

# EB-5 AS AN INSTRUMENT OF SUSTAINABLE CAPITALISM

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*This article proposes a targeted application of the EB-5 Immigrant Investor Program to solve a heretofore intractable national problem: “nonpoint source water pollution,” which is the most significant single source of water pollution in the United States (U.S.). With this goal in mind, EB-5 can be cultivated and grown into a program, both ethical and pragmatic, that serves the public good via a mission to reclaim and restore a significant component of our environment.*

*The article provides the historic context, a legal précis, and an introduction to the process that is the EB-5 Program; explores the constitutional, ethical, and administrative dilemmas that plague the program; examines some notable successes; and proposes a systematic evolution of EB-5 for application in Vermont in the service of anticipatory regenerative environmental design, construction, and maintenance of sustainable development.*

*Thus matured, EB-5 becomes a financial “kick-start” for animating the laboratory of democracy that is Vermont, to begin a series of watershed specific research and development projects to conceive, design, and develop regenerative solutions to this perpetual problem.*

*A collateral virtue of this evolved EB-5 Program is that, while distinctly local to each watershed, the underlying concepts and best practices developed are eminently “scalable”—applicable throughout the United States and ultimately the world. Thus, investments made by immigrant investors in the U.S. may well end up serving the very countries from which their personal wealth was derived.*

Introduction.....	68
I. EB-5 Background .....	70
A. Context .....	70
B. Legal Précis .....	74

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2014]	<i>EB-5 as an Instrument of Sustainable Capitalism</i>	67
	1. The Pilot Program and Regional Centers .....	75
	2. TEA—High Unemployment or Rural Area.....	77
	C. EB-5 Process .....	78
II.	Problems with EB-5—Controlling/Shaping Issues and Themes.....	80
	A. Constitutional Issues—A Question of Subversion of Due Process Rights During the Green Card Conditional Phase .....	80
	B. Ethical Issues.....	83
	1. Citizenship for Sale .....	83
	2. Fraud—Gerrymandering the Investor Visa .....	88
	C. Administrative Dilemmas.....	89
	1. Ambiguity and Lack of Clear Guidance.....	89
	2. Uncertainty and Lack of Timeliness.....	90
	3. Underutilization.....	93
III.	EB-5 Cons.....	95
	A. General Factors .....	95
	B. Job Creation Paradox—The Number of Jobs Created by Immigrant Investors is Very Difficult to Estimate.....	96
	C. Quantitative Input/Output Modeling of Economic Impact .....	99
	D. Time Frame .....	101
IV.	EB-5 Pros.....	102
	A. General Factors .....	102
	B. Program Growth.....	103
	C. EB-5 is a Bargain .....	104
	1. Historic Pricing.....	104
	2. Present Value.....	105
	3. Price/Value Optimization .....	105
	4. Equitable Division.....	106
	D. EB-5 in Vermont.....	107
V.	Sustainable Capitalism as Ecological Modernization .....	108
VI.	Public Private Partnerships (PPPs) .....	111
VII.	Vermont as Laboratory.....	112
VIII.	The Plan .....	113
	A. Phase I—Initiating .....	113
	B. Phase II—Prototyping.....	114
	C. Phase III—Scaling Up.....	115
	Conclusion .....	118

*Law is a bailiff for the ruling power of the moment, lending to that power its authority. Like any obedient bailiff, it wants to be told by the present power (or, if for any reason they can utter no commands, then by the movers of some impending power) precisely what to do. Without such fresh commands that law will merely continue to pursue, with steadily less relevance to anything except rote tradition, whatever last orders were given it, however inappropriate altered circumstances have made them.*<sup>2</sup>

E. F. Murphy

#### INTRODUCTION

The Employment Creation Immigrant Visa (“EB-5”) is a United States Customs and Immigration Services (“USCIS”) administered immigrant investor program that can and should mature into an optimized ethical financial instrument of sustainable capitalism.<sup>3</sup> With this evolution, EB-5 can be used to kick-start domestic investment in anticipatory design and construction of resilient “green” infrastructure. It can do this via investment in the regeneration and maintenance of a healthy environment, while creating perpetual local employment. By identifying and prototyping best practices via this application of EB-5 to federally mandated nonpoint source storm water management, the State of Vermont could serve as a model for scaling up this application throughout the U.S.

The EB-5 program was conceived to grant citizenship to those with proven facility in turning capital into jobs.<sup>4</sup> As envisaged by Congress, EB-5 permits these investors to provide this expertise by indirection via a requisite investment, cash, or its equivalent at risk with no hedging, and arms-length policy oversight.<sup>5</sup> Though the program is of long standing, and well supported by Congress, it suffers from fundamental conflicts of opposing values, underutilization, and inefficiency due to lack of focus on what constitutes appropriate foreign investment in genuine domestic job growth; as well as how to measure that growth. In addition, it appears that the USCIS’ expertise in immigration—administered under the auspices of the Department of Homeland Security (“DHS”)—is matched by its inability to master the many, varied, and constantly evolving ways and means of commerce in general and secured transactions in particular.

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2. EARL FINBAR MURPHY, *MAN AND HIS ENVIRONMENT: LAW 16* (Harper & Row 1971)

3. Immigration and Nationality Act of 1990, § 203(b)(5), 8 U.S.C. § 1153(b)(5) (2012).

4. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SECURITY, PM-602-0083, EB-5 ADJUDICATIONS POLICY 1 (May 30, 2013) [hereinafter USCIS POLICY MEMO], available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>.

5. *Id.* at 3.

This article proceeds in nine parts. Part I provides the background information on USCIS Employment-Based Immigration. This background begins by setting the context, a brief legislative history of the program from inception to the present, within which subsequent analysis of the program will be based. This is followed by a legal précis of the Immigration and Nationality Act of 1990 section 203(b)(5), which established the class of immigrant visas known as EB-5.<sup>6</sup> This background briefing concludes with an examination of the process for obtaining an EB-5 Investor Green Card.

Part II examines the problems manifested in the EB-5 program past and present; ranging from underlying constitutional and ethical issues through the broad systems based dilemmas that confront day-to-day administration of the program.

Part III explores, in detail, the factors within USCIS' systems that conspire against effective and efficient administration of the program.

Part IV begins to find light at the end of the tunnel; examining aspects of EB-5 that have met, are meeting, or are on course to exceed Congress' expectations for the program. Analysis of the two sides of the coin that is the price and value of an EB-5 visa is followed by a proposal for optimizing price/value and for its equitable distribution among the states. This part concludes with a synopsis of present EB-5 financed projects in Vermont.

