises associated with a regional center. USCIS has provided legislative proposals to Congress to expand those authorities.

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[5] Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012).

The draft report references instances in which USCIS has granted EB-5 benefits to investors whose capital was used to pay off construction loans or other bridge financing from projects that had already begun. We note that EB-5 program rules do allow EB-5 capital to replace bridge financing under certain circumstances.[6] For example, a bank may approve a temporary construction loan on the condition that the loaned funds will be replaced once a developer is able to secure EB-5 funding. These types of financing arrangements permit shovel-ready projects to begin (and jobs to be created) right away. Of course, USCIS has denied and will continue to deny cases where a project is already completed and circumstances do not warrant attribution of jobs to a proposed late-stage investment.

Program Integrity

Throughout the draft report, the OIG has included references to casework that may leave the reader with the impression that these cases were adjudicated in error, even though the draft report states, with respect to at least a number of these cases, that there is evidence to support the adjudicative decisions reached. As a result of the OIG's willingness to provide a list of the actual cases referenced, USCIS has been able to look into each of these cases further to determine whether a case had been adjudicated properly. A total of twenty-two (22) regional center applications were identified by the OIG. USCIS has determined that in each of the applications cited in the report in which a final decision has been made, that decision was in accordance with the law, regulations, and policy. USCIS thanks the OIG for the opportunity to clarify this issue.

Inasmuch as the case review found that each case cited by the OIG had been decided properly, USCIS must conclude that the OIG's concern is not that cases are being adjudicated improperly, but rather the OIG does not concur with the statute, regulations or policy, as written. In the section below, USCIS will directly address each area of concern to provide clarification of the relevant law, regulation or policy.

A. Regional Center Accountability

We disagree with the draft report's finding that USCIS does not require regional centers to meet all regulatory requirements, and in particular the requirement on which the draft report focuses:

[6] See EB-5 Policy Memorandum (May 30, 2013) at 15-16 ("Since it is the commercial enterprise that creates the jobs, the developer or the principal of the new commercial enterprise, either directly or through a separate job-creating entity, may utilize interim, temporary or bridge financing – in the form of either debt or equity – prior to receipt of EB-5 capital. If the project commences based on the interim or bridge financing prior to the receipt of the EB-5 capital and subsequently replaces it with EB-5 capital, the new commercial enterprise may still receive credit for the job creation under the regulations. Generally, the replacement of bridge financing with EB-5 investor capital should have been contemplated prior to acquiring the original non-EB-5 financing. However, even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs. For example, the non EB-5 financing originally contemplated to replace the temporary financing may no longer be available to the commercial enterprise as a result of changes in availability of traditional financing.")

that an application for a new regional center must provide "in verifiable detail how jobs will be created indirectly." 8 C.F.R. § 204.6(m)(3)(ii). The draft report suggests that USCIS should interpret its regulation to require that all new regional center applications include a fully developed business plan, but that view is contrary to the statute, which permits creation of a regional center based on "general proposals." The regional center legislation states that the program "shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment" and that "[t]he establishment of a regional center may be based on general predictions."[7] In light of the controlling statute, USCIS has interpreted the regulation's reference to "verifiable detail" as requiring substantial evidence of how jobs will likely be created, but not necessarily a fully developed business plan, which is not a requirement authorized by the statute.

It is important to note that no alien is properly admitted as an immigrant to the U.S. under the EB-5 program if he or she cannot show a fully developed business plan and firm commitment of the required investment amount. At the stage at which an individual investor seeks approval to invest in an already-approved regional center, a fully developed business plan must be presented. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). The statute, however, does clearly permit regional centers to be approved at the outset, before any individual investors have been approved, on a lesser showing. Again, if Congress modified the statute to require a more detailed showing by the regional center, USCIS would adhere to that new standard.

In another example cited in the draft report, the OIG suggests that USCIS improperly urged an applicant to omit information from an application in contravention of the regulations. The OIG is incorrect; in the case discussed, USCIS followed ordinary evidentiary procedures in a manner consistent with law. USCIS adjudicates every regional center application to ensure that the documents submitted establish eligibility for the designation as a regional center as of the date of filing. In addition to establishing eligibility for designation as a regional center, Form I-924 applications are sometimes accompanied by a Form I-526 Exemplar along with draft documents describing the proposed investment opportunity. The I-526 Exemplar is an avenue available to the regional center applicant to obtain a determination from USCIS, in advance of the filing of actual investor petitions, that the draft documents do not contain provisions that violate program requirements. If the draft investment documents contain impermissible provisions, USCIS provides the applicant the opportunity to amend the draft investment documents through a Request for Evidence (RFE). This process is permissible under both the statutes and the regulations. Moreover, the exemplar process is an important tool to ensure predictability and efficiency in the processing of investor petitions under the regional center project. We therefore believe the OIG's criticism of this established and well-designed process is unwarranted.

