

Too Porous for Protection? Loopholes in EB-5 Investor Visa Oversight Are Cause for National Security Concern

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TABLE OF CONTENTS

I.	INTRODUCTION	418
II.	THE EB-5 VISA—BASICS AND REQUIREMENTS	421
III.	HISTORY OF THE EB-5 PROGRAM THUS FAR	425
	<i>A. Legislative Intent Underlying the EB-5 Program</i>	425
	<i>B. Changes in EB-5 Law Since Enactment</i>	427
	<i>C. The Surge in Demand for EB-5 Visas Has Been Accompanied By Fraud Scandals</i>	432
IV.	THE EB-5 VISA PROGRAM, AS IT CURRENTLY STANDS, APPEARS TO BE AT ODDS WITH CURRENT NATIONAL SECURITY POLICIES	434
	<i>A. The National Security Landscape Has Changed Significantly Since the EB-5 Visa Program Was Created in 1990</i>	435
	<i>B. The Shift in Perceived Threats</i>	437
	1. <i>The Growing Problem Presented By Vulnerability in Cybersecurity</i>	438
	2. <i>Foreign Investment is Uniquely Implicated By This Shift in Threats</i>	440
	<i>C. Recent Incidents Highlight the Tension Between Promoting Foreign Involvement in the American Economy and Safeguarding National Security</i>	441

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V.	SHORTCOMINGS OF THE EB-5 VISA PROGRAM THROW NATIONAL SECURITY THREATS INTO SHARP RELIEF	444
A.	<i>CIS Procedures in Assessing EB-5 Investments Present A Stark Contrast to the Stringent CFIUS Review of Foreign Direct Investments, Though There Appears to Be No Way to Meaningfully Distinguish the Discrepancies in Scrutiny Levels</i>	445
B.	<i>The Lack of Information for the EB-5 Program is Troubling, Considering the Nature of Current Threats</i>	449
VI.	RECOMMENDATIONS FOR REMEDYING SEVERAL EB-5 SHORTCOMINGS	452
VII.	CONCLUSION	455

I. INTRODUCTION

In the autumn of 2012, Ralls Corporation, a Chinese-owned wind farm developer, brought suit against the Committee for Foreign Investment in the United States (“CFIUS”) and Timothy F. Geithner, Secretary of the Treasury. CFIUS had issued an order requiring Ralls Corporation to immediately cease operations and divest its interest in four small wind farms in Oregon after CFIUS identified national security concerns stemming from Ralls Corporation’s acquisition of the wind farms.¹ CFIUS gave national security grounds for blocking the transaction; one of the wind farms acquired by Ralls potentially reduced naval airspace for low-level military aircraft training.² In February 2013, the United States District Court of the District of Columbia granted the government’s motion to dismiss and held, *inter alia*, that Ralls Corporation’s due process challenge to the order issued by CFIUS was moot.³

The American public has long viewed foreign direct investment (“FDI”) with suspicion, even though foreign investment in the United States economy generates revenue and creates jobs, because FDIs result in effective control of significant assets in America.⁴ CFIUS is an inter-

1. Complaint for Declaratory and Injunctive Relief at 29, *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2013) (No. 1:12-cv-01513), available at http://www.iflr.com/pdfs/IFLRNY/RALLS_CORPORATION_v_COMMITTEE_%20COMPLAINT.pdf. The Amended Order Establishing Interim Mitigation Measures also prohibited Ralls from completing a sale or transfer of the project companies until after it removed “[a]ll items deposited, installed, or affixed (including concrete foundations).” *Id.* at 2.

2. *Id.* at 8.

3. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 99 (D.D.C. 2013).

4. Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Comm. on Foreign Inv. in the U.S.*, 30 QUINNIPIAC L. REV. 2 (2011).

agency committee that, among other things, monitors FDIs.⁵ CFIUS may review any transaction that could result in foreign control of a company engaged in interstate commerce in the United States.⁶ “CFIUS may further investigate, modify, block, or unwind any acquisition or similar transaction that could result in foreign control of a U.S. business where such control is likely to impair or threaten U.S. national security.”⁷ In the past decade, CFIUS has become more active in investigating transactions.⁸ Between 2007 and 2010, the number of transactions CFIUS reviewed increased almost tenfold.⁹

While CFIUS has flagged several FDI transactions as threats to national security, the most recent National Security Strategy Report from the White House declared “cyber security and countering intelligence threats” to be pressing security priorities.¹⁰ However, no alarm bells have sounded regarding the continuation of the EB-5 Investor Visa Program, under which 10,000 visas are allocated each year to alien investors who invest

5. JAMES K. JACKSON, CONG. RESEARCH SERV., RL333888, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 5 (2014).

6. See 50 U.S.C. app. § 2170(b)(1)(D)(i) (“[t]he President or Committee may initiate a review . . . of any covered transaction. . .”); *Id.* at § 2170(a)(3) (“The term ‘covered transaction’ means any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”).

7. Merrill, *supra* note 4, at 9–10; 50 U.S.C. app § 2170(b)(2)(A) (“In each case described in subparagraph (B), the Committee shall immediately conduct an investigation . . . and take any necessary action in connection with the [covered] transaction. . .”); 50 U.S.C. app § 2170(b)(2)(B)(i) (“Subparagraph (A) shall apply in each case in which . . . (I) the transaction threatens to impair national security . . . and that threat has not been mitigated during or prior to the review . . . (II) the transaction is a [FGCE]; or (III) the transaction would result in control of any critical infrastructure . . . if the Committee determines that the transaction could impair national security. . .”). CFIUS may also institute an investigation in any case where “the lead agency recommends, and the Committee concurs. . .”; 50 U.S.C. app. § 2170(b)(2)(B)(ii).

8. James D. Carlson, William V. Dunlap, Adrienne Goins, Geoffrey M. Goodale, Jonathan Michael Meyer, Jason I. Poblete, Guy C. Quinlan, & Michael O. Walker, *Nat’l Security Law*, 47 INT’L LAW 453, 454 (2013).

9. *Id.* The number of transactions reviewed grew “from a meager 4 percent in 2007, to 15 percent in 2008, and to 38 percent in 2009 and 2010.” *Id.*

10. “Cybersecurity threats represent one of the most serious national security, public safety, and economic challenges we face as a nation. . . Our daily lives and public safety depend on power and electric grids, but potential adversaries could use cyber vulnerabilities to disrupt them on a massive scale.” NAT’L SECURITY STRATEGY REPORT, 27 (May 2010) available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

in a commercial enterprise that will create at least ten jobs for U.S. citizens.¹¹ To receive an EB-5 visa, alien investors must first file Form I-526.¹² Then, alien investors are granted conditional residence in the United States.¹³ After two years, alien investors can file an I-829 to remove residency conditions and begin the process of becoming a U.S. citizen.¹⁴

In addition to providing the mechanism for admitting people into the country, immigration law and policy is a strong tool for accomplishing national security aims. However, the EB-5 Visa Program appears at odds with the national security concerns underlying CFIUS scrutiny. Though FDIs have been subject to increasing scrutiny for national security reasons, foreign investments made through the EB-5 Program as a means of securing citizenship have not. Instead, EB-5 visas have become easier and easier to obtain.¹⁵ Like FDIs, investments made through the EB-5 Program implicate foreign investments, which can range greatly in size, and can involve any industry. Because it is difficult to distinguish FDIs and EB-5 investment in terms of the national security threats posed,¹⁶ the stark contrast between CFIUS review and the minimal oversight of EB-5 investments is troubling. Recent Treasury Department incidents and a shift in characterization of current national security threats, particularly when coupled with a recent surge in EB-5 visa use, call into question the advisability of continuing the EB-5 Visa Program as it currently exists.

This Comment examines whether continuation of the EB-5 Visa Program, as it currently stands, must be assessed in light of national security concerns. Part II will discuss the basics of acquiring an EB-5 Visa. Part III will discuss the changes in EB-5 requirements since the program was created, the recent surge in demand for EB-5 visas, and problems of EB-5 fraud. Part IV will examine the shift in perceived national security threats since the creation of the EB-5 Program and recent actions by CFIUS. Part V will address several shortcomings of the EB-5 Program and conclude that the EB-5 Visa, as it currently exists, is inadvisable in light of the recent national security concerns flagged by CFIUS and is

11. Immigration and Nationality Act [hereinafter INA] § 203(b)(5); 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6. *See also* “Employment Creation Immigrant Visa (EB-5) Program Recommendations” Office of the Citizenship and Immigration Services Ombudsman 3 (Mar. 18, 2009) [hereinafter March 2009 Ombudsman Report], *available at* <https://www.dhs.gov/xlibrary/assets/CISOmbudsmanEB-5Recommendation31809.pdf>.

12. USCIS Policy Memorandum 602-0083: “EB-5 Adjudications Policy” 20 (May 20, 2013) [hereinafter 2013 EB-5 Adjudications Policy Memorandum], *available at* [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Assessment%20of%20EB-5%20Investment%20Programs\)%20Final%20\(2013-13\).pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Assessment%20of%20EB-5%20Investment%20Programs)%20Final%20(2013-13).pdf).

13. *Id.*

14. *Id.*

15. *See* Section III, Subsection B, *infra*.

16. *See* Section IV, *infra*.

inconsistent with the policies underlying CFIUS review. Part VI will suggest alternatives to remedy several national-security shortcomings of the EB-5 Program.

II. THE EB-5 VISA—BASICS AND REQUIREMENTS

The Immigration Act of 1990 (“IMMACT”), among other things, established new categories for admission into the United States.¹⁷ The IMMACT created five employment-based (“EB”) immigration categories, allowing recipients of EB visas and their immediate family members to obtain legal permanent resident status and, eventually, U.S. citizenship.¹⁸ While the first four EB categories are truly employment-based, the fifth category (EB-5) is based upon investment and employment-creation.¹⁹ Ten thousand visas are allocated to the EB-5 category annually.²⁰

To qualify for an EB-5 visa, an investing alien must have established—and be entering the United States for the purpose of—“engaging in a new commercial enterprise.”²¹ That investment must benefit the United States economy²² and create employment for at least ten United States citizens or employment-authorized immigrants (excluding the principal alien and their spouse, sons, or daughters).²³ The investor must also be able to demonstrate that the capital on which the investment is based was obtained by lawful means.²⁴ There are no limitations on the type of enterprise into which an alien investor may invest.²⁵

17. Pub. L. No. 100-649, 104 Stat. 4978 (1990) (codified as amended in several sections of 8 U.S.C.); INA, *supra* note 11, at § 203.

18. INA, *supra* note 11, at § 203(b).

19. The first four categories provide a conditional-residency visa on the basis of: priority workers (EB-1); persons with exceptional ability or advanced degrees (EB-2); professionals, skilled and unskilled workers (EB-3); and special immigrants (EB-4). *Summary of the New Employment-Based Categories*, in RICHARD STEEL & MICHAEL PATRICK, EMPLOYMENT-BASED IMMIGRATION: NEW LAW AND NEW STRATEGIES 2 (1992).

20. March 2009 Ombudsman Report, *supra* note 11, at 3.

21. INA, *supra* note 11, at § 203(b)(5)(A). The alien must have invested (after November 29, 1990) or be in the process of investing no less than a certain sum (normally, \$1,000,000). The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may, by regulation, increase the requisite investment amount. *See* INA, *supra* note 11, at § 203(b)(5)(C)(i); 8 U.S.C. § 1153(b)(5)(C)(i) (2012).

22. INA, *supra* note 11, at § 203(b)(5)(A)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii) (2012).

23. *Id.*; *see also* 8 C.F.R. § 204.6(j) (2014).

24. *See* 8 C.F.R. § 204.6(j).