Part V is the heart of the article, wherein the concept of ecological modernization under the umbrella of sustainable capitalism is introduced as a gateway concept upon which to base a mature application of EB-5 as an instrument of ethically financing sustainable capitalist development that will further stabilize and energize the program. This part concludes by suggesting that an ideal application of EB-5 would be to assist state and municipal government authorities in addressing federal environmental protection mandates, specifically the leading cause of water quality degradation and nonpoint source pollution via compliance with the nonpoint source water pollution component of Phase 2 of the National Pollutant Discharge Elimination System permit program for Municipal Separate Storm Sewer Systems.

Part VI lays the administrative foundation for leveraging EB-5 finance for these types of projects via application of Public Private Partnerships ("PPPs"). When properly administered, PPPs become ideal vehicles for ethical and pragmatic organization of relationships between public sector bodies, non-profit/not-for-profit organizations, and for-profit private entities.

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6. 8 U.S.C. § 1153(b)(5) (2012).

Part VII proposes Vermont as a “laboratory” in which to bench test and scale up best practices identified in application of the above concepts and administrative mechanisms to address a leading cause of water quality degradation: nonpoint source water pollution.

Part VIII lays out a multi-phase plan for addressing Vermont’s nonpoint source water pollution problems; beginning with pilot projects, developing prototypical applications, and identifying best practices to be optimized for scaling solutions up for state-wide application. This part closes with a range of options for the permanent financing of these projects, recognizing EB-5 as a source of seed monies to “kick-start” the process, not a sole source of perpetual capital.

Part IX ties together the various strands of the proposed evolution of EB-5 into an ethical program that leads by example, spearheading a pragmatic mission to tackle the ongoing and growing issue of nonpoint source pollution. This part concludes the article’s proposal for a systematic re-conceptualization of EB-5 for application in Vermont in the service of anticipatory environmentally regenerative design, construction, and maintenance of sustainable development.

## I. EB-5 BACKGROUND

### A. *Context*

In passing employment creation legislation, Congress sought to attract entrepreneurial immigrants to the U.S., reasoning that this class of immigrants could invest capital to create jobs for U.S. workers, thereby stimulating the economy.<sup>7</sup> The Immigration and Nationality Act of 1990 (“INA” or “Act”) permits a non-citizen, who invests (or is actively in the process of investing) lawfully obtained capital in a new or existing commercial enterprise (in the U.S.), that creates or maintains full-time employment for qualified workers, to apply for permanent residency in the U.S. by filing a petition submitted under the Employment-Based Immigration Fifth Preference program, hence the moniker EB-5.<sup>8</sup>

In the U.S., “every fiscal year (October 1st – September 30th), approximately 140,000 employment based immigrant visas are made available to qualified applicants.”<sup>9</sup> “Employment-based immigrant visas are

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7. USCIS POLICY MEMO, *supra* note 4, at 1.

8. Immigration and Nationality Act of 1990, 8 U.S.C. § 1153(b)(5) (2012).

9. Kate Kalmykov, *How Many EB-5 Visas are There?*, THE NAT’L L. REV. (June 12, 2012), <http://www.natlawreview.com/article/how-many-eb-5-visas-are-there>; Bureau of Consular Affairs, U.S. Dep’t of State, *Employment-Based Immigrant Visa*, U.S. VISAS,

divided into five preference categories.”<sup>10</sup> “The EB-5 category is allotted 7.1% of the yearly worldwide limit of employment-based immigrant visas.”<sup>11</sup> “This translates to approximately 10,000 immigrant visas per year in the EB-5 category.”<sup>12</sup> “The 10,000 visa figure include derivative visas for the spouses and minor children of investors.”<sup>13</sup> Three thousand of these visas are reserved specifically for Regional Center based petitions; this is a minimum not a maximum number.<sup>14</sup> “Likewise, of the 10,000 immigrant visas available for investors, 3,000 are set aside for EB-5 cases located in [T]argeted [E]mployment [A]reas.”<sup>15</sup> Both Targeted Employment Areas and Regional Centers are defined below.

To obtain this “Employment Creation EB-5 Visa” individuals must invest \$1,000,000 in an eligible project anywhere within the U.S., or at least \$500,000 in a project located within a Targeted Employment Area (“TEA”)—a qualifying high unemployment or rural area.<sup>16</sup> This investment must create or preserve at least ten jobs for U.S. workers excluding the investor and immediate family.<sup>17</sup> If the investment takes place under the auspice of a “Regional Center,” accounting for job-creation can be done either directly or indirectly.<sup>18</sup>

The EB-5 program is based on the notion that we should give priority to people who are already successful in their native countries, and who have the interest and the capital to invest in the development of this nation.<sup>19</sup> This is justified under the premise that EB-5 visa recipients are inherently law abiding and take no jobs from U.S. citizens. To the contrary, they are creating jobs that by law must go to citizens or legal residents.<sup>20</sup> Rather than strain existing social safety services, these immigrants have the

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<http://travel.state.gov/content/visas/english/immigrate/types/employment.html> (last visited Sept. 4, 2014).

10. Kalmykov, *supra* note 9.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 8 C.F.R. § 204.6(f) (2014).

17. Immigration and Nationality Act of 1990, 8 U.S.C. § 1153(b)(5) (2012).

18. 8 C.F.R. § 204.6(j)(4)(iii) (2014); CUSTOMER SERV. AND PUB. ENGAGEMENT DIRECTORATE, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., EXECUTIVE SUMMARY, EB-5 IMMIGRANT INVESTOR PROGRAM QUARTERLY STAKEHOLDER ENGAGEMENT 5, 9 (May 1, 2012), *available at* [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/May%202012/May\\_2012\\_Quarterly\\_EB5\\_Engagement\\_Executive\\_Summary.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/May%202012/May_2012_Quarterly_EB5_Engagement_Executive_Summary.pdf).

19. *See generally* CMB Regional Centers, *EB-5 In-Depth*, WHAT IS AN EB-5 BASED VISA?, <http://www.cmbeb5visa.com/what-is-eb-5/what-is-an-eb-5-based-visa/eb-5-in-depth> (last visited Sept. 2, 2014) (explaining the qualifications of successful investors).

20. 8 C.F.R. § 204.6(e), (g)(2) (2014).

demonstrated wealth to afford a six or seven-figure investment, plus associated filing and legal fees. In addition to putting their capital at risk, they are willing to join us in a lifetime of paying federal, state, and local taxes.

Under the EB-5 program, the federal government does not guarantee a financial return on such foreign investment.<sup>21</sup> The USCIS Ombudsman has expressed the opinion that those who engage in this type of investment accept little, if any, financial return in exchange for the possibility of securing American visas for themselves and their families.<sup>22</sup> The U.S. Securities and Exchange Commission's Office of Investor Education and Advocacy and USCIS jointly issued an Investor Alert echoing this opinion.<sup>23</sup> Common sense—reinforced by the published fallout surrounding litigation resulting from failed Regional Centers,<sup>24</sup> as well as from successful ongoing applications of the program<sup>25</sup>—indicates that this may not be the universal investor expectation.