[7] Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012).

The OIG also concludes that USCIS's regulations and policies pertaining to the designation of Targeted Employment Areas (TEA) are unclear. Specifically, the OIG appears to take issue with an adjudicator's ability to challenge the designated boundaries of a TEA. USCIS believes the recent policy memorandum removes any ambiguity. As noted in the May 30, 2013 EB-5 Policy Memorandum, "USCIS defers to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the targeted employment area. However, for all TEA designations, USCIS must still ensure compliance with the statutory requirement that the proposed area designated by the state in fact has an unemployment rate of at least 150 percent of the national average rate." This policy pronouncement adheres to the legal framework for TEA designation.

B. USCIS Regulations and Policy

We agree with the OIG's concern that USCIS has historically applied laws and policies inconsistently in the EB-5 program. This has been an ongoing source of criticism for the agency, and one that has been warranted. The program's eligibility criteria, involving complex issues of job creation projection, economic modeling, business plan evaluation, and review of transactional documents, complicate efforts to devise simple rules that are readily applied to actual cases. The problem was long exacerbated by three key deficiencies that USCIS has now made significant headway in resolving: (1) USCIS had no formal policies addressing many of the critical issues that frequently arise in EB-5 cases; (2) USCIS did not inject meaningful economic or corporate legal expertise into the program; and, (3) USCIS did not require regional center applicants to submit standardized and basic information to gain approval, or to update USCIS regularly on their status once approved.

On May 30, 2013, USCIS issued a 27-page EB-5 policy memorandum that, for the first time in the program's history, addresses comprehensively the range of eligibility issues in a single document. The issuance of the new policy memorandum was a seminal event for the program, and though it was finalized only toward the end of the OIG's audit period, we are confident that it will result in more consistent decision-making that faithfully applies the statutory and regulatory requirements. We regret that the OIG has not addressed the policy memorandum.

Furthermore, USCIS has made great strides in resourcing the EB-5 program with the types of expertise necessary to conduct these complex adjudications. In 2009, USCIS had just nine employees assigned to the program, none of whom were economists or corporate attorneys. With the creation and ongoing staffing of the new program office, there are currently more than 80 employees assigned to the EB-5 program, including economists and corporate attorneys whose expertise will pay enormous dividends in terms of improving the agency's consistency and adherence to law in its adjudications. The program chief is also now designated, for the first time in program history, as an SES-level position.

USCIS has also sought to bring order and consistency to the regional center approval and monitoring process, which until recently was extraordinarily under-developed and *ad hoc*. Historically, and as recently as 2009, a regional center applicant could apply to USCIS through

an informal letter-writing process. There was no regular security vetting and no standardized collection of basic information. USCIS in 2010 introduced a new form, Form I-924, that collects this information and that all new regional center applicants (or regional centers filing to amend their designation) are required to use. USCIS also began, for the first time, charging a fee for regional center applications. Previously, regional center applicants paid no fee at all, meaning that the work undertaken to adjudicate cases filed by sophisticated business interests was effectively subsidized by the rest of USCIS's customers. That inequity no longer persists. Moreover, as of 2011, approved regional centers are required to submit extensive information to USCIS on an annual basis through Form I-924A, updating the agency on the status of their investment projects and management or ownership changes, and permitting USCIS to conduct heightened oversight and vetting of regional centers on a continuing basis.

All of these changes have contributed to enhanced consistency and integrity in USCIS's administration of the program.

Lastly, the draft report implicitly criticizes USCIS's policy of deferring to prior agency decisions involving the same investment project, but we believe the criticism is misplaced. An important element of consistency is that USCIS must not upend settled and reasonable business expectations by issuing contradictory decisions relating to the same investment projects. It disserves the public, undermines program integrity, and is fundamentally unfair for USCIS to approve a project, have the developers and investors act in reliance on the approval, and then subsequently reverse course by determining that the agency's initial approval was in error. To that end, USCIS has long followed a policy that it will defer to its own prior decisions unless there is evidence of fraud, material change in facts, or legal deficiency in the prior decision. Some of the sharpest criticism USCIS has historically received from Congress and stakeholders relates to perceived failures to follow this deference policy, precisely because of the huge reliance U.S. project developers and investors justifiably place on USCIS's decisions. Where a prior approval was issued in objective contravention of law, USCIS will not accord deference to that approval (and indeed has refused to defer in such cases in recent years). But where an adjudicator simply would have decided a close case differently, it undermines the program's effectiveness, predictability, and consistency for the agency to abruptly reverse course.[8]

C. Internal and External Influence

USCIS agrees with the OIG's observation that EB-5 cases attract significant interest from a range of stakeholders, including members of Congress, state and local officials, the business