25. “[T]he regulation governing the EB-5 Program defines the term ‘commercial enterprise’ broadly, consistent with the realities of the business world and the many different

A major goal of Congress in establishing the investment-based category was to attract foreign investment into less-developed regions.²⁶ Therefore, 3,000 EB-5 visas are set aside each year for “targeted employment areas,” rural areas or areas that have experienced high unemployment (at least one and a half times the national average rate).²⁷ To encourage investment into targeted employment areas, the required investment amount is lessened to \$500,000.²⁸

All EB-5 petitions are filed with the United States Citizenship and Immigration Services (“CIS”).²⁹ As part of the procedure for obtaining a green card—also known as “legal permanent resident” (“LPR”) status—through investment, the immigrant investor must file an I-526 form.³⁰ “In the case of multiple investors, each foreign investor seeking EB-5 status must independently qualify for the EB-5 visa and file a[n] I-526 form.”³¹ The I-526 form requires an applicant to provide personal information, information about the investment project, information about the composition of the petitioner’s investment, and information about employment creation (including how many jobs will be created by the investor’s investment).³² Additionally, the I-526 form is three pages in length.³³ The I-526 form also contains no sections inquiring into an applicant’s business ties or prior criminal history.³⁴

forms and types of structures that job-creating activities can have.” 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 9.

26. March 2009 Ombudsman Report, *supra* note 11, at 4. “A Senate Committee Report stated that the EB-5 provision was ‘intended to provide new employment for U.S. workers and to infuse new capital in the country, not to provide immigrant visas to wealthy individuals’ [S. Rep. No. 55, 101st Cong., 1st Sess. at 21 (1989)]. . . . To encourage use of the EB-5 visa category, Congress established the Immigrant Investor Pilot Program in 1993 and set aside 3,000 of the allocated 10,000 visas for investors who invest within designated “regional centers.” *Id.*

27. “Rural area” is defined as any area other than an area within a standard metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census.” OFFICE OF THE CITIZENSHIP AND IMMIGRATION SERVICES, EMPLOYMENT CREATION IMMIGRATION VISA (EB-5) PROGRAM RECOMMENDATIONS 3–4 (2009) (citing to S. REP. NO. 55, 101st Cong., 1st Sess. at 21 (1989)).

28. See INA, *supra* note 11, at § 203(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2).

29. 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 20. “The EB-5 Program provides that the immigrant investor will file an initial petition and supporting documentation to be classified as eligible to apply for an EB-5 visa through USCIS’s adjustment of status process within the United States or through the Department of State’s visa application process abroad.” *Id.*

30. See 8 C.F.R. § 204.6(a) (2014).

31. *Id.*

32. See FORM I-526, IMMIGRANT PETITION (Exp. Sept. 30, 2016), available at <http://www.uscis.gov/sites/default/files/files/form/i-526.pdf>.

33. See *id.*

34. *Id.*

Once CIS accepts an I-526 form, CIS checks for completeness.³⁵ CIS will then approve the petition, deny the petition, or request more information.³⁶ The decision on Form I-526 involves a determination of whether the applicant has established eligibility for the requested benefit.³⁷ If an alien investor establishes eligibility, the petition will be approved.³⁸

After approval of the I-526 form, CIS grants an immigrant investor two years of conditional permanent resident status.³⁹ Within the 90-day period before the second anniversary of obtaining lawful permanent residence,⁴⁰ the investor must submit an I-829 petition to remove the conditional status.⁴¹ The petition must contain facts and information demonstrating that: (1) a commercial enterprise was established by the alien; (2) the alien invested or was actively in the process of investing the requisite capital; and (3) the alien “sustained the actions” described in those two requirements throughout the period of the alien’s residence in the United States.⁴² The regulations also require an investor to provide evidence that the investment has created, or will create, within a reasonable period of time, ten full-time jobs for U.S. workers.⁴³ The petition must include an audited financial statement or “other probative evidence” to show establishment of a viable commercial enterprise⁴⁴ The period of conditional residence counts toward the period of lawful residence required for naturalization.⁴⁵

35. *Id.* at 3.

36. *Id.*

37. *Id.*

38. Instructions for Form I-526, Immigrant Petition by Alien Entrepreneur, OMB No. 1615-0026; Exp. 09/30/2016, 3. “If you have established that you qualify for investor status, the petition will be approved.” *Id.* As such, there is no discretion in approval or denial of I-526 applications, in contrast to other immigration benefits.

39. INA, *supra* note 11, at §216A(c)(1)(A); The EB-5 visa imposes a two-year conditional residency upon an investor whose I-526 form has been approved. *Id.* Congress was concerned that the employment creation category would attract fraudulent investments. STEPHEN YALE-LOEHR ET. AL., EB-5 IMMIGRANT INVESTORS, IMMIGRATION AND NATIONALITY HANDBOOK 63, 76 (2009 ed., 2008). In response, the investor provision is accompanied by a fraud-deterrent statutory scheme, which is similar to that of the two-year conditional resident status for immigrant visas based upon marriages. *Id.*

40. INA, *supra* note 11, at §216A(c)(1)(A).

41. *Id.* at § 216A(d)(2)(A).

42. INA, *supra* note 11, at §§ 216A(c)(1)(A), 216A(d)(2)(A), (B) and (C).

43. 8 C.F.R. § 216.6(a)(4)(iv).

44. *Id.* at § 216.6(a)(4)(ii).

45. *See* INA, *supra* note 11, at § 216A(e).

The INA, as amended, provides a procedure for the adjustment of an alien's status from immigrant to LPR and, eventually, to United States citizen.⁴⁶ In addition to possessing the rights to live and work in the United States, LPRs are also able to file petitions that allow family members to obtain LPR status.⁴⁷ However, “there are many circumstances that can lead to loss of status, including certain criminal conduct, extended absences from the United States, assisting other persons to enter the U.S. unlawfully, using false documents, and making false claims to U.S. citizenship.”⁴⁸

LPRs are able to apply to become United States citizens through the naturalization process.⁴⁹ In general, most LPRs are eligible to apply for citizenship after 5 years in LPR status; however, in some situations, the waiting period is shorter.⁵⁰ Similarly, an alien investor using an EB-5 visa may naturalize and become a U.S. citizen 3 years after approval of the I-829 petition.⁵¹ Citizenship requirements include physical presence in the U.S., good moral character, and certain knowledge and literacy requirements, which may be altered or waived in certain circumstances.⁵²

There are several significant differences between LPR status and citizenship.⁵³ LPRs, for example, cannot vote in state or federal elections.⁵⁴ In addition, U.S. citizens can file petitions for more categories of family members, including married sons and daughters, parents, and siblings.⁵⁵ Perhaps most significantly, U.S. citizens do not lose citizen status, even if some of the circumstances that would lead to loss of LPR status are present.⁵⁶ Consequently, conferral of citizenship status entails legally significant implications, particularly with regard to prosecution.

46. *Id.* at § 245.

47. *Id.*

48. *What Does It Mean to Be A Lawful Permanent Resident?*, CLINICLEGAL.ORG, 1 available at <https://cliniclegal.org/sites/default/files/lpr.pdf>; see also USCIS Policy Memorandum, *Adjudication of Eb-5 Regional Center Proposals and Affiliated Form I-526 and I-829 Petitions; Adjudicator's Field Manual Update to Chapters 22.4 and 25.2 (AD09-38)* (Dec. 11, 2009).

49. *Id.*

50. *Id.*

51. 8 C.F.R. § 216.

52. *Id.*

53. For a general explanation on naturalization, adjustment of status, and citizenship consequences, see generally ALLAN WERNICK, U.S. IMMIGRATION AND CITIZENSHIP (2002).

54. See 18 U.S.C. § 611.

55. *Id.* at 87.

56. *Id.*

III. HISTORY OF THE EB-5 PROGRAM THUS FAR

Despite the few requirements to qualify for an EB-5 visa, demand for EB-5 visas has been limited and the Program has not obtained the desired economic impact originally envisioned by Congress. From 1990 to 2010, fewer than 10% of the available EB-5 visas were used.⁵⁷ In an effort to attract more alien investors and facilitate administrative convenience, CIS has relaxed significantly or entirely eliminated most of the original EB-5 requirements and restrictions.⁵⁸ These many changes in EB-5 law appear to be successful in boosting EB-5 demand: use of the EB-5 visa grew dramatically in the past three years.⁵⁹ However, in making the EB-5 visa much easier to obtain, Congress has sharply curtailed the amount of scrutiny for both alien investors and the investments. In the wake of several EB-5 fraud scandals, which highlight the absence of oversight,⁶⁰ these changes in law appear problematic.

A. Legislative Intent Underlying the EB-5 Program

Creation of the EB-5 provision was intended both “to provide new employment for U.S. workers and to infuse new capital into the country. . . .”⁶¹ “Therefore, the creation of jobs for U.S. workers was a critical element of the EB-5 Program.”⁶² In enacting the EB-5 Program, Congress initially believed that the investor visa could substantially bolster the economy, estimating that “as many as 4,000 foreign investors and their families would seek U.S. lawful permanent residence (LPR or “green card” status), bringing in fresh investment funds totaling an estimated \$4 billion and creating 40,000 jobs annually.”⁶³ Other proponents of the EB-5 Program claimed that the Program could attract up to eight

57. SONIA SUJANANI, STEPHEN YALE-LOEHR, & ROBERT C. DIVINE, A CUMULATIVE ANALYSIS OF WHAT USCIS LOOKS FOR IN EB-5 I-829 RFES AND DENIALS, REGIONAL CENTER. BUS. J. 7 (2013).

58. See 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 11, 19 (explaining the relaxation of previously enforced EB-5 requirements).

59. EB-5 filings have increased year-after-year for the past three years and, in FY 2012, the U.S. government issued over 7,400 EB-5 visas. See *id.* at 2.

60. See Section IV, *infra*.

61. S. REP. NO. 55, 101st Cong., 1st Sess. at 21 (1989).

62. 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 15.

63. DEP'T OF HOMELAND SEC., EMPLOYMENT CREATION IMMIGRATION VISA (EB-5) PROGRAM RECOMMENDATIONS (Mar. 18, 2009), http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

billion dollars annually in capital contributions and create 100,000 jobs each year.⁶⁴ In Fiscal year 1993, CIS issued only 583 EB-5 visas.⁶⁵ Additionally, until 2011, applications for EB-5 visas remained low.⁶⁶ However, the elimination of several EB-5 requirements has coincided with a surge in demand for EB-5 visas. In the 2012 Fiscal year, there were 6,200 EB-5 visa petitions filed, a dramatic increase from the 3,805 EB-5 petitions filed in 2011 and only 1,953 EB-5 visa petitions in 2010.⁶⁷ Demand for EB-5 visas has steadily increased and from Fiscal year 2001 to Fiscal year 2015; “there ha[s] been a 1,250% increase in EB-5 visas” issued over that period.⁶⁸ In Fiscal year 2014, CIS issued 9,225 EB-5 visas. And within the first three months of Fiscal year 2014, 4,748 EB-5 visas were already been spoken for.⁶⁹

Despite underwhelming results for the first 20 years that the Program existed, Congress has extended the EB-5 visa scheme several times with strong bipartisan support.⁷⁰ Curiously, though the EB-5 Program has had

64. See Ashley Dunn, *Lure of Visas Fails to Attract Rich Investors*, L.A. TIMES, Dec. 24, 1991, at A3.

65. March 2009 Ombudsman Report, *supra* note 11, at 7; see also CORA D. TEKACH, IMMIGRATION ACT OF 1990 TODAY: CURRENT STATE OF THE 1990 CHANGES IN IMMIGRATION AND NATURALIZATION LAW 155 (ed. 2004–2005).