The EB-5 program got off to a rocky start and has seen its share of ups and downs over the past twenty-four years due to a variety of factors. Among these are: an all-time low credit availability in a post-Great Recession U.S. commercial market begging for liquidity,<sup>26</sup> and historic and expanding growth in foreign High Net Worth Individuals (“HNWI”) in search of investment opportunities—specifically Asian-Pacific wealth which is expected to become the largest wealth market by population as

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21. See 8 C.F.R. § 204.6(j)(5) (2014) (stating that the investment funds must be “at risk”); USCIS ADJUDICATOR'S FIELD MANUAL, § 22.4 available at <http://qa-env.www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-6330/0-0-0-8263.html> (last updated Sept. 12, 2006).

22. OFFICE OF THE CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, U.S. DEP'T OF HOMELAND SEC., EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS (Mar. 18, 2009) [hereinafter OMBUDSMAN RECOMMENDATIONS], available at [http://www.dhs.gov/xlibrary/assets/CIS\\_Ombudsman\\_EB-5\\_Recommendation\\_3\\_18\\_09.pdf](http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf) (“The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.”).

23. *Investor Alert - Investment Scams Exploit Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC. (Oct. 1, 2013), <http://uscis.gov/news/alerts/investor-alert-investment-scams-exploit-immigrant-investor-program>.

24. Gordon K. Eng, *Satisfying the Requirements of EB-5 Visa Real Estate Investments*, L.A. LAWYER 10 (Jan. 2013), available at <http://www.lacba.org/Files/LAL/Vol35No10/2989.pdf>.

25. Anne Galloway & Hilary Niles, *Jay Peak to Pay 35 Tram Haus Investors Additional \$10,000*, VTDIGGER.ORG (Aug. 10, 2014), <http://vtdigger.org/2014/08/10/jay-peak-pay-35-tram-haus-investors-10000-dividends>.

26. See MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POLICY INST., RECESSION BREATHES NEW LIFE INTO U.S. IMMIGRANT INVESTOR VISA PROGRAM (2009), available at <http://www.migrationpolicy.org/article/recession-breathes-new-life-us-immigrant-investor-visa-program>.

early as 2014.<sup>27</sup> Riding the coattails of these phenomena, EB-5 is experiencing an upsurge in interest and rapid growth in numbers of applications; turning EB-5 into a mainstay for financing major projects in New York, California, Texas, and Vermont.<sup>28</sup>

U.S. Employment Based Immigrant Visa Utilization (Principals & Derivatives), FY 2003-12<sup>29</sup>

PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND MAJOR CLASS OF ADMISSION: FISCAL YEARS 2003 TO 2012											
Type and class of admission	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	EB-5 as %
TOTAL											
Total	703,542	957,883	1,122,257	1,266,129	1,052,415	1,107,126	1,130,818	1,042,625	1,062,040	1,031,631	0.64%
Employment-based preferences	81,714	155,317	246,865	159,075	161,733	164,741	140,903	148,343	139,339	143,998	4.60%
First: Priority workers	14,453	31,291	64,731	36,960	26,697	36,678	40,924	41,055	25,251	39,316	
Second: Professionals with advanced degrees or aliens of exceptional ability	15,406	32,534	42,597	21,911	44,162	70,046	45,552	53,946	66,831	50,959	
Third: Skilled workers, professionals, and unskilled workers	46,415	85,969	129,070	89,922	85,030	48,903	40,398	39,762	37,216	39,229	
Fourth: Certain special immigrants	5,376	5,394	10,121	9,533	5,038	7,754	10,341	11,100	6,701	7,866	
Fifth: Employment creation (investors) EB-5	64	129	346	749	806	1,360	3,688	2,480	3,340	6,628	100.00%
Compared to previous year	100%	202%	268%	216%	108%	169%	271%	67%	135%	198%	

This growth has been paralleled by criticisms that the program, as currently administered, suffers from a poor reputation, complexity, and lack of regulatory oversight.<sup>30</sup> Critics also claim that program underutilization is rooted in uncertainty and inefficiency due to the poor “casting” of an adjudicative authority with institutional biases regarding immigration and national security issues (USCIS acting under DHA) overseeing a program

27. M. George Lewis, *Asia-Pacific Wealth Report 2013: The 8th Annual Asia-Pacific Wealth Report from Capgemini and RBC Wealth Management*, CAPGEMINI WORLDWIDE, <http://www.capgemini.com/asiapacificwealthreport> (last visited Aug. 29, 2014).

28. BRANDON MEYER & KAREN CACO, SPREADING LIKE WILDFIRE! WHAT EXPLAINS THE EXPLOSIVE GROWTH OF EB-5 REGIONAL CENTERS?, IMMIGRATION BRIEFINGS 1–16 (2010); Patrick McGeehan & Kirk Semple, *Rules Stretched as Green Cards Go to Investors*, N.Y. TIMES (Dec. 18, 2011), available at [http://www.nytimes.com/2011/12/19/nyregion/new-york-developers-take-advantage-of-financing-for-visas-program.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/19/nyregion/new-york-developers-take-advantage-of-financing-for-visas-program.html?pagewanted=all&_r=0).

29. U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2012, TABLE 6 (Jan. 17, 2014), available at <http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents>.

30. AUDREY SINGER & CAMILLE GALDES, IMPROVING THE EB-5 INVESTOR VISA PROGRAM: INTERNATIONAL FINANCING FOR U.S. REGIONAL ECONOMIC DEVELOPMENT 2, 10 (2014), available at [http://op.bna.com/dlrcases.nsf/id/lswr-9g8rhk/\\$File/Brookings%20EB-5%20Report.pdf](http://op.bna.com/dlrcases.nsf/id/lswr-9g8rhk/$File/Brookings%20EB-5%20Report.pdf).

increasingly dominated by complex commercial/investment concerns.<sup>31</sup>

In addition, EB-5 program underutilization may be caused by a confluence of factors—including “program instability, the changing economic environment, and more inviting immigrant investor programs offered by other countries.”<sup>32</sup>

Finally, USCIS has been accused of inefficiency due to inconsistent administrative and adjudicative standards regarding what constitutes appropriate foreign investment in genuine domestic job growth—as well as how to measure that growth.<sup>33</sup> This criticism focuses on how, if at all, USCIS measures and verifies the causal relationship between specific EB-5 investments and employment. In recognition of these factors and critiques, Congress and successive presidents have pressured USCIS into taking “all necessary and appropriate steps to facilitate a healthy, vigorous, and smooth-running employment creation immigrant visa program.”<sup>34</sup>

### B. *Legal Précis*

*“This legislation . . . will promote the initiation of new business in rural areas and the investment of foreign capital in our economy.”*<sup>35</sup>

President George H. W. Bush, November 1990

INA section 203(b)(5) establishes a class of immigrant visas (EB-5) for individuals who invest either \$500,000 or \$1,000,000 (depending on the specific investment location relative to the existing local unemployment rate) in a new (or to preserve/revive an existing) qualifying commercial enterprise located within the U.S..<sup>36</sup> This investment must create (and/or preserve) full-time employment for not fewer than 10 qualified employees.<sup>37</sup>

The program requires the investor to: (1) invest the requisite funds from lawful sources; (2) in a new business, a substantially restructured existing business, or in a business in which the foreign investment will result in a material change in the capital of the company; (3) create at least ten full-

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31. See David North, *Is DHS the Correct Institutional Home for the EB-5 Visa Program?*, CENTER FOR IMMIGRATION STUDIES (Jan. 2014), <http://www.cis.org/Videos/ImmigrationPolicyInterviews/David-North-EB5-Investor-Visa#LeastDemanding>.

32. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 1.

33. *Id.* at 5–12.

34. *Id.* at 1.

35. George H.W. Bush, *Statement on Signing the Immigration Act of 1990*, THE AMERICAN PRESIDENCY PROJECT (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/?pid=19117>.

36. 8 U.S.C. § 1153(b)(5)(C) (2012).

37. *Id.* at (b)(5)(A)(ii).

time jobs within two years; (4) engage in a management role in the business (either through the exercise of day-to-day managerial responsibility or through policy formulation); and (5) operate the business for at least two years.<sup>38</sup> EB-5 has two distinct pathways for a foreign investor to gain lawful permanent residence: the Basic Program and the Immigrant Investor Pilot Program, which was created by section 610 of Public Law Number 102-395,<sup>39</sup> and has been extended through September 30, 2015.<sup>40</sup>

### 1. The Pilot Program and Regional Centers

EB-5 requirements for an investor under the Pilot Program are essentially the same as in the Basic Program, except the Pilot Program provides for investments that are affiliated with an economic unit known as a Regional Center.<sup>41</sup> A Regional Center is any qualified public or private economic unit that is involved with the promotion of economic growth, including “increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”<sup>42</sup>

This change was made to the EB-5 visa program to add flexibility to how the employment requirements were satisfied.<sup>43</sup> A business may be qualified as a Regional Center if it is expected to have an employment and business effect in a specified geographic area.<sup>44</sup> Making investments through Regional Centers allows for the possible advantage of a larger concept of job creation, including both “direct” and “indirect” jobs.<sup>45</sup> For these reasons, in a Regional Center, it is easier for the investor to meet the employment requirements. Further, if more jobs are counted in the

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38. 8 C.F.R. § 204.6(j) (2014).

39. USCIS POLICY MEMO, *supra* note 4, at 2 (“In 2012 Congress reaffirmed its commitment to the regional center model of investment and job creation by removing the word “Pilot” from the now twenty-year old program, and by providing a three-year reauthorization of the regional center model through September 2015.”) However, the use of the term “Pilot Program” still permeates the texts associated with this program so I retain it throughout the balance of this paper.

40. Act of Sept. 28, 2012, Pub. L. No. 112-176, *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-112publ176/html/PLAW-112publ176.htm>.

41. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., EB-5 IMMIGRANT INVESTOR PILOT PROGRAM 7, *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/EB-5%20Investor%20Pilot%20Program.pdf> (last visited Sept. 7, 2014).

42. 8 C.F.R. § 204.6(e) (2014).

43. See USCIS POLICY MEMO, *supra* note 4, at 13 (explaining how there are now “direct” and “indirect” jobs that may satisfy the requirement).

44. *What Is the EB-5 Program?*, THE BEACON (Nov. 30, 2010), [http://blog.uscis.gov/2010/11/what-is-eb-5-program\\_30.html](http://blog.uscis.gov/2010/11/what-is-eb-5-program_30.html).

45. *EB-5 Program*, INVEST LA, <http://www.investlaeb5.com> (last visited Sept. 20, 2014); See IV. EB-5 CONs – A. Job Creation Paradox (below).

business, more EB-5 investors can participate in the project, resulting in more funding for the developer.

As of June 2014, USCIS has approved approximately 579 Regional Centers nation-wide.<sup>46</sup> “A range of different real estate projects have qualified for Regional Center status, including shopping malls, hotels, mixed use developments, warehouse distribution centers, manufacturing facilities, and business incubators.”<sup>47</sup> Because the primary objective of Regional Centers is to create jobs, Regional Centers often choose to work closely with local governments to form PPP’s.<sup>48</sup>

#### Locations of EB-5 Visa Regional Centers in the U.S.<sup>49</sup>



LOCATION OF EB-5 VISA REGIONAL CENTERS:

Typically, Regional Centers are privately held not-for-profits, or are considered international business institutes organized under the umbrella of a state university run through a governor's office of economic development.<sup>50</sup> The Vermont EB-5 Regional Center is the only USCIS Designated Regional Center in the U.S. owned, controlled, and supervised directly by a state government.<sup>51</sup> As of March 2013, there were seven EB-5 projects in various stages of development in the state.<sup>52</sup>

46. *Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers> (last visited Aug. 13, 2014) (listing current EB-5 Regional Centers by state).

47. Eng, *supra* note 24, at 10.

48. *Id.*

49. *Regional Centers on Map*, EB5INFO.COM, [http://eb5info.com/regional\\_centers/on\\_map](http://eb5info.com/regional_centers/on_map) (last visited Aug. 13, 2014).

50. *EB-5 Regional Center*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/eb-5-regional-center> (last visited Oct. 16, 2014).

51. *Vermont EB5 Regional Center*, VT. AGENCY OF COM. & CMTY. DEV., DEP'T OF ECON. DEV., [http://accd.vermont.gov/business/relocate\\_expand/eb5](http://accd.vermont.gov/business/relocate_expand/eb5) (last visited Aug. 13, 2014); *Vermont EB-5*

In addition to their initial investment, each investor pays a subscription fee to the Regional Center (\$1,500 in Vermont<sup>53</sup> to more than \$30,000 in California).<sup>54</sup> Further, each investor will need to hire an experienced immigration attorney and perhaps other professionals (economist, business and securities attorney, business plan writer, etc.) to assist with the investor's individual visa application, which must include or reference a detailed business plan.<sup>55</sup>

Total fees associated with EB-5 investments are difficult to determine. However, a 2013 Securities Exchange Commission ("SEC") charge against a fraudulent Chicago based EB-5 investment scheme indicates that investors paid over 7.5% of their gross Immigrant Investor funds in "fees" (\$11,000,000 in "fees" on a total of \$145,000,000 in securities from more than 250 investors—or approximately \$44,000 per investor).<sup>56</sup> Given the early stages of this project, these "fees" were likely for development of the detailed business plan that must accompany all I-526 petitioner applications, for which attorneys charge from \$5,000 to \$25,000.<sup>57</sup> These fees generally do not include the work to be done in the filing of the subsequent I-829 petition that must be submitted to, and approved by, USCIS to remove the two-year conditional limitation for green cards.<sup>58</sup>

## 2. TEA—High Unemployment or Rural Area

The laws governing the EB-5 program define a TEA as, "at the time of investment, a rural area or an area that has experienced unemployment

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*Regional Center*, MOUNT SNOW EB5, <http://mountsnoweb5.com/the-vermont-regional-center/> (last visited Sept. 28, 2014).