[8] The draft report cites an application of USCIS deference policy in terms that we believe mischaracterize our processes. Before USCIS determines that one of its prior decisions was incorrect and that the agency should reverse a prior approval, a "Deference Board" of USCIS officials, including economists, convenes to review the case and make a determination as to the appropriate way forward. The Deference Board process includes an opportunity to discuss and clarify issues in the case with the applicant. In the case cited at page 13 of the draft report, the Deference Board determined that the agency's initial decision was not in error and should not be disturbed, notwithstanding the contrary view of a USCIS adjudicator. We believe the process worked in this case, and that the OIG's criticism is unwarranted; indeed, we are concerned that the draft report does not even acknowledge that the ultimate decision in this case was made pursuant to this careful process.

community, and the applicants themselves. On average, USCIS receives hundreds (and in recent years thousands) of EB-5 case inquiries from members of Congress per year.

As a threshold matter, we note the draft report's finding that the case files "appeared to contain sufficient evidence to support the final adjudication decision" in each of the cases that the OIG reviewed involving external inquiries. USCIS's core function is, in a manner consistent with ensuring national security, to approve cases that are eligible, and to deny cases that are not. We decide cases based on the facts and the law – and nothing else. USCIS management officials have in many instances received case inquiries from members of Congress or applicants and declined to take action because they assessed that the agency had reached the right result. In other instances, USCIS officials have become more involved where they believe the agency had erred. That is as it should be.

We agree with the draft report that it is important to have processes in place to manage external inquiries about EB-5 cases, to permit appropriate responsiveness to those inquiries, and to avoid perceptions that anything other than the facts and the law drives agency decisions. At the same time, we must be accountable and responsive to legitimate criticism. In the EB-5 program in particular, our agency has historically struggled with issuing timely decisions that are consistent with the law given the enormously complex economic and legal issues that these cases can raise. If our agency has decided a case incorrectly, in the EB-5 program or any other visa program, we cannot allow that error to go uncorrected when it is brought to our attention. Senior agency managers must be empowered to supervise and to correct course when they believe difficult issues are not being handled correctly in cases. That is the responsibility of the chain of command.

We would welcome suggestions from the OIG for processes that USCIS could implement to accommodate all of these legitimate concerns. We would particularly welcome suggestions from the OIG as to protocols it would recommend for documenting the agency's response to the thousands of inquiries received every year regarding EB-5 cases. It is important that the public, Congress, and USCIS staff all have confidence in the integrity of the EB-5 process and our adherence to the law. We are committed to taking any steps that can help accomplish this.

Conclusion and Recommendations

We concur with three of the four OIG recommendations, although as noted above we have refined some of the action items to comport with USCIS's authorities and structure. We respectfully request that the recommendations be amended to reflect these refinements:

1. USCIS will update regulations to provide greater clarity regarding the requirements for establishing eligibility under the program, in particular by more clearly delineating the evidentiary requirements applicable to stand-alone EB-5 petitions versus Regional Center-based applications and petitions. A revised rule will be drafted for interagency clearance within nine months of this report.

Official Comments to the Draft Report Recommendations on *U.S. Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program* – For Official Use Only (OIG-12-166)
Page 13

2. USCIS will develop and implement an interagency collaboration plan outlining liaison and collaboration roles and responsibilities among key federal partners, to include the Department of Commerce and the Securities and Exchange Commission, within six months of this report.

3. USCIS's mandate is to adjudicate EB-5 cases according to the eligibility criteria, including the statutory job creation requirements. USCIS is not charged with conducting a broader assessment of the program's impact. And while we agree that an assessment may be beneficial, we do not believe USCIS, as the administering benefits agency, is best positioned to conduct that study. USCIS therefore disagrees with the OIG's recommendation that such a study be undertaken by USCIS.

4. USCIS will establish within six months quality assurance steps to promote program integrity and ensure regulatory compliance.

We appreciate the OIG's review of the legacy EB-5 program and we concur in the OIG's assessment that improvements to the legacy program will enhance USCIS's ability to ensure the program is administered efficiently and consistently, with due focus on preventing fraud and threats to national security. The OIG's assessment echoes concerns we developed independently and which spurred us to transform the way the EB-5 program is administered. Some of those steps have come online over the past several years, but other critical and transformative changes have become a reality only in the months since the OIG finished its audit work. We therefore renew our invitation for the OIG to conduct audit work on the new EB-5 program office that we launched in May of this year, the new EB-5 policy memorandum that we published in May of this year, and the many anti-fraud and national security measures we have recently implemented. We and the public would benefit from the OIG's independent analysis of these measures, which are not currently reflected in the draft report.

Appendix C
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Appendix D
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