66. See NUMBER OF I-526 IMMIGRANT PETITIONS BY ALIEN ENTREPRENEURS BY FISCAL YEAR, QUARTER, AND CASE STATUS 2008-2014, *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2014qtr2.pdf.

67. *Id.*

68. “Current Demand for EB-5 Visas Will Lead to Retrogression in FY-2015, According to Department of State & Other Takeaways from Visa Update Panel” (Nov. 14, 2014) *available at* <https://iiusa.org/blog/events/conferences/current-demand-eb5-visas-lead-retrogression-fy2015-department-state-takeaways-visa-update-panel/>.

69. *Id.*

70. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105–119, 111 Stat. 2440 (1997); Act of October 30, 2000, Pub. L. No. 106-396, 114 Stat. 1637; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, 116 Stat. 1758 (2002); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108–156, 117 Stat. 1944; Congress enacted Section 610 of the Fiscal year 1993 Appropriations Act for the Justice Department. Act of October 6, 1992, Pub. L. No. 102–395, 106 Stat. 1828; The Basic Pilot Program Extension and Expansion Act of 2003 extended the EB-5 Immigrant Investor Regional Center Pilot Program for five years, until September 30, 2008. See Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944; The Fiscal 2009 Omnibus Appropriations Bill, H.R. 1105, extended the Program to September 30, 2009. Omnibus Appropriations Act, 2009, Pub. L. No. 111–8, 123 Stat. 524. The 2012 (and most recent) re-authorization of the Program through 2015 struck “pilot” from the statute when referring to the EB-5 Regional Center Program. Act of September 28, 2012, Pub. L. No. 112-176, 126 Stat. 1325.

neither the impact nor the interest that Congress envisioned, legislative support for the investor visa program has not wavered.⁷¹

B. Changes in EB-5 Law Since Enactment

In an effort to increase use of the EB-5 category, several subsequent changes to EB-5 law, including interpretation of the statutory requirements and changes in CIS adjudication policy, made it easier to obtain an EB-5 visa and gain LPR status. Significantly, each of the requirements was relaxed in favor of approving applications for EB-5 visas and granting petitions to remove conditional residency.

Section 610 of the Appropriations Act created the Immigrant Investor Pilot Program (“Pilot Program”) on October 6, 1992, in an attempt to give immigrant investors the option of qualifying for legal residence by creating jobs indirectly.⁷² Section 610(a) of the Act provides that EB-5 visas will be allocated to aliens investing in “a [R]egional [C]enter in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”⁷³ “The requirements for an investor under the Pilot Program are almost identical to the basic EB-5 Investor Program, except that the Pilot Program provides for investments affiliated with a Regional Center.⁷⁴ The INS indicated that “Regional Centers” include state government agencies as well as private entities.⁷⁵ As a result, there is currently no requirement of direct investment to qualify for an EB-5 visa. Consequently, an alien investor who is investing money through a Regional Center is not required to consider, much less actually create, 10 full-time jobs.

One of the most significant relaxations of EB-5 requirements has been the subsequent announcement of statutory interpretation. A policy memorandum released by CIS on May 30, 2013 resolved some of the

71. The legislation that extended the Program was passed with unanimous support in the Senate and by a 412-3 margin in the House of Representatives before being signed into law by President Obama. See BILL SUMMARY AND STATUS, 112th Congress, S. 3245 (2011–2012).

72. See Act of October 6, 1992, Pub. L. No. 102–395, 106 Stat. 1828.

73. *Id.*

74. The Immigrant Investor Pilot Program (“Pilot Program”) was created by Section 610 of Public Law 102–395 (Oct. 6, 1992).

75. See *INS Implements New Pilot Program for Immigrant Investors*, 70 INTERPRETER RELEASES 1129, 1130 (Aug. 30, 1993).

ambiguity with regard to acceptable Regional Centers.⁷⁶ In addition to clarifying that adjudications are to be based upon a preponderance of the evidence standard, the policy memorandum established that CIS examiners should give deference to previous determinations.⁷⁷ Following the memorandum, a Regional Center is no longer restricted to a particular industry code, economic methodology, or geographic area.⁷⁸ The memorandum provides minimal guidance for determining acceptable Regional Center geography, stating only “the proposed area is contributing significantly to the supply chain, as well as the labor pool, of the proposed project.”⁷⁹ Further, the memorandum eliminates the previous requirement that the proposed economic activity “will substantially promote economic growth in the proposed area as a whole.”⁸⁰ Consequently, CIS has recently adopted a position that significantly expands the number of regions available for interested alien entrepreneurs to invest in, while broadening the boundaries originally created by Congress in implementing the EB-5 Program. In addition, Section 610(c) of the Appropriations Act expressly relaxes the job creation requirement currently set forth in 8 C.F.R. Section 204.6, because it allows aliens investing in new commercial enterprises located within Regional Centers to establish mere ‘reasonable methodologies’ for determining the number of jobs created.⁸¹ As such, Section 610(c) provides alien investors with tremendous leeway in demonstrating that they have satisfied the job creation requirements of the Pilot Program.⁸²

In 2002, Congress passed provisions that gave several hundred investors an opportunity to reestablish eligibility for the EB-5 Program.⁸³ Under the 2002 provisions, investors who were able to satisfy the original, pre-1998 requirements were immediately granted LPR status and investors who had not met the original requirements were given an additional two years to be able to demonstrate the requisite investment and job creation.⁸⁴

76. 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12.

77. *Id.* at 13.

78. *Id.* at 13–15.

79. *Id.* at 14.

80. *Id.* at 17. Whereas Regional Centers were previously required to prove that the proposed project (to serve as the basis for EB-5 visas) would substantially promote economic growth in the proposed area as a whole, the May 2013 Policy Memorandum indicated that this former requirement could be satisfied without providing any evidence, but instead by mere showing that the surrounding area will contribute to the proposed project. *Id.* at 14.

81. Immigrant Investor Pilot Program, 59 Fed. Reg. 17920, 17921 (Apr. 15, 1994).

82. *Id.*

83. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, §§ 11031–37, 116 Stat. 1758 (2002).

84. *Id.*

On January 18, 2005, CIS issued a memorandum entitled “Extension of Status for Conditional Residents with Pending or Denied Form I-829” to issue guidance for adjudicating I-829 petitions.⁸⁵ That memorandum provided “. . . for those cases where the Form I-829 has not already been adjudicated, an initial determination be made on an eligible alien’s petition.”⁸⁶ According to CIS guidance,

if the Secretary of Homeland Security determines that the alien has met the job creation and capital investment requirements outlined by this law, and that there is no material misrepresentation with respect to the Form I-829, the Secretary must notify the alien and remove the conditional basis of the alien’s status, as well as that of the alien’s spouse and children if their status was obtained under Section 216A of the Act.⁸⁷

As such, only a cursory check for satisfaction of EB-5 requirements is necessary to remove conditional residency. Despite growing national security concerns over foreign companies investing in the United States, no inquiry is made into whether a foreign investor has committed any crimes or has been flagged for national security reasons.

In addition, CIS policy for adjudicating I-829 petitions has made clear that the original EB-5 requirements created by Congress are, in practice, flexible.⁸⁸ The I-829 petition is intended to examine whether the alien entrepreneur has satisfied the conditions of his admission to the United States.⁸⁹ Primarily, CIS is determining whether the alien has invested the requisite capital and created the requisite jobs through that investment.⁹⁰ CIS regulations provide that a petitioner must demonstrate that “the alien has created or can be expected to create within a reasonable period of time” the required jobs in order to remove conditional residence.⁹¹ “For purposes of the Form I-526 adjudication and the job creation requirements,

85. USCIS Inter-Office Memorandum, Extension of Status for Conditional Residents with Pending or Denied Form I-829, Petitions Subject to Public Law 107–273 (Jan. 18, 2005).

86. *Id.* at 2.

87. *Id.*

88. See 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 22 (explaining that so long as an investor is in “substantial compliance” with the investment and job-creation requirements, conditional residency will be removed).

89. *Id.* at 6.

90. “At the Form I-829 stage, USCIS will require evidence verifying that the escrowed funds were released and that the investment was sustained in the new commercial enterprise.” *Id.*

91. 8 C.F.R. § 216.6(c)(1)(iv) (2009).

the two year period described in 8 C.F.R. Section 204.6(j)(4)(i)(B) will be deemed to have commenced six months after the adjudication of the Form I-526.⁹² CIS also has determined that both indirect and construction jobs now also qualify as permanent jobs for satisfying EB-5 requirements.⁹³

Moreover, the CIS Adjudicator's Field Manual ("AFM") provides that "there may be some flexibility with respect to the timing of job creation at the Form I-829 . . . stage."⁹⁴ In other words, an investment's failure to produce 10 full-time jobs within two years does not necessarily result in an alien investor's conditional residency status being revoked. Adopting a flexible approach, CIS policy now provides that Form I-829 must contain evidence that the petitioning alien "has created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees."⁹⁵ CIS policy further explains that an alien investor's Form I-829 should be approved (and conditional residency should end) "if, after considering the evidence, the officer determines that the jobs are merely 'more likely than not' going to be created within a reasonable time."⁹⁶

The May 2013 Policy Memorandum also provides that multiple alien investors seeking EB-5 visas can pool their resources and invest in a single project together.⁹⁷ The only requirement is that each alien investor independently invests the minimum amount and that at least ten full-time jobs per alien investor are created.⁹⁸ The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial

92. 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12, at 19.

93. *Id.*

94. *Id.* "Recognizing that circumstances may change after an alien secures admission to the United States, CIS chose to implement INA section 216A with some 'flexibility.'" USCIS Policy Memorandum HQDOMO 70/6.1.8, "EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions (AFM Update AD 09-04)," at 6 (June 17, 2009) [hereinafter *EB-5 Alien Entrepreneurs*] available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/eb5_17jun09.pdf; see also Conditional Permanent Resident Regulations for Alien Entrepreneurs, Spouses, and Children, 59 Fed. Reg. 94-12524 (May 23, 1994).

95. 8 C.F.R. § 216.6(a)(4)(iv); In making the "reasonable time" determination, USCIS should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526, the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner. *EB-5 Alien Entrepreneurs, supra* note 94, at 6.

96. "American Immigration Lawyers Association EB-5 Committee and Invest In the USA," IIUSA (Dec. 14, 2009), available at <http://www.uscis.gov/outreach/notes-previous-engagements/american-immigration-lawyers-association-eb-5-committee-and-invest-usa-iiusa>; see also *EB-5 Alien Entrepreneurs, supra* note 94.

97. 2013 EB-5 Policy Adjudications Memorandum, *supra* note 12, at 20.

98. *Id.*

enterprise as the basis of a petition on Form I-526.⁹⁹ CIS must recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions. Provided the allocation of jobs does not conflict with a prior agreement made by the alien investors, there is, apparently, no problem with allocating jobs created between multiple investors.¹⁰⁰

Consequently, CIS has relaxed or eliminated nearly every original requirement of the EB-5 Program. Whereas EB-5 investors were initially required to have their applications adjudicated by CIS, now EB-5 investors have the option of selecting a Regional Center to apply through. While the original requirements demanded that an investor demonstrate that his or her active investment created at least 10 direct jobs, current policies allow for indirect jobs to count toward job creation. CIS also has indicated that the 10 jobs do not need to be created within the original two-year period; instead, investors will be deemed to have satisfied the requirements if it looks “likely” that jobs are expected to be created “within a reasonable time.” As a result, proof of investment or job creation is not currently required to remove conditional residency. Further, the creation of the Regional Center program eliminated the “active investor” requirement. Now, CIS allows for pooled investments and for EB-5 visa-holders to delegate among themselves how job creation will be allocated. The one constant in EB-5 requirements after nearly twenty-five years is the minimum investment amount. In eliminating the original requirements of the EB-5 visa, these changes have made it easier for investors to not only obtain LPR status (and, thereby, citizenship), but also to do so without the normal oversight allocated to visas.