52. Dan D'Ambrosio, *EB-5: The Whole Picture*, BURLINGTON FREE PRESS (Mar. 14, 2013), <http://www.burlingtonfreepress.com/article/20130314/BUSINESS08/303140011/EB-5-whole-picture>.

53. *Vermont 2011 Acts & Resolves 52 (H. 287)*, Chapter 3. EB-5 Investment, §21. EB-5 Enterprise Fund, Approved: May 27, 2011, available at <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT052.PDF> (§ 21(c) allows Vermont to set its own administrative charges); *The Public-Private Prototype - Highlighting the Vermont EB-5 Regional Center*, EB5 INVESTORS (Aug. 19, 2014), <http://www.eb5investors.com/magazine/article/The-Public-Private-Prototype>.

54. *Creating an EB-5 Regional Center*, LAWLER & LAWLER, <http://www.aboutvisas.com/eb-5-regional-centers/setting-up-an-eb-5-regional-center/> (last visited Aug. 27, 2014) (discussing, as a law firm in California, the regional center's subscription fee that is usually \$30,000 to \$50,000).

55. 8 C.F.R. § 204.6 (j)(4)(i)(B) (2014).

56. *SEC Halts \$150 Million Investment Scheme to Dupe Foreign Investors and Exploit Immigration Program*, U.S. SEC. AND EXCH. COMM'N (Feb. 8, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171512748#UxN8fKWMVUM>.

57. *How Much Are EB-5 Attorney Fees?*, EB-5 INVESTORS (Feb. 11, 2013), available at <http://www.eb5investors.com/qa/how-much-are-eb5-attorney-fees>.

58. *Id.*

of at least 150 percent of the national average rate.”<sup>59</sup> The definition of “rural area” is “any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).”<sup>60</sup> “In other words, a rural area must be both outside of a metropolitan statistical area and outside of a city or town having a population of 20,000 or more.”<sup>61</sup>

Vermont’s Agency of Commerce and Community Development (“ACCD”) operates the Vermont EB-5 Regional Center.<sup>62</sup> This Regional Center operates within a TEA that encompasses the entire state, with the exception of Chittenden County (the cities of Burlington and South Burlington).<sup>63</sup>

### C. EB-5 Process

For a potential investor, the EB-5 Green Card process can be relatively easy to follow.<sup>64</sup> The investor submits a Petition by Foreign Entrepreneur (Form I-526), usually prepared by an immigration attorney, which includes five years of investment returns to substantiate the source of investment funds.<sup>65</sup> The funds can be: (1) the investor’s own money; (2) a loan not secured by the EB-5 investment; or (3) a gift, which would allow a parent to gift the funds to a dependent.<sup>66</sup> If required by the investor’s home country, any gift taxes must be paid.<sup>67</sup> The investor must also demonstrate that the invested capital is coming directly from the investor and is being applied to the EB-5 enterprise (via bank transfers and other financial documentation).<sup>68</sup>

Once an investor has ensured the financial viability of an EB-5 project, the investor’s I-526 petition is filed with USCIS, which must certify that the investment is eligible for EB-5 status.<sup>69</sup> This certification process (an

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59. 8 C.F.R. § 204.6(e) (2014); USCIS POLICY MEMO, *supra* note 4, at 7.

60. USCIS POLICY MEMO, *supra* note 4, at 7; 8 C.F.R. § 204.6(e) (2014); 8 U.S.C. § 1153(b)(5)(B)(iii) (2012).

61. USCIS POLICY MEMO, *supra* note 4, at 7.

62. VT. AGENCY OF COMMERCE & CMTY. DEV., *supra* note 51.

63. *Id.*

64. MARK A. IVENER & DAVID R. FULLMER, HANDBOOK OF IMMIGRATION LAW 98 (4th ed. 2009).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 98–99.

“adjudication” in USCIS/DHS parlance) takes approximately four to six months for Regional Center cases and usually longer for regular program cases.<sup>70</sup>

Once the Form I-526 petition is approved, an Immigrant Investor must either file a Form I-485 (Application to Register Permanent Resident or Adjust Status) with USCIS to adjust their immigration status to a conditional permanent resident in the U.S., or file a DS-230 (Application for Immigrant Visa and Foreign Registration) with the Department of State to gain admission to the U.S. with an EB-5 visa.<sup>71</sup>

Once USCIS approves an investor’s Green Card, the Green Card remains conditional for two years.<sup>72</sup> “Between 21-24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made or is still in place and that the employment requirement has been fulfilled or maintained.”<sup>73</sup> Filing Form I-829, the Petition by Entrepreneur to Remove Conditions, accomplishes this.<sup>74</sup> “If USCIS approves this petition, the conditions will be removed from the EB-5 applicant’s status and the EB-5 investor and derivative family members will be allowed to permanently live and work in the United States.”<sup>75</sup> To then finally remove a conditional Green Card status, the immigrant investor must file an application with USCIS.<sup>76</sup>

When the condition has been removed, permanent resident status in the U.S. is granted with a full Green Card.<sup>77</sup> USCIS suggests that it takes approximately four years from the time the immigrant investor applies for the conditional Green Card until USCIS approves the application to remove conditions—actual time for this process can be considerably longer.<sup>78</sup>

Subsequently, “in approved Regional Center programs . . . the investment may be sold, and the investor will still maintain the permanent Green Card.”<sup>79</sup> After a conditional Green Card is awarded, U.S. citizenship is possible approximately five years after the residence criteria are

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70. *Id.* at 99.

71. *EB-5 Immigrant Investor Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process> (last updated June 25, 2014) [hereinafter *Process*].

72. IVENER & FULLMER, *supra* note 64, at 99.

73. *Id.*

74. *I-829, Petition by Entrepreneur to Remove Conditions*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/i-829> (last updated July 2, 2013).

75. *Process*, *supra* note 71.