Unsurprisingly, the elimination of most EB-5 requirements has coincided with a surge in the number of applications.¹⁰¹ Additionally, like application rates, approval rates of I-526 and I-829 forms have increased.¹⁰² Approval

99. *Id.*

100. *Id.*

101. *See, e.g.*, “Current Demand for EB-5 Visas Will Lead to Retrogression in FY-2015, According to Department of State & Other Takeaways from Visa Update Panel,” *supra* note 68.

102. *See* IIUSA Obtains I-526/829/924 Adjudication Data for FY2013, Releases Comprehensive Dataset (1991–2013), INVESTMENT IN THE USA BLOG, (Jan. 13, 2014), available at <http://iisablog.org/government-affairs/iusa-obtains-i526829924-adjudication-data-fy2013-releases-comprehensive-dataset-19912013/>. “The I-829 approval rate over the last six years (FY2008–2013) averages out to 87.1%, much higher than the 73.2% over the entire span of the Program’s existence.” *Id.* “Over the last three years (FY2011–2013),

rates for I-526s and I-829s remained fairly high in the 2012 fiscal year, although slightly below the fiscal year 2011 average (79% approval percentage for I-526s in fiscal year 2012 compared to 81% in fiscal year 2011, and 94% for I-924s in fiscal year 2012 compared to 96% in fiscal year 2011).¹⁰³ This shows some continued drop-off in approval rates for I-526 initial petitions from previous years, while approval rates for the second-step removal of conditions have improved.¹⁰⁴ During fiscal year 2010, 89% of the initial individual EB-5 Immigrant Petitions for Alien Entrepreneur (Form I-526) were approved; 80% of the subsequent Petitions to Remove Conditions (Form I-829) were approved.¹⁰⁵

C. The Surge in Demand for EB-5 Has Been Accompanied By Fraud Scandals

The elimination of several EB-5 requirements allows alien investors to gain EB-5 visas without providing very much information. The I-526 form requires basic information about the prospective investment, but does not require that CIS inspect the investment project's potential prior to approving an EB-5 visa.¹⁰⁶ Not surprisingly, several instances of fraud have emerged.

On October 1, 2013, the U.S. Securities and Exchange Commission ("SEC") and CIS issued a joint investor alert warning of potential scams targeting foreign nationals wishing to immigrate to the United States through the EB-5 Program.¹⁰⁷ "The alert noted that the mere designation

I-526 approval rates have hovered right around 80%; while the I-829 approval rate has eclipsed 90% in each of those years." *Id.*

103. Office of Performance and Quality, Data Analysis and Reporting Branch, *Immigrant Petition by Alien Entrepreneur (I-526) and Petition by Entrepreneur to Remove Conditions (I-829) Service-wide Receipts, Approvals, Denials Fiscal year(s): 2005–2012 (Third Quarter)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Apr. 23, 2012), available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2012%20Events/July%202012/EB5_Statistics_Q3_2012.pdf.

104. *See id.*

105. *Id.*

106. *See* FORM I-526, *supra* note 32.

107. Ana Campoy, *SEC Case Shows Greater Scrutiny of EB-5 Programs*, WALL ST. J., October 18, 2013, available at <http://www.wsj.com/articles/SB10001424052702304500404579129690408822088>. The alert alleged that a married couple fraudulently promised to invest the money of alien investors, but instead diverted those funds for personal use. Press Release, U.S. Sec. and Exch. Comm'n, SEC Halts Texas-Based Scheme Targeting Foreign Investors Seeking U.S. Residency Through EB-5 Visa Program, (Oct. 1, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854731#U-EH7PldXnE>. "According to the SEC's complaint, beginning in 2010, the Ramirezses sought approval from USCIS to register USA Now as an EB-5 Regional Center that would accept and direct investments from foreign investors into investment opportunities that

of a business as a Regional Center by CIS does not mean any of its investments have been approved by a government agency. The alert cites cases in which Regional Centers have falsely promised investors a specified return on their investment and misused investors' money for personal expenses.¹⁰⁸

Allegations of fraud surrounding EB-5 visas also emerged in South Dakota when “Northern Beef Packers filed for Chapter 11 bankruptcy in July with a plan to sell its assets, after suspending operations at its South Dakota meat packing plant. The 420,000-square-foot plant in Aberdeen opened in October 2012, and executives said in January 2013 that it had raised \$150 million in financing.”¹⁰⁹ Much of this funding came from EB-5 visas, as Northern Beef Packers was one of several South Dakota Regional Center (“SDRC”) loan projects.¹¹⁰ Northern Beef Packers began laying off workers, defaulted on its loan in March 2013, and then sold its assets for \$44.3 million in December 2013.¹¹¹

Joop Bollen, president of Aberdeen, South Dakota-based SDRC, is a defendant in a civil case filed in federal court in Sioux Falls, South Dakota in October. It claims he provided ‘inaccurate and incomplete information’ to Chinese citizens who put \$500,000 each into the Northern Beef Packers cattle processing plant in Aberdeen in 2009 and 2010. He failed to disclose there were liens against the plant and that it was then about two years behind schedule, according to the suit.¹¹²

In January 2014, Rep. Stace Nelson (R-19/Fulton) proposed a new bill to ban the EB-5 Program in South Dakota.¹¹³

would purportedly satisfy the EB-5 visa requirements. But even before USCIS decided, the Ramirezes and other USA Now employees already had started soliciting investors with false promises about how their money would be invested.” *Id.*

108. LexisNexis Legal Newsroom Staff, *News Excerpts From the Nov. 1, 2013 Bender’s Immigration Bulletin*, LEXISNEXIS LEGAL NEWSROOM IMMIGRATION LAW (Oct. 21, 2013), available at <http://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2013/10/21/excerpts-from-the-nov-1-2013-bender-s-immigration-bulletin.aspx>.

109. Stephanie Gleason, *Northern Beef to Be Sold to White Oak for \$44.3 Million*, WALL ST. J., Dec. 6, 2013, available at <http://www.wsj.com/articles/SB10001424052702303497804579242333031677004>.

110. See *Current Model: SDRC Loan Projects*, S. D. REG’L CTR., INC., available at http://www.sdrc-eb5.com/?page_id=27 (last visited Feb. 21, 2014).

111. Gleason, *supra* note 109.

112. Dune Lawrence, *Coming to America Costs \$500,000 With Job Plan Prone to Failures*, BLOOMBERG, March 22, 2012, available at <http://www.bloomberg.com/news/2012-03-23/coming-to-america-costs-500-000-with-job-plan-prone-to-failures.html>.

113. H.B. 1176, 2014 Legis. Assemb., 89th Sess. (S.D. 2014), available at <http://legis.sd.gov/docs/legsession/2014/Bills/HB1176P.pdf>. Terms of the bill included: “No

The growing number of events and stories alleging EB-5 fraud indicate that the relaxation of EB-5 requirements poses threats to both alien investors' ability to identify sham investments and CIS's ability to ensure that the investments on which a grant of citizenship is based actually are creating jobs.

IV. THE EB-5 VISA PROGRAM, AS IT CURRENTLY STANDS, APPEARS TO BE AT ODDS WITH CURRENT NATIONAL SECURITY POLICIES

Immigration law plays an important role in safeguarding national security, serving as both a tool for controlling entry into the country and a means of achieving the Presidential Administration's policies. Indeed, enforcement of immigration law is inextricably linked to the efficacy of American national security.¹¹⁴ Further, the terms of and policies underlying immigration law explicitly recognize the importance of national security and the key position that immigration policy plays in maintaining national security, imposing penalties, and legal consequences for national security threats by non-citizens.¹¹⁵ With the many changes in national security law, policy, and administration since the creation of the EB-5 Program and the emergence of a cybersecurity threat, FDIs are a source of growing governmental concerns and, as a result, subject to increasing scrutiny. Even though the EB-5 Program involves foreign investments and potential foreign control of American assets, the level of scrutiny applied to transactions reviewed by CFIUS is not similarly allocated to inspect foreign investors using the EB-5 Program. Particularly in light of several recent red flags issued by CFIUS when reviewing large-scale foreign investments, the prudence of continuing the EB-5 investor visa program, as it currently stands, is questionable.

official or agency of the State of South Dakota nor any political subdivision of the state may participate in, or enter into any contract or agreement associated with, the federal EB-5 Immigrant Investor Program administered by the United States Citizenship and Immigration Services of the United States Department of Homeland Security." *Id.* As of January 2015, no other states have (or attempted to) ban the EB-5 Program.

114. See generally Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEORGETOWN IMM. L. J. 383 (2007) (discussing the link between immigration law and national security).

115. The INA provides that "the term 'national security' means the national defense, foreign relations, or economic interests of the United States." INA, *supra* note 11, at 8 U.S.C. § 1189(d)(2) (2004).

A. The National Security Landscape Has Changed Significantly Since the EB-5 Visa Program Was Created in 1990

When Congress enacted the IMMACT, the United States' top national security priorities included deterrence of nuclear attacks and maintaining technological superiority, especially in nuclear forces and the space program.¹¹⁶ The years immediately following the enactment of the Immigration Act of 1990 were marked by attempts to strengthen the economy and effect significant changes in immigration law.¹¹⁷ However, the national security climate and America's national security concerns have changed significantly since the EB-5 Program was enacted—first shifting to focus on military power and presently confronting the threats posed by cybersecurity and countering intelligence threats.¹¹⁸

The terrorist attacks of September 11, 2001, fundamentally altered American national security, underscoring the inextricable link between immigration and national security.¹¹⁹ The hijackers who perpetrated the September 11th attacks entered the United States through “valid” visas.¹²⁰ The 9/11 Commission Report revealed that slipshod visa screening permitted most of the hijackers to enter the United States with fraudulent passports and false statements on their visa applications,¹²¹ concluding that the authorities

116. GEORGE BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES: 1990–1991, at 22–23, 93–97 (1990).

117. “Nineteen-ninety six was a watershed year for immigration law. In response to the Oklahoma City bombing, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was passed . . . expanding the grounds for deportation and narrowing the provisions for discretionary relief.” ARTHUR L. RIZER, III, THE NATIONAL SECURITY IMPLICATIONS OF IMMIGRATION LAW 64 (2012); Congress also passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which focused on the apprehension and expeditious removal of undocumented immigrants. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996); The AEDPA and the IIRIRA created the method by which terrorist aliens and others considered national security threats can be detained and removed, signaling a change in the threats perceived from tensions abroad to concrete dangers of terrorism faced domestically. *See generally id.*; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996).

118. *See* Brian Katulis, *5 National Security Issues to Watch in 2015*, WALL ST. J. (Dec. 31, 2014), *available at* <http://blogs.wsj.com/washwire/2014/12/31/5-national-security-issues-to-watch-in-2015/>.

119. *See generally* Kerwin & Stock, *supra* note 114.

120. Farrah G. de Leon, *Girding the Nation's Armor: The Appropriate Use of Immigration Law to Combat Terrorism*, 3 REGENT J. INT'L L. 115, 116 (2005).

121. *Id.*

could have intercepted as many as fifteen of the nineteen hijackers if authorities had observed proper procedures.¹²²

The September 11th terrorist attacks not only were the catalyst of long-lasting American military engagements in the Middle East, but also ushered in several of the most significant changes in national security law and policy, including The PATRIOT Act,¹²³ the creation of the Department of Homeland Security,¹²⁴ the Intelligence Reform and Terrorism Prevention Act of 2004,¹²⁵ the President's Surveillance Program, and the FISA Amendments.¹²⁶ These acts changed existing law in a number of areas, including government surveillance of foreign nationals, information sharing between domestic law enforcement and foreign intelligence agencies, government access to personal and business records, and federal prosecution of terrorism suspects under federal criminal law.¹²⁷ Creation of these laws also afforded the federal government greater ability to combat and prevent perceived security threats, both domestically and abroad.

Similarly, immigration law changed following the September 11th attacks, responding largely to concerns over admission into the country and the ability to prosecute non-citizens. The USA PATRIOT Act and REAL ID Act became law, making more substantive changes to the INA terrorism provisions.¹²⁸ The INA now not only mandates the removal of aliens who engage in national security threats such as espionage, sabotage, the transfer of restricted technology or information, and membership in Communist or totalitarian parties, but also removal for what is called "terrorist activity."¹²⁹ Perhaps most significantly, the Department of Homeland Security was created in 2003, incorporating the former Immigration and Nationalization Services ("INS") and 21 other federal agencies.¹³⁰ "In one

122. *Id.*; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 384 (2004), available at <http://www.9-11commission.gov/report/911report.pdf>.

123. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (amending numerous federal laws as well as creating new ones).

124. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

125. *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

126. *See generally* Foreign Intelligence Surveillance Act of 1978, ch. 36, 50 U.S.C. § 1801 (1978); *see also* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

127. *See* PATRIOT Act, *supra* note 123, at Title II "Enhanced Surveillance Procedures."

128. *Id.*; *see also* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13, 119 Stat. 302 (2008).

129. Immigration and Nationality Act of 1965, ch. 12; 8 U.S.C. § 1182(a)(3)(B)(iii).

130. Kerwin & Stock, *supra* note 114, at 388.

fell swoop, the U.S. immigration function became a homeland security concern. The creation of DHS represented the largest U.S. government restructuring since World War II. . . .”¹³¹ Soon after assuming the role of immigration enforcement and the duty to effectuate terrorism policy in the United States, the Department of Homeland Security began using its immigration power to fight domestic terrorism.¹³² Indeed, the dramatic and rapid shift in national security priority to terrorism prevention is evident in the Department of Homeland Security’s mandate and demonstrates the federal government’s recognition of the link between effective national security practices and immigration practices. It follows that a vital part of the national security plan is immigration regulation to prevent terrorists from entering the United States, in order to reduce America’s exposure to subsequent terrorist attacks.¹³³ Moreover, when individuals who wish to do harm to the United States are found in the country, the ability to remove or detain those individuals is critical from a national security perspective.¹³⁴

B. Shift in Perceived Threats

Though the threat of terrorism has predominated in the national security arena over the past decade, rapidly growing concern for cyber security indicates a coming shift in defense priorities and tactics.¹³⁵ Cyberspace, an increasingly pervasive part of life, has revolutionized the way businesses, communications, societies, and even governments function. Part and parcel of the internet is sharing, which, in addition to facilitating openness, creates another avenue of vulnerability. Cyber espionage and cyberattacks

131. *Id.*

132. RIZER, *supra* note 117, at 51.

133. *Id.* at 52.

134. *Id.*

135. U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM (2012) (stating that there was a “lessened threat from terrorist groups”); *see* NAT’L SECURITY STRATEGY REPORT, *supra* note 10, at 27 (listing cyber security and countering intelligence threats as security priorities, providing “cyber security threats represent one of the most serious national security, public safety, and economic challenges we face as a nation. . . . Our daily lives and public safety depend on power and electric grids, but potential adversaries could use cyber vulnerabilities to disrupt them on a massive scale.”). In addition, the Office of the Coordinator for Cyber Issues (S/CCI), which was established in February 2011, included “reduc[ing] intrusions into and disruptions of US networks” in its policy outline. In July 2012, President Obama issued an op-ed addressing how the federal government was “taking cyberattack threat seriously.” *See* Barack Obama, *Taking the Cyberattack Threat Seriously*, WALL ST. J. (July 19, 2012).

present an increasing threat to both the U.S. economy and national security. And despite fostering open markets and free trade, the United States also seeks to safeguard national security. The growing number of transactions by foreign companies flagged by CFIUS and questioned by Congress¹³⁶ highlights the fact that these two interests are increasingly at odds.

1. The Growing Problem Presented By Vulnerability in Cybersecurity

A growing challenge in ensuring national security is dealing with the challenge of protecting cyber infrastructure. In 2003, the Department of Homeland Security released the National Strategy to Secure Cyberspace, underscoring the importance of “critical infrastructures.”¹³⁷ Though many of the critical infrastructures are privately owned and operated, securing these networks is essential to American economic well-being and national security.¹³⁸ Recent technology trends—particularly the growth in mobile technology, migration to cloud computing, and social networking—exacerbate the challenge of ensuring cybersecurity.¹³⁹

The seriousness of the threat posed by cyberattacks has grown tremendously in the past few years. President Obama penned a *Wall Street Journal* op-ed in August 2012 describing the cyberthreat as “one of the most serious economic and national security challenges” facing our nation.¹⁴⁰ Six months later, President Obama again underscored the importance of cybersecurity in his post-election, State of the Union Address.¹⁴¹ “In March 2013, just one year after FBI Director Robert Mueller

136. See Cedarbaum & Preston, *infra* note 151.

137. U.S. COMPUTER EMERGENCY READINESS TEAM, NAT’L STRATEGY TO SECURE CYBERSPACE (Feb. 2003), available at https://www.us-cert.gov/sites/default/files/publications/cyberspace_strategy.pdf (“Our nation’s critical infrastructures are composed of public and private institutions in the sectors of agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking, and finance, chemicals and hazardous materials, and postal and shipping. Cyberspace is their nervous system—the control system of our country. Thus, the healthy functioning of cyberspace is essential to our economy and our national security.”).

138. Melanie J. Teplinsky, *Fiddling on the Roof: Recent Developments in Cybersecurity*, 2 AM. U. BUS. L. REV. 225, 233 (2013).

139. *Id.*

140. Obama, *supra* note 135.

141. President Barack Obama, State of the Union Address (Feb. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> (signaling his intention to make cybersecurity a priority in his second term and to lay out his plan for doing so, stating: “Earlier today, I signed a new executive order that will strengthen our cyber defenses But now Congress must act as well, by passing legislation to give our government a greater capacity to secure our networks and deter attacks. This is something we should be able to get done on a bipartisan basis.”).

warned that cyberthreats were expected to surpass terrorism as the single greatest threat to the United States, the U.S. Director of National Intelligence identified cybersecurity as the top threat facing America. The next day, President Obama invited select CEOs of critical infrastructure companies directly to the White House to discuss cybersecurity, and a few weeks later, in April 2013, he summoned 15 of America's top financial leaders to the White House to discuss . . . cyberrisks."¹⁴²

Despite investments in and efforts to ensure cybersecurity, America's digital assets and critical infrastructures continue to be targeted and exploited by espionage.¹⁴³ Large-scale cyber operations "uncovered during the same time period include Red October,"¹⁴⁴ an alleged Chinese cyberespionage operation uncovered in October 2012, and a massive operation discovered in early 2013 that targeted Apple, Facebook, Twitter, Microsoft, and an estimated forty other companies.¹⁴⁵

The shift in national security threats has necessitated not only the adoption of new tools to combat such threats, but also a consideration of vulnerable areas ripe for penetration.

142. Teplinsky, *supra* note 138, at 246; *see also* Frederick Kempe, *Seeking to Avert Cyberwar*, REUTERS (Apr. 15, 2013), *available at* <http://blogs.reuters.com/thinking-global/2013/04/15/seeking-to-avert-cyber-war/>. An executive who participated in the April meeting explained: "[t]he President scared the hell out of all of us, and we're not easy to frighten." *Id.*

143. Teplinsky, *supra* note 138, at 246. American targets of major cybersecurity incidents over the past few years have included:

U.S. Chamber of Commerce (May 2010), Google (June 2010), RSA Security (May 2011), Sony (May 2011; October 2012), Booz Allen Hamilton (July 2011), U.S.-China Economic and Security Review Commission (September 2011), twenty-three natural gas pipeline operators (December 2011–June 2012), Global Payments (March 2012), numerous financial services companies and the New York Stock Exchange (September 2012–March 2013), the White House (September 2012), Nationwide Mutual Insurance Company (October 2012), major U.S. media outlets—including the New York Times and Wall Street Journal (October 2012–January 2013), the Alabama State Government (January 2013), the U.S. Sentencing Commission (January 2013), the U.S. Probation Office for the Eastern District of Michigan, Evernote (March 2013), and Reddit (April 2013).

Id.

144. *See* Teplinsky, *supra* note 138, at 246–48.

145. *Id.* at 247–49.

2. *Foreign Investment is Uniquely Implicated By This Shift in Threats*

In 2008, the CIA identified the then-ongoing economic crisis as the “foremost current threat to national security.”¹⁴⁶ Indeed, the value of foreign entities’ acquisitions in the United States increased 93 percent between 2006 and 2007, due largely to the dollar’s weak value at that time and soaring revenues in China and oil-rich countries.¹⁴⁷ “Foreign buyers accounted for 46 percent of the \$230.5 billion of U.S. mergers and acquisitions in the fourth quarter of 2007,¹⁴⁸ the largest percentage of foreign buyers since 1998.”¹⁴⁹ Though CFIUS has existed for almost 40 years,¹⁵⁰ “controversial transactions since September 11th—most notably the outcry over the initial approval of United Arab Emirates-based Dubai Ports World’s acquisitions of a company operating marine terminals in a number of major U.S. ports—have elevated CFIUS from relative obscurity to the front pages.”¹⁵¹

In response to national security concerns surrounding the potential problems of FDI,¹⁵² Congress enacted the Exon-Florio Amendment.¹⁵³ The Exon-Florio Amendment authorizes the President to investigate mergers, acquisitions, and takeovers by foreign persons or entities that result in foreign control over a U.S. company or certain U.S. assets.¹⁵⁴ The Exon-Florio Amendment allows CFIUS (acting under Executive Branch authority) to block a transaction when, after a review, CFIUS “finds

146. See Mark Mazzetti, *Global Economic Crisis Poses Top Threat to U.S., Spy Chief Warns*, N.Y. TIMES, Feb. 13, 2009, at A14; see also Peter Boone & Simon Johnson, *The Next World War? It Could be Financial*, WASH. POST, Oct. 12, 2008, at B1.

147. Jamie S. Gorelick, Stephen W. Preston, Jonathan G. Cedarbaum, *The Foreign Investment and National Security Act of 2007: Navigating the New Regulations*, ABA INT’L LAW SECTION, 2 (Apr. 4, 2008), available at <http://www.wilmerhale.de/files/publication/0cea02a2-9b16-4fde-b5e7-4337b0afbddb/presentation/publicationattachment/c5250cf6-6c51-48ec-b84e-05482ae0f407/cfius.pdf> (citing Ariana E. Cha, *Weak Dollar Fuels China’s Buying Spree of U.S. Firms*, WASH. POST, Jan. 28, 2008, at A1).

148. *Id.*

149. *Id.* at 1–2.

150. Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975).

151. Jonathon G. Cedarbaum & Stephen W. Preston, *CFIUS and Foreign Investment*, HOMELAND SECURITY: LEGAL AND POLICY ISSUES 235–36 (Joe D. Whitley & Lynne K. Zusman eds., 2009).

152. “By the late 1980s, Congress and the public had grown increasingly concerned about the sharp increase in foreign investment in the United States and the potential impact such investment might have on the U.S. economy.” JACKSON, *supra* note 5, at 4; “In 1988, amid concerns over foreign acquisition of certain types of U.S. firms, particularly by Japanese firms, Congress approved the Exon-Florio provision.” *Id.* at 3.