76. IVENER & FULLMER, *supra* note 64, at 99.

77. *Id.*

78. *Id.*

79. *Id.*

satisfied.<sup>80</sup>

## II. PROBLEMS WITH EB-5—CONTROLLING/SHAPING ISSUES AND THEMES

### A. *Constitutional Issues—A Question of Subversion of Due Process Rights During the Green Card Conditional Phase*

To what constitutional rights and freedoms are foreign nationals who invest in the EB-5 program entitled? The candid answer to that question is, “it depends.” The difficulty in providing a definitive answer is rooted in the historically ambivalent approach that the United States Supreme Court has taken towards non-citizens. This ambivalence is underscored by the historical seesaw of American attitudes toward immigrants, from hate to love and back again, which is reflected in state legislation and lower court proceedings.<sup>81</sup>

Regarding immigration, “(o)ver no conceivable subject is the legislative power of Congress more complete.”<sup>82</sup> At the heart of that observation lies the “plenary power” doctrine, under which the Court has repeatedly declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.<sup>83</sup>

The Supreme Court has insisted for more than a century that foreign nationals living among us are “persons” within the meaning of the Constitution, and are protected by those rights that the Constitution does not expressly reserve to citizens alone (at least with regard to criminal prosecution).<sup>84</sup> Because the Constitution expressly grants citizens only the rights to vote and to run for federal elective office, equality between non-nationals and citizens would appear to be the constitutional rule.<sup>85</sup>

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80. *Id.*

81. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003).

82. *Olooto v. Immigration & Naturalization Serv.*, 643 F.2d 679, 680 (9th Cir. 1981) (showing that the implementation scheme for admission and deportation of aliens “has long been recognized by the judiciary as largely immune from court control”).

83. *E.g.*, *Fiallo v. Bell*, 430 U.S. 787 (1977) (gender and legitimacy); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (race); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (race).

84. *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896) (regarding unlawful aliens, “[i]t is not consistent with the theories of our government that the Legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents”).

85. U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § 1; U.S. CONST. amend. XV.

A plain reading of the Constitution could leave one with the impression that all other non-enumerated rights are applicable to both citizens and non-citizens without limitation. Per the text of the Fifth and Fourteenth Amendments, due process and equal protection guarantees extend to all “persons.”<sup>86</sup> Further, the rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to “the accused.”<sup>87</sup> And, both the First Amendment’s protections of political and religious freedoms and the Fourth Amendment’s protection of privacy and liberty apply to “the people.”

In 1971, the Court held that due process infringements for non-citizens as a group, a discrete and insular minority deserving of heightened judicial protection, were worthy of “strict scrutiny.”<sup>88</sup> Subsequently, the Court has retreated from this, dividing non-citizen due process rights into two specific and much smaller spheres, (1) for persons seeking to enter the U.S. (either illegally or legally) there are no due process rights;<sup>89</sup> and, (2) for undocumented persons already resident within the U.S. due process applies, at least with regard to criminal prosecution and/or deportation proceedings.<sup>90</sup>

In its execution of Congress’ plenary authority, USCIS administers the EB-5 Program to attract only those foreign investors who are willing to invest their capital in the U.S. with merely the hope of obtaining a return on their investment while helping create American jobs. The invested capital needs to be “at risk” to some degree, meaning there must be a chance for loss or gain; however, the law does not specify exactly what the degree of risk must be.<sup>91</sup> If the immigrant investor is promised to receive any amount of their original investment this negates the required element of risk.<sup>92</sup>

The invested capital is not at risk when the immigrant investor is

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86. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

87. U.S. CONST. amend. VI.

88. *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971) (holding that classifications based on citizenship are inherently suspect and are subject to strict judicial scrutiny whether or not a fundamental right is impaired).

89. *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (establishing that Fourteenth Amendment protections extend to immigrants and the Equal Protection Clause applies to all citizens regardless of race or country of origin. The Court’s silence with regard to non-citizens and undocumented persons is deemed to underscore non-application to these “others”).

90. *Wong Wing*, 163 U.S. at 237–38.

91. USCIS POLICY MEMO, *supra* note 4, at 5.

92. *Id.*

guaranteed the return of a portion or a rate of return on a portion of their investment.<sup>93</sup> “Nothing, however, precludes an investor from receiving a return on his or her capital (*i.e.*, a distribution of profits) during or after the conditional residency period, so long as prior to or during the two-year conditional residency period, and before the requisite jobs have been created, the return is not a portion of the investor’s principal investment and was not guaranteed to the investor.”<sup>94</sup>

Until the investor has obtained conditional, lawful permanent resident status, the investor’s money can be held in escrow.<sup>95</sup> The release of the escrowed funds will be contingent only upon (1) approval of the investor’s Form I-526; (2) subsequent visa issuance; and (3) admission to the U.S. as a conditional permanent resident.<sup>96</sup> In the case of a status adjustment, approval of the investor’s Form I-485 will be necessary.<sup>97</sup> The investment monies may be held in escrow within the U.S. to avoid issues that might arise through major currency fluctuations or export restrictions on foreign capital.<sup>98</sup> Foreign escrow accounts can be used “as long as the petition establishes that it is more likely than not that the minimum qualifying capital investment will be transferred to the new commercial enterprise in the United States upon the investor obtaining conditional lawful permanent resident status.”<sup>99</sup> When it comes to completing the Form I-829, USCIS must have evidence verifying the escrowed funds were released and used to sustain the new commercial enterprise.<sup>100</sup>

If USCIS determines an EB-5 investment is deficient, that the investor’s money is not truly at risk, or that insufficient jobs (in quantity or quality) were created through the investment, then the investor’s petition for citizenship may be denied. These investments are not backed or guaranteed by the government. Thus, there are no guarantees that an investor may either recoup their capital or ultimately be granted unconditional permanent resident status through an EB-5 investment.<sup>101</sup>

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93. *Id.*

94. *Id.* at 6.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See 8 C.F.R. § 204.6(j)(2) (demonstrating the requirements to meet “at risk” investment status); *EB-5 Inquiries*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-inquiries> (last visited Sept. 3, 2014) (explaining that Regional Center designation does not mean that the regional center’s capital investment projects are backed or guaranteed by the

If these deficiencies are the product of domestic negligence or fraud, then what protections does the Constitution offer? For a non-citizen (undocumented person) seeking to enter the country there are no constitutional due process rights (exclusion), and even if a person is already an undocumented resident of the U.S., these rights are presently limited to due process under criminal prosecution (deportation).<sup>102</sup>

Thus, with regard to the constitutional issues concerning immigration, *fairness* to those who enter the country is deemed the purview of the federal government. The history regarding the application of this *fairness* has not been pretty. At present, investors are warned that they should exercise “due diligence” when making an EB-5 investment—does this *caveat emptor* provide the protection upon which a future bona fide citizen applicant can rely?<sup>103</sup>

### B. Ethical Issues

#### 1. Citizenship for Sale

“[I]t sounds like an EB-5 visa is just that, a way for people to buy their way into this country.”

Representative Louie Gohmert (R-TX1), Texas<sup>104</sup>

Congress, expressing the will of the people through legislation passed over more than two decades, has established that in very limited circumstances citizenship can be “sold.” This majoritarian legislative expression invites two equally longstanding questions: (1) what is the value of this citizenship (and by inference, what should be its “price”), and (2) what governmental oversight is required regarding these transactions?