153. 50 U.S.C. § 2170 (2007).

154. *Id.*

credible evidence that a transaction would impair national security.”¹⁵⁵ Because CFIUS review specifically focuses on the national security ramifications of a transaction, initiation of CFIUS review is most likely “. . . when the target U.S. company has classified contracts with the U.S. government or provides products or services involving U.S. export-controlled technologies [. . .or. . .] operates or supplies U.S. critical infrastructure, such as the telecommunications network.”¹⁵⁶

The shift in national security concerns focused attention and efforts on information-based threats, highlighting the need to carefully evaluate the best methods of promoting economic growth raising questions about the appropriate regulation of foreign investment.¹⁵⁷

C. Recent Incidents Highlight the Tension Between Promoting Foreign Involvement in the American Economy and Safeguarding National Security

The growing number of mergers and acquisitions flagged by CFIUS and the Treasury Department during the past five years demonstrates the growing concern of the security implications that foreign investment entails.

The Exon-Florio Amendment has received increased attention in the past decade, due to an increase in the number of transactions reviewed by CFIUS and a growing concern with the government’s ability to prevent terrorism after September 11th.¹⁵⁸ Exon-Florio clearance processes can complicate and delay transactions, even when clearance is ultimately

155. 50 U.S.C. App. § 2170(d)(4). CFIUS’s ability to block a merger or acquisition is only possible where the Executive Branch has no other explicit authority to stop a transaction.

156. Cedarbaum & Preston, *supra* note 151, at 240.

157. “The increasing investments in the United States by sovereign wealth funds—large pools of investment capital controlled by foreign governments—have also raised new questions in Congress and the executive branch about the regulation of foreign investment.” Cedarbaum & Preston, *supra* note 151, at 236 (As with investments by other sorts of foreign investors, investments by sovereign wealth funds emanating from countries such as China and the Gulf Arab states, with which the United States has important strategic and geopolitical entanglements, have raised particular concerns.) For an overview of sovereign wealth funds, see Robert M. Kimmitt, *Public Footprints in Private Markets*, 87 FOREIGN AFF. 119, 119–30 (Jan./Feb. 2008); *Asset-Backed Insecurity—Sovereign-Wealth Funds*, THE ECONOMIST, Jan. 19, 2008, at 78–80.

158. Jeffrey L. Kessler & Spencer Weber Waller, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12:14 (2d ed. 2006).

provided.¹⁵⁹ The clearance process is designed to last no more than 90 days, but the parties are often forced to withdraw and re-file their transaction notifications, thereby restarting the process, under threat that the transaction will otherwise be blocked.¹⁶⁰ In addition, clearance is increasingly contingent on parties making adjustments to the planned transactions in order to obviate perceived security concerns.¹⁶¹

In 2003, Hong Kong-based company Hutchison Whampoa withdrew its bid to acquire Global Crossing, a telecommunications company, after encountering resistance from Exon-Florio review.¹⁶² After a lengthy review and agreement on extensive network security measures, the President approved Singapore Technology Telemedia's acquisition of the U.S. firm.¹⁶³ Bush Administration officials contended that the proposed transactions would threaten national security, although the principal Global Crossing asset at issue was a commercial telecommunications network.¹⁶⁴

Two years later, Dubai Ports, a company owned by United Arab Emirates, attempted "to acquire The Peninsular and Oriental Steam Navigation Company (P&O), a British firm that operates in a number of U.S. ports and other ports around the world."¹⁶⁵ After an initial approval of the acquisition generated controversy and a request for additional CFIUS review,¹⁶⁶ Dubai Ports announced on March 9, 2006, that it would transfer operations of American ports to a U.S. entity.¹⁶⁷

Responding to these trends, Congress passed the Foreign Investment and National Security Act (FINSA) in late 2007,¹⁶⁸ which brought some

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*; See Dennis K. Berman, *Bush is Expected to Approve Global Crossing Deal*, WALL ST. J., Sept. 9, 2003, at A2.

163. See *Company News: Global Crossing Sale Clears One U.S. Hurdle*, N.Y. TIMES, Sep. 20, 2003, at C4; Kessler & Waller, *supra* note 158.

164. Berman, *supra* note 162; Kessler & Waller, *supra* note 158.

165. Kessler & Waller, *supra* note 158; see also Press Release, U.S. Dep't of Treasury—Comm. on Foreign Inv. in the U.S., CFIUS and the Prot. of the Nat'l Sec. in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), available at <http://www.treas.gov/press/releases/js4071.htm>. [hereinafter *CFIUS Protection*]; Press Release, Office of the White House Press Sec'y, The CFIUS Process and the DP World Transaction (Feb. 23, 2006), available at <http://www.georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060222-11.html>.

166. See *CFIUS Protection*, *supra* note 165; S. 2341, 109th Cong. §§ 12–13 (2006) (enacted).

167. See Press Release, Peninsular and Oriental Steam Navigation Co., *Sale of P&O Ports in N. Am.* (Mar. 15, 2006).

168. Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246.

significant changes to the CFIUS program.¹⁶⁹ “Further clarification has come in the Treasury Department’s revised CFIUS regulations, required under FINSA, and effective as of December 22, 2008. Industry-specific regimes managed by various departments and agencies have also continued to develop alongside the CFIUS process.”¹⁷⁰

A proposed acquisition of Firstgold, an American mining firm, by the Chinese Northwest Non-Ferrous International Company Limited (“Northwest”) was cancelled because of CFIUS concerns.¹⁷¹ On July 20, 2009, Firstgold announced a \$26.5 million investment in the company by Northwest, an entity controlled by the Shaanxi provincial government.¹⁷² Under the agreement between the two companies, Northwest would purchase some of Firstgold’s secured debt while also taking a 51% stake in Firstgold.¹⁷³ On December 18, 2009, one month after CFIUS initiated a review of the transaction, Firstgold announced that CFIUS intended to reject the transaction.¹⁷⁴ Apparently, CFIUS’s primary concern was the proximity of four Firstgold mines to the Fallon Naval Air Station and the existence of a possible threat to other sensitive and classified security and military assets.¹⁷⁵

In February 2011, Futurewei, the U.S. subsidiary of Huawei Technologies Co., Ltd., a Chinese telecommunications equipment producer, bowed out of a \$2 million acquisition of patents from 3Leaf, an insolvent California-based startup, after CFIUS suggested that Huawei voluntarily divest the

169. Cedarbaum & Preston, *supra* note 151, at 236–37. “FINSA required CFIUS to conduct more investigations, guided those investigations by providing more detailed congressional instruction about what to look for, authorized the Committee to impose sanctions on foreign companies that failed to comply with CFIUS requirements, and mandated that additional, extensive, and detailed reports be provided to Congress. By codifying these requirements, FINSA formalized CFIUS’s role statutorily, whereas it had previously been defined only by an executive order of the president.” David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL L. REV. 81, 95–96 (2009).

170. Cedarbaum & Preston, *supra* note 151, at 237.

171. See Memorandum from Davis Graham & Stubbs LLP and Reed Smith LLP to Nw. Non-Ferrous Int’l Co. Ltd. and Firstgold Corp., at 2–3 (Dec. 14, 2009), *available at* <http://www.graphics8.nytimes.com/packages/images/nytint/docs/memo-regarding-the-sale-of-firstgold-corp/original.pdf> [hereinafter Davis Graham & Stubbs LLP Memo].

172. See Matthew C. Sullivan, *Mining for Meaning: Assessing CFIUS’s Rejection of the Firstgold Acquisition*, 4 BERKELEY J. INT’L L. PUB. 12, 15 (2010).

173. *Id.*

174. *Id.*

175. See Davis Graham & Stubbs LLP Memo, *supra* note 171, at 3; Sullivan, *supra* note 175, at 16.

3Leaf assets.¹⁷⁶ The U.S. government had expressed concerns for Huawei for a number of years because of the company's close relationship with the Chinese government and China's security services.¹⁷⁷ Though Huawei never sought CFIUS approval of the transaction, a report from the House Intelligence Committee flagged several security issues stemming from Huawei acquisitions, including concerns of Chinese intelligence agencies penetrating American telecommunications networks and industrial espionage.¹⁷⁸

These blocked transactions reflect not only the increased role of CFIUS in American national security protection, but also a growing concern for a new type of intelligence threat that is location-sensitive.

IV. SHORTCOMINGS OF THE EB-5 VISA PROGRAM THROW NATIONAL SECURITY THREATS INTO SHARP RELIEF

The recent boom in the number of mergers and acquisitions flagged by CFIUS as potential threats to national security is a pointed reminder of the tension between promoting foreign involvement in the American economy and safeguarding national security. And though high-profile transactions have been subjected to scrutiny, the security implications of foreign investment not accomplished through FDIs remains unclear. While the responsibility of reviewing large-scale transactions with foreign companies falls primarily to CFIUS, similar scrutiny is absent for investments made for immigration purposes. Indeed, the recent CFIUS incidents raise more questions than they answer with respect to the EB-5 Program. Against the current national security landscape, foreign investment through the EB-5 Visa Program appears problematic, not least because it also entails the promise of citizenship.

176. See, e.g., Chris V. Nicholson, *The Big Chill: Huawei Imbroglia Puts Countries at Odds*, N.Y. TIMES (Feb. 18, 2011, 4:49 AM), available at <http://dealbook.nytimes.com/2011/02/18/the-big-chill-huawei-imbroglio-puts-countries-at-odds/?r=1>; Sinead Carew & Jessica Wohl, *Huawei Backs Away from 3Leaf Acquisition*, REUTERS (Feb. 19, 2011, 2:02 PM), available at <http://www.reuters.com/article/2011/02/19/us-huawei-3leaf-idUSTRE71138920110219>.

177. Carew & Wohl, *supra* note 176.

178. "The National Security Implications of Investments and Products from the People's Republic of China in the Telecommunications Sector," U.S. China Economic and Security Review Commission Staff Report, January 2011, p. 16, 20, available at http://www.uscc.gov/sites/default/files/Research/FINALREPORT_TheNationalSecurityImplicationsofInvestmentsandProductsfromThePRCintheTelecommunicationsSector.pdf.

A. CFIUS Procedures in Assessing EB-5 Investments Present A Stark Contrast to the Stringent CFIUS Review of Foreign Direct Investments, Though There Appears to Be No Way to Meaningfully Distinguish the Discrepancies in Scrutiny Levels

Though FDIs and investments completed through the EB-5 Program share several striking similarities (including control of American businesses by non-citizens and potential national security threats), the stringent CFIUS scrutiny of FDIs is markedly different from the striking absence of oversight over the EB-5 process.

CFIUS consists of the heads of nine separate federal agencies: the State Department, Treasury Department, Department of Defense, Department of Homeland Security, Department of Commerce, Department of Energy, the Department of Justice, the Office of the United States Trade Representative, and the Office of Science and Technology Policy.¹⁷⁹ “According to the amended Exon-Florio provision, the President or any member of CFIUS can initiate a review of an investment transaction in addition to a review that is initiated by the parties to a transaction providing a formal notification.”¹⁸⁰ CFIUS then has 30 days to review a transaction and determine if action is needed.¹⁸¹

The Exon-Florio provision includes a list of 12 factors the President must consider in deciding to block a foreign acquisition:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects and capability and capacity of the U.S to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical or biological weapons; and transactions identified by the Secretary of Defense as “posing a regional military threat” to the interests of the United States. These factors are also considered

179. JACKSON, *supra* note 5, at 11.

180. *Id.* at 16.

181. *Id.*

- by the individual members of CFIUS as part of their own review process to determine if a particular transaction threatens to impair the national security;
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;
 - (6) whether the transaction has a security-related impact on critical infrastructure in the United States;
 - (7) the potential effects on United States critical infrastructure, including major energy assets;
 - (8) the potential effects on United States critical technologies;
 - (9) whether the transaction is a foreign government-controlled transaction;
 - (10) in those cases involving a government-controlled transaction, a review of
 - (A) the adherence of the foreign country to nonproliferation control regimes,
 - (B) the foreign country's record of cooperating in counter-terrorism efforts,
 - (C) the potential for transshipment or diversion of technologies with military applications;
 - (11) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and
 - (12) such other factors as the President or the Committee determine to be appropriate.¹⁸²

As such, CFIUS is required to consider the impact of an investment on critical infrastructure and the national security ramifications as key factors for blocking or postponing a transaction.¹⁸³ Review is terminated (and the FDI in question is allowed to continue) if CFIUS concludes that the investment does not threaten national security.¹⁸⁴ However, if one or more of the agencies participating in CFIUS review decides that an investment poses a national security risk, CFIUS initiates a 45-day investigation of the investment and the investor.¹⁸⁵

This stringent process, which involves several agencies and takes into consideration both short term threats and potential for long-term problems, highlights the absence of similar concerns with regard to EB-5 visas,

182. *Id.* at 18.

183. *See id.* “The Director of National Intelligence is required to carry out a thorough analysis of ‘any threat to the national security of the United States’ posed by the merger, acquisition, or takeover being reviewed. In addition, the Director of National Intelligence is required to seek and to incorporate the views of ‘all affected or appropriate’ intelligence agencies.” *Id.*

184. *Id.*

185. *Id.*

which, by contrast require minimal documentation and are automatically approved if its minimal requirements are met.¹⁸⁶

Moreover, the absence of scrutiny for EB-5 visas is inconsistent with the approval process for others visas. Many visas require background checks to be conducted—and cleared—prior to approval of the visa.¹⁸⁷ These background checks include biometric-based and biographic-based inquiries.¹⁸⁸ If the background check results are cause for law enforcement or national security concern, CIS may then work with law enforcement agencies “to determine whether law enforcement actions should be pursued.”¹⁸⁹ However, as CIS has progressively and consistently relaxed the EB-5 requirements, less documentation is required to qualify for the visa (and, thereby, LPR status). Consequently, the lack of application information cannot be cured by oversight throughout the investment process before conditional residency is removed. The EB-5 application process does not contain sufficient information or oversight to ensure that the job creation requirement is met, as demonstrated by recent fraud scandals. And because the forms for obtaining an EB-5 visa are three pages in length and limited to information about the prospective investments, not enough information is provided to allow federal agencies to screen for potential national security threats and existing CIS background checks for EB-5 visas appear insufficient to ensure that applicants do not pose a national security threat. More troubling still is that the EB-5 visa application and approval process lacks sufficient information to conduct even the background checks that are routine for visa approvals.

Perhaps an even larger problem with respect to background checks is posed by the allowance of EB-5 investments through Regional Centers. Regional Centers are business entities (often private) that coordinate foreign investment within a particular geographic area. While regulations

186. See I-526 Instructions, *supra* note 38 (indicating that an alien investor is granted an EB-5 visa and conditional residence provided the I-526 form is satisfactorily filled out).

187. “Title 8 U.S.C. § 1101 et seq. requires background checks to be conducted for . . . many visas. . . .” U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE IMMIGRATION BENEFITS BACKGROUND CHECK SYSTEMS, 1 (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf.

188. The four background checks normally required are: the FBI Fingerprint Check, the US-VISIT’s Automated Biometric Identification System (IDENT) Fingerprint Check, the FBI Name Check, and TECS Name Check. *Id.* at 2.

189. *Id.* “. . . CIS may work with DHS Customs and Border Patrol (CBP), the FBI, or other law enforcement entities, such as Immigration and Customs Enforcement (ICE).” *Id.*

require that each Regional Center must “demonstrate in verifiable detail how jobs will be created” and “commit sufficient funds to promote and oversee capital investment opportunities,”¹⁹⁰ there are no official policies or guidelines regarding background checks of investors using Regional Centers. Current EB-5 law requires Regional Centers to confirm merely that prospective investors will be able to invest the required amount. An alien investor utilizing a Regional Center is subjected to only a basic due diligence inquiry in his or her process to acquire citizenship.¹⁹¹ Consequently, even if a Regional Center were to request background information from an investor, that Regional Center’s ability to verify information would be sharply limited, as it would lack access to federal agency databases. Further, by allowing potential investors to invest through a regional center and file an application directly through a Regional Center, CIS’s ability to conduct background check or exercise oversight over those applying for LPR status is severely curtailed.

The EB-5 Visa Program—and the Regional Center Program, in particular—thus allows alien investors to obtain status without being subject to the routine background inquiries required for both foreign investment and the majority of immigration visas. Consequently, the EB-5 Visa Program’s application system—and, therefore, security measures—have several information loopholes.

The discrepancies in policies and practices between CFIUS and the EB-5 Program highlight an inconsistency in the treatment of foreign investment. However, there has been no proffered explanation to reconcile the different levels of scrutiny. It is unclear how to differentiate the threat posed by foreign investment into the American economy from the threat posed by foreign investors investing money in the United States to obtain citizenship. Neither the size of the group making an investment nor the total amount invested appears to be dispositive. Moreover, there appears to be no way to highlight sensitive locations under the EB-5 review, as CIS only requires 10 jobs and does not impose limitations for sensitive locations or industries. Though many of the mergers and acquisitions blocked by CFIUS were being sought by Chinese companies with close ties to the Chinese government,¹⁹² neither close association to a hostile foreign government nor a highly regulated field (such as aviation or

190. See 2013 EB-5 Adjudications Policy, *supra* note 12, at 13.

191. An alien investor’s due diligence efforts are limited to ensuring he or she can invest the required amount and investing in an enterprise likely to create jobs. The second step is guaranteed to be satisfied where the enterprise has been pre-approved, as is the case with every Regional Center. See generally 2013 EB-5 Adjudications Policy Memorandum, *supra* note 12.

192. See Section IV, Subsection B 2, *supra*.

energy) appears to be dispositive for CFIUS rejection.¹⁹³ As a result, there does not appear to be a way to meaningfully distinguish the potential threat posed by FDIs and the foreign investments used as a basis for an EB-5 visa.

Though Congress created the EB-5 Visa Program to bolster the American economy, the relaxation of the original EB-5 requirements and absence of background checks for the investors appear at odds with the increased scrutiny to which both foreign investments and visa applicants are subjected. Moreover, the limited economic success of the EB-5 Program and several recent EB-5 scandals involving fraud call the prudence of continuing to offer the foreign investor visa, as it currently stands, into question.

*B. The Lack of Information for the EB-5 Program is Troubling,
Considering the Nature of Current Threats*

The intense and detailed reviews conducted by CFIUS throw the shortcomings of the EB-5 Program, most notably the lack of any similar background checks, into focus. Conspicuously absent are any inquiries into criminal convictions, much less any inquiry into troubling connections that possibly pose security threats. Perhaps more troubling still is that, absent adequate review, the EB-5 visa can serve as a route around CFIUS scrutiny, effectively sidestepping inquiries into security threats and simultaneously granting citizenship status. This is particularly worrisome, considering the complex nature of the threat posed by cyberattacks—just one type of threat that CFIUS screens for—and the recent surge in EB-5 applications.¹⁹⁴

193. See generally Fred M. Greguras, Michael J. O'Neil & Chenhao Zhu, *M&A in the United States: What Chinese Companies Need to Know about Exon-Florio Review in the Clean Technology and Other Business Sectors*, THE FLETCHER SCHOOL, TUFTS UNIV. (April 2012), available at http://fletcher.tufts.edu/~media/Fletcher/Microsites/swfi/pdfs/2012/Updated_Exon-Florio.pdf. For instance, a more positive result was obtained by the China Aviation Industry General Aircraft Co., Ltd. (“CAIGA”) from its March 2011 acquisition of Cirrus Industries, Inc. (a Minnesota-based manufacturer of small aircraft). While CAIGA is a wholly owned subsidiary of the Aviation Industry Corporation of China, a Chinese government-owned entity, and CAIGA was acquiring an aircraft manufacturer, CAIGA nonetheless was able to close its acquisition without any serious impediment from CFIUS. *Id.* at 2.

194. See, e.g., “Current Demand for EB-5 Visas Will Lead to Retrogression in FY-2015, According to Department of State & Other Takeaways from Visa Update Panel,” *supra* note 68.

On December 12, 2013, Senator Charles E. Grassley wrote an open letter to John Sandweg, the Acting Director of U.S. Immigrations and Customs Enforcement, asking questions about the EB-5 Visa Program and making public a Homeland Security Investigations (“HSI”) internal memo that was leaked.¹⁹⁵ The memo is from HSI, the investigative branch of Immigrations and Customs Enforcement and America’s second largest investigatory agency after the FBI, and “appears to have been written in response to a request from then-Secretary Janet Napolitano as part of an investigation of Iranian operatives with known connections to terrorist groups.”¹⁹⁶ In the memo, HSI expressed concerns that the EB-5 investor visa program could be abused by foreign operatives as a means to infiltrate the United States.¹⁹⁷ The memo describes the HSI investigation of a known Iranian operative involved in a procurement network that exports items, particularly sensitive electronics, to Iran for use by “secret Iranian government agencies” involved in a series of international assassination and terrorism operations.¹⁹⁸ That particular operative was employed by a participant in the EB-5 Visa Program.¹⁹⁹ Additionally, the memo identified seven main areas of vulnerability with the EB-5 Visa Program:

(1) export of sensitive technology/economic espionage; (2) use by foreign government agents/espionage; (3) use by terrorists; (4) investment fraud by Regional Center; (5) investment fraud by investors; (6) fraud conspiracies by investors and Regional Center; and (7) illicit finance/money laundering.²⁰⁰

The memo, though heavily redacted, confirms that the EB-5 Program has the potential to be (and is actually being) used to sidestep the routine security checks required to obtain other visas. The memo underscores the problematic lack of information with EB-5 visas—both at the time of initial application and following approval. Most notably, the memo demonstrates that the EB-5 Program has no mechanism for recognizing individuals known to the intelligence community and are known to be potential

195. Letter from Charles Grassley, U.S. Senator, to John Sandweg, Acting Director U.S. Immigration and Customs Enforcement (Dec. 12, 2013) [hereinafter Grassley Letter], available at <http://www.grassley.senate.gov/news/news-releases/internal-memo-outlines-national-security-concerns-eb-5-immigration-program>. U.S. Senator Charles E. Grassley (R-Iowa), ranking member of the Senate Committee on the Judiciary, sent a letter to Immigration and Customs Enforcement Director, John Sandweg, expressing concerns with the security of the EB-5 Regional Center program following a memorandum from Homeland Security Investigations (HSI) addressing questions from then-Secretary of Homeland Security Janet Napolitano. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See id.*

200. *Id.*

security threats, much less a process for referring those individuals for additional oversight or scrutiny prior to visa approval. Indeed, despite the existence of the Visa Security Program (“VSP”), which examines visa applications for fraud and initiates investigations of suspected terrorist suspects,²⁰¹ the VSP does not provide additional security to the EB-5 Program, as the EB-5 application process lacks a mechanism to, first, flag problematic individuals and then refer those individuals to additional oversight. Consequently, EB-5 applications cannot be referred to VSP or another similar security-based agency because there is insufficient background information provided in an EB-5 application to alert CIS of potential security issues.