Congress’ rationally based but ambiguously expressed goals with regard to mining immigrant investors for both investment capital and entrepreneurial expertise for domestic job creation have sometimes been undermined. EB-5 critics have labeled the program a “cash-for-visas scheme,” which indiscriminately promotes projects (with little

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government and how there are no guarantees an investor will be granted unconditional permanent resident status using the EB-5 program).

102. See *Wong Wing*, 163 U.S. at 237–38 (1896) (limiting the protections afforded unlawful aliens to criminal prosecutions).

103. *Investor Alert – Investment Scams Exploit Immigrant Investor Program*, *supra* note 23.

104. *Safeguarding the Integrity of the Immigration Benefits Adjudication Process: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Rep. Louie Gohmert, Member, Subcomm. on Immigration Policy and Enforcement), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72904/html/CHRG-112hhrg72904.htm>.

oversight).<sup>105</sup> Critics point to fiscally impossible, irresponsible projects and marginal investment opportunities associated with EB-5.<sup>106</sup>

To some, the EB-5 program appears to be federal policy acting as a thumb on the scales (a not so “invisible hand”) promoting projects that would not stand financially without the program. From this perspective, EB-5 appears at best to foster marginal business opportunities that have trouble securing regular financing and at worst to serve as federal government cover for outright investment frauds and/or “fee mills.” Immigration firms can masquerade as developers, but actually be in the business of selling visas in exchange for “administrative fees.”<sup>107</sup>

The following are recent examples of the EB-5 program appearing in this unfavorable light:

*i. Mississippi, 2007–2013*

Accusations of political favoritism and gaming of the employment based immigration program came to light when former Democratic National Committee chairman Terry McAuliffe purchased, renamed, and reorganized a Chinese “green” automobile manufacturing concern, GreenTech Automotive (“GTA”)<sup>108</sup> and relocated it to Tunica, Mississippi.

GTA was charged with receiving preferential treatment from then USCIS head Alejandro Mayorkas, who was in charge of the EB-5 program.<sup>109</sup> GTA was accused of obtaining unfair access to immigrant investor startup capital via Gulf Coast Funds Management, Ltd., a TEA approved by Mayorkas in 2008.<sup>110</sup>

In 2009, the Virginia Economic Development Partnership (“VEDP”)—the state’s business-recruitment agency—passed on an opportunity to host

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105. Dirk Lammers, *Critic: EB-5 visa draws marginal projects*, BLOOMBERG BUSINESSWEEK (Nov. 1, 2013), <http://www.businessweek.com/ap/2013-11-01/critic-eb-5-visa-draws-marginal-projects>.

106. *Id.*

107. *See id.* (describing ventures that raked in millions of dollars in “fees”).

108. *Terry McAuliffe’s Former Car Company is Signaling Problems in his Virginia Governor’s Race*, WASH. POST (Aug. 13, 2013), [http://www.washingtonpost.com/opinions/terry-mcauliffes-former-car-company-is-signaling-problems-in-his-virginia-governors-race/2013/08/13/b55b38b6-0430-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/opinions/terry-mcauliffes-former-car-company-is-signaling-problems-in-his-virginia-governors-race/2013/08/13/b55b38b6-0430-11e3-a07f-49ddc7417125_story.html).

109. CAUSE OF ACTION: ADVOCATES FOR GOV’T ACCOUNTABILITY, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM 5 (2013), *available at* <http://causeofaction.org/assets/uploads/2013/09/130922-REPORT-Final-GreenTech-Automotive-FINALIZED.pdf>.

110. *Id.* at 5, 7, 18.

this venture.<sup>111</sup> The VEDP executive director sent the Virginia Secretary of Commerce and Labor a letter in which he wrote, “we have grave doubts about the business model presented to us” by GTA.<sup>112</sup> He mentioned several times that the company had not answered key questions that had been raised by VEDP. Suspecting a “visa-for-sale scheme,” he warned that Virginia could be sullied by linking a new EB-5 program to the fortunes of such a startup company.<sup>113</sup>

Subsequently, McAuliffe resigned as chairman of GTA<sup>114</sup> and went on to become the 72nd Governor of Virginia.<sup>115</sup> In December 2013, Mayorkas became the Deputy Secretary of Homeland Security, overseeing USCIS as well as 21 other agencies charged with protecting the U.S. from terrorism, man-made accidents, and natural disasters.<sup>116</sup>

### ii. Texas, 2013

In October 2013, SEC brought fraud charges against a husband and wife for stealing funds from foreign investors via misapplication and mismanagement of the EB-5 program.<sup>117</sup> The SEC charged Marco and Bebe Ramirez with fraudulently raising at least \$5,000,000 from investors by falsely promising that the money would be invested as part of the EB-5 Immigrant Investor Pilot Program into a company named “USA Now.”<sup>118</sup> The money received by the Ramirezes from investors was not invested in the EB-5 program but instead was funneled into unidentified businesses and personal use.<sup>119</sup> “In at least one instance, they used new investor funds to

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111. Michal Conger, *Report: GreenTech Automotive suspected in 'visas-for-sale' scheme*, WASH. EXAMINER (Sept. 24, 2013), <http://washingtonexaminer.com/report-greentech-automotive-suspected-in-visas-for-sale-scheme/article/2536327>.

112. Email from Liz Povar, Vice President, Va. Econ. Dev. Partnership, to Sandi McNinch, General Counsel, Va. Econ. Dev. Partnership, CGC UPDATE (Nov. 17, 2009), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/561607/gta-nov-2009.pdf> (posting of 79 pages of documents online in January 2010, which were revealed pursuant to a Freedom of Information Act request filed by PolitiFact).

113. *Id.*

114. Alexander Burns, *Terry McAuliffe Left Car Firm in December*, POLITICO (Apr. 5, 2013), <http://www.politico.com/story/2013/04/terry-mcauliffe-left-controversial-car-firm-in-december-89684.html?hp=14>.

115. INAUGURATION OF TERRY MCAULIFFE, <http://www.inauguration2014.com> (last visited Aug. 27, 2014).

116. Seung Min Kim, *Alejandro Mayorkas Confirmed for DHS*, POLITICO (Dec. 20, 2013), <http://www.politico.com/story/2013/12/alejandro-mayorkas-department-of-homeland-security-101382.html>.

117. *SEC Halts Texas-Based Scheme Targeting Foreign Investors Seeking U.S. Residency Through EB-5 Visa Program*, U.S. SEC. & EXCH. COMM’N (Oct. 1, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854731#.U1qCIKWMVUM>.