Given the legal significance attached to adjustment of status from LPR to U.S. citizen and the number of recent national security threats flagged by CFIUS, it is surprising that there are so few background reviews of alien investors. In the approval processes for I-526 and I-829 forms, there are no criminal checks and no inquiries into investors’ unfavorable ties.²⁰² Further, the relaxation of several basic requirements has not only made it easier to qualify for an EB-5 visa, but has also effectively dispensed of any scrutiny that may have taken place during the approval process.²⁰³ Unsurprisingly, this relaxation of requirements has been coupled with a surge in EB-5 visa applications and approvals.²⁰⁴ But worryingly, the EB-5 Program appears to be being used by some as a way to evade scrutiny, as the amount of background information required to obtain an EB-5 visa is minimal.²⁰⁵

Because there does not appear to be a way to meaningfully distinguish between FDIs subjected to CFIUS review and investments through the EB-5 Program used to obtain American citizenship, additional oversight

201. DEP’T OF HOMELAND SEC., DHS/ICE/PIA-011(A), PRIVACY IMPACT ASSESSMENT FOR THE VISA SECURITY PROGRAM TRACKING SYSTEM-NETWORK VERSION 2.0, at 2-4 (Jan. 17, 2013), *available at* http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia-ice_vspts%20net%202%200_20130117.pdf.

202. For explanation of the qualification process for an alien to obtain an EB-5 visa, *see generally* I-526 Instructions, *supra* note 38 and Instructions for I-829, Petition by Entrepreneur to Remove Conditions *available at* <http://www.uscis.gov/sites/default/files/files/form/i-829instr.pdf> [hereinafter I-829 Instructions].

203. *See* IIUSA, *supra* note 96.

204. *See, e.g.*, “Current Demand for EB-5 Visas Will Lead to Retrogression in FY-2015, According to Department of State & Other Takeaways from Visa Update Panel,” *supra* note 68.

205. *See* Grassley Letter, *supra* note 195.

and deeper inquiries of EB-5 applications are needed to ensure that prospective EB-5 investors do not pose threats to national security. Though the magnitude and potential ramifications of the EB-5 Program's shortcomings are still unknown, the absence of a meaningful, background-checking mechanism allows the EB-5 Program to serve as a route around other established channels of scrutiny, as is demonstrated by the investigation described in the leaked HSI memo. As such, the economic benefits of offering foreign investor visas may be far outweighed by the national security costs of continuing the EB-5 Program.

VI. RECOMMENDATIONS FOR REMEDYING SEVERAL EB-5 SHORTCOMINGS

In light of the leaked HSI memo, the EB-5 Program appears to be both inconsistent with the national security policies underlying CFIUS scrutiny and a very real frontier for evading routine security checks. Because the EB-5 visa process has serious shortcomings, implementing several changes to the basic operation of the approval process is necessary to reduce the security risk posed by the program.

A key change is that the Regional Center program should sunset (that is, Congress should allow the statutory provision expire), as there appear to be no safeguards that can be put in place that will reasonably ensure the integrity of the Regional Center model. Indeed, recent EB-5 fraud incidents demonstrate an absence of oversight concerning both EB-5 investors and investments in Regional Centers.²⁰⁶ Because the Regional Center program delegates security checks to the private company running each respective Regional Center, other attempts to bolster security of EB-5 visas (such as changing the application forms to include more questions on investors' backgrounds) would likely be meaningless if conducted without access to the federal government's informational databases. As such, the benefits of eliminating the Regional Center program would outweigh the costs of sacrificing convenience.

In addition, strictly enforcing several of the original requirements—particularly active investment and calculation of job creation—would both enforce investor compliance and ensure the economic success of the EB-5 Program. Under the current adjudication of I-829 forms, active investment and creation of 10 jobs do not need to be conclusively shown to remove conditional residency.²⁰⁷ Consequently, the economic benefits that were intended to be the basis of EB-5 investors' citizenship cannot be verified. The HSI memo suggested that “the EB-5 Program should be

206. *See id.*

207. *See* IIUSA, *supra* note 96.

open only to active investors involved in managing and directing a business enterprise . . . provid[ing] a heightened degree of certainty regarding the intentions of the alien applicant. Passive investors are too far removed from these projects to have any verifiable connections or ties.”²⁰⁸ Further, restricting the types of investors who qualify for the EB-5 visa will also serve to reduce the number of applications and approvals, allowing CIS to conduct more thorough reviews and exercise more oversight throughout the investment process and grant of citizenship.

CIS should also edit the forms (I-526, I-829, I-924, and I-924A) currently used by CIS, Regional Centers, and alien investors to require more background information at the time of application. These forms do not collect enough information to determine the validity of either the Regional Centers, the alien investors, or the source of the investor’s funds.²⁰⁹ Requiring additional background information on alien investors (such as political affiliation, criminal record, and biometrics) would allow EB-5 background checks to more closely monitor the same concerns as CFIUS screens for and has previously identified as problematic.

In addition, the minimum investment amount should be raised. In the internal memo, “HSI proposed increasing the threshold investment amount to \$2,000,000 and \$1,000,000 for Targeted Employment Areas, as the minimum investment amounts have not changed since the inception of [the EB-5 Program].”²¹⁰ Raising the required investment amounts would make fraud more inconvenient and provide a more legitimate basis to meet the job creation goals of the program. Further, increasing the minimum investment amount would likely attract less investors, enabling CIS to spend more time checking each application for security concerns.

The investor visa programs created by other countries may also serve as models for modifying the EB-5 Program. Other countries with investor visas include the UK, Australia, Canada, Austria, Germany, and Spain. Of the countries with investor visas, very few offer citizenship.²¹¹ Many

208. See Grassley Letter, *supra* note 195.

209. See generally I-526 Instructions, *supra* note 38; I-829 Instructions, *supra* note 202.

210. See Grassley Letter, *supra* note 195.

211. See generally *Study of the United States Immigrant Investor Pilot Program (EB-5)*, IIUSA (May 18, 2010), available at <http://iiousa.org/blog/wp-content/uploads/2012/10/IIUSA-economic-impact-research-project-packet-AUBER-2012.pdf>. Austria does offer direct citizenship by investment upon an investment of 4 million euros. Bulgaria, Dominica, and Montenegro also offer direct citizenship. The Bahamas, Belgium, Canada, Hong Kong,

of the other countries also use a point-based system for administering visas—using factors such as education, occupation, language proficiency, age, and work experience to select applicants most likely to produce economic benefits.²¹² In addition, several of the nations offering investor visas automatically flag applications of investors from countries considered potential threats and subject those applications to additional scrutiny.²¹³ Significantly, several of the countries offering investor visas have expressed security concerns with their programs.²¹⁴ For example, in February 2014, Canada terminated its immigrant investor program, which was similar to the EB-5 Program.²¹⁵ In its 2014 budget report, the Canadian Ministry of Finance wrote that the investor visa

significantly undervalued Canadian permanent residence, providing a pathway to Canadian citizenship in exchange for a guaranteed loan that is significantly less than our peer countries require. . . There is also little evidence that immigrant investors as a class are maintaining ties to Canada or making a positive economic contribution to the country.²¹⁶

An alternative to the EB-5 Program altogether would be to offer tax incentives to promote foreign investment. As the EB-5 Program was created to stimulate the economy,²¹⁷ tax incentives to invest in the United States could be offered instead of EB-5 visas. Over the past two decades, many Governments have implemented incentives to attract private capital to

Iceland, Switzerland, the UK, Latvia, Singapore, Monaco, Panama, and New Zealand do not.

212. *See id.* at 78. The point-based systems for immigration was pioneered by Canada and has since been adopted by the UK, Australia, and New Zealand. Though the U.S. considered the point-based system in 2007, it was never adopted or applied to the EB-5 visa. *Id.*

213. The UK, for example, automatically sets aside investor visa (Tier 1) applications made by nations of several countries, including Russia, Iraq, Liberia, Libya, and Somalia.

214. *See, e.g.,* Vanessa Kortekaas & Helen Warrel, *Concern Grows Over Checks on ‘Investor’ Visa Applicants*, FINANCIAL TIMES (Sept. 23, 2013) (“In 2008, when investor visas were introduced, 43 foreign nationals successfully applied for them. But, last year, the number of visas granted surged to 470—about half of which went to Russian and Chinese applicants. However, some of the wealth managers involved in verifying foreign millionaires’ funds and the UK investments they later make have raised questions about the level of checks conducted by the Home Office.”).

215. Canada’s Citizenship and Immigration Minister Chris Alexander, issued the Economic Action Plan (EAP) 2014 on February 11, 2014 and announced the government’s intent to terminate the federal Immigrant Investor Program (IIP) and Federal Entrepreneur (EN) Program. Press release *available at* <http://www.cic.gc.ca/english/department/media/releases/2014/2014-02-11.asp>.

216. *Id.*

217. *See* “Employment Creation Immigrant Visa (EB-5) Program Recommendations,” *supra* note 11, at 4 (the EB-5 provision was “intended to provide new employment for U.S. workers and to infuse new capital in the country.”).

further their countries' economic goals.²¹⁸ As part of the efforts to encourage investment, tax incentives are increasingly becoming part of the measures adopted to promote FDI.²¹⁹ Tax incentives include "reduced tax rates on profits, tax holidays, accounting rules that allow accelerated depreciation and loss carry forwards for tax purposes, and reduced tariffs on imported equipment, components, and raw materials, or increased tariffs to protect the domestic market for import substituting investment projects."²²⁰ China, for example, offers a reduced income rate for foreign investment varying by region, as a means of encouraging investment in targeted development zones.²²¹ India, on the other hand, offers a tax exemption on profits of firms engaged in tourism or travel.²²² In addition, Ireland provides write-offs for investors' expenditures on certain construction projects.²²³ The United States could similarly employ tax measures to encourage foreign investment and serve as a substitute for EB-5 visas.

VII. CONCLUSION

The tension between strengthening the economy and preserving national security is increasingly apparent in CFIUS scrutiny and recent revelations about the EB-5 visa. Congress' grand expectations of EB-5 visas rejuvenating the American economy, for the most part, have been unfulfilled. And though the past two years have seen a massive surge in the number of EB-5 applications, relaxed requirements and several fraud scandals demonstrate that the economic value of EB-5 visas remain

218. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, TAX INCENTIVES AND FOREIGN DIRECT INVESTMENT: A GLOBAL SURVEY 11 (2000), *available at* http://unctad.org/en/Docs/iteipemisc3_en.pdf. Countries have employed measures such as "liberalizing the laws and regulations for the admission and establishment and foreign investment projects; providing guarantees for repatriation of investment and profits; and establishing mechanisms for the settlement of investment disputes." *Id.* at 11.

219. *Id.* "Over the past two decades, most Governments have been actively promoting their countries as investment locations to attract scarce private capital and associated technology and managerial skills in order to help achieve their development goals. They have increasingly adopted measures to facilitate the entry of foreign direct investment (FDI). Examples of such measures include liberalizing the laws and regulations for the admission and establishment of foreign investment projects; providing guarantees for repatriation of investment and profits; and establishing mechanisms for the settlement of investment disputes. Tax incentives are also part of these promotional efforts." *Id.*

220. *Id.* at 12.

221. *Id.* at 76.

222. *Id.* at 12.

223. *Id.* at 126.

unclear. In light of increasingly CFIUS scrutiny on foreign investments and the HSI memo's indication that the EB-5 visas have been used to evade security checks, the costs of continuing the EB-5 Visa Program as it currently exists may well outweigh the benefits that the program provides.

Recent growth in the number of applications filed and revelations of EB-5 misuse call into question the prudence of allowing the EB-5 Visa Program to continue as is. Given the shifts in national security threats from physical attack to cyber penetration, as well as upcoming immigration reform, promptly making several changes to limit the EB-5 Program would be consistent with both national security policy and immigration practice.