118. *Id.*

119. *Id.*

make Ponzi-like payments to an existing investor.”<sup>120</sup>

The SEC’s complaint described how the Ramirezes originally targeted Mexican investors, but then went on to solicit investors in Egypt and Nigeria.<sup>121</sup> In 2010, the Ramirezes desired to register their EB-5 project USA Now, with USCIS as an EB-5 Regional Center.<sup>122</sup> This would allow USA Now to accept money from foreign investors and direct it towards investment opportunities in order to satisfy the EB-5 visa requirements.<sup>123</sup> Allegedly, the Ramirezes told investors that USA Now would hold the investment capital in escrow until USCIS approved USA Now.<sup>124</sup> The Ramirezes further told investors that once the funds were released from escrow, they would be used for legitimate EB-5 approved business purposes.<sup>125</sup> In reality, the Ramirezes never held the funds in escrow and diverted the funds for other uses, in some instances on the same day they were received.<sup>126</sup>

### *iii. Chicago, 2013*

The SEC announced charges and froze the assets of a company that planned on building the “World’s First Zero Carbon Emission Platinum LEED certified” hotel and conference center near O’Hare International Airport.<sup>127</sup> The agency alleged that the developer fraudulently sold more than \$145,000,000 in securities and charged \$11,000,000 in fees to more than 250 investors, most of whom are Chinese.<sup>128</sup>

This SEC prosecution was even reported by the largest TV network in China, and the Chinese government has issued warnings to investors about fraud in the EB-5 program.<sup>129</sup> “It is very rare for the Chinese Ministry of

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120. *Id.*

121. *Id.*; A not so amusing inverse on one of the endemic international scams of our era. *See Common Fraud Schemes, Nigerian Letter or “419” Fraud*, THE FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/scams-safety/fraud> (last visited Aug. 13, 2014).

122. *SEC Halts Texas-Based Scheme Targeting Foreign Investors Seeking U.S. Residency Through EB-5 Visa Program*, *supra* note 117.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *SEC Halts \$150 Million Investment Scheme to Dupe Foreign Investors and Exploit Immigration Program*, *supra* note 56.

128. *Id.*

129. Nat Rudarakanchana, *State Pulls Plug on EB-5 Project*, VTDIGGER (Apr. 3, 2013, 3:32 PM), <http://vtdigger.org/2013/04/03/state-pulls-plug-on-eb-5-project/>; Mona Shah & Yi Song, *How the ACCC Scandal has Disturbed the EB-5 Market in China – Current Market Trends and Updates*, LEXISNEXIS LEGAL NEWSROOM: BANKING AND FINANCE (Mar. 12, 2013), <http://www.lexisnexis.com/legalnewsroom/banking/b/venture-capital/archive/2013/03/12/how-the-acc-scandal-has-disturbed-the-eb-5-market-in-china-current-market-trends-and-updates.aspx>.

Foreign Affairs to make such a bold comment.”<sup>130</sup>

iv. Vermont, 2012

The Vermont ACCD cancelled an agreement with American Dream, a wholly owned subsidiary of DreamLife,<sup>131</sup> a Canada-based self-styled “EB5 Green Card Facilitator” and developer of DreamLife Retirement Resorts,<sup>132</sup> based on “material misrepresentations.”<sup>133</sup> DreamLife proposed up to six \$24,000,000 senior living facilities in Montpelier, Rutland, White River Junction, and Newport.<sup>134</sup> Each facility was to consist of a mix of independent and assisted living senior units, with underground parking, health spas, hair salons, bank services, convenience stores, bowling allies, bistros, and dining rooms.<sup>135</sup>

ACCD based the termination of EB-5 certification on confirmation that DreamLife’s project leaders falsely claimed to have retained licensed attorneys and listed people as project partners without their knowledge or consent.<sup>136</sup> In addition, DreamLife listed construction team members on its website that state officials determined were not aware of their roles in the project; they did not have contracts with the company.<sup>137</sup> Finally, former DreamLife employees indicated the company reneged on numerous business commitments.<sup>138</sup>

As if to illustrate critics’ continued concern regarding administrative opacity and subsequent uncertainty, ACCD reopened negotiations in 2013 with DreamLife’s successor.<sup>139</sup> Its EB-5 certification has since been reinstated.<sup>140</sup>

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130. Shah & Song, *supra* note 129, at 2.

131. Dan D’Ambrosio, *Dreamlife, An EB-5 Project, Receives Final Notice of Cancellation*, BURLINGTON FREE PRESS (June 18, 2013), <http://archive.burlingtonfreepress.com/article/20130618/BUSINESS/306180025/DreamLife-an-EB-5-project-receives-final-notice-of-cancellation>.

132. Hilary Niles, *Dreamlife Hopes for Second Shot at Cancelled EB-5 Project*, VTDIGGER (July 3, 2013), <http://vtdigger.org/2013/07/03/dreamlife-hopes-for-second-shot-at-cancelled-eb-5-project/>.

133. Rudarakanchana, *supra* note 129.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Paul Heintz, *Seeing Green*, SEVEN DAYS (Apr. 4, 2012), <http://www.sevendaysvt.com/vermont/seeing-green/Content?oid=2183949>.

139. *See DreamLife fights for EB-5 reinstatement*, U.S. IMMIGRATION (Apr. 9, 2013), <http://www.us-immigration.com/us-immigration-news/us-green-card/dreamlife-fights-for-eb-5-reinstatement/> (explaining how the project will continue).

140. *Id.*

These four examples of conspicuous failure described above contribute to EB-5's poor reputation. They also represent to the casual observer a program of inherent complexity suffering from an apparent lack of reciprocal regulatory oversight. Combined with other factors, these failures manifest in the appearance of an instable program that undermines the citizenship, investment, and employment goals set by Congress.

## 2. Fraud—Gerrymandering the Investor Visa

In 2011, a *New York Times* investigation into the EB-5 financing of a Manhattan high-rise development found evidence of “gerrymandering,”<sup>141</sup> and stated how “developers and state officials are stretching the rules to qualify projects for this foreign financing.”<sup>142</sup> Two years later an investigative reporter using federal rules for TEAs,<sup>143</sup> federal government supplied census tract maps<sup>144</sup> and unemployment data,<sup>145</sup> a helpful how-to article by an immigration lawyer,<sup>146</sup> and guidance from the California Governor's Office<sup>147</sup> was able to carve out a properly depressed TEA that included the White House.<sup>148</sup> Apparently the whole process, once the basic data was in hand, took only several minutes.<sup>149</sup>

Because the ultimate determination of a TEA “may” be made with “a letter from the state government designating a geographic or political subdivision located outside a rural area but within its own boundaries as a

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141. *Senate History: Eldridge Gerry, 5th Vice President (1813-1814)*, U.S. SENATE [http://www.senate.gov/artandhistory/history/common/generic/VP\\_Elbridge\\_Gerry.htm](http://www.senate.gov/artandhistory/history/common/generic/VP_Elbridge_Gerry.htm) (last visited Aug. 13, 2014) (explaining that the term “gerrymander” was first used in 1812 to describe the shape of an election district concocted for political advantage by then Governor of Massachusetts Governor (and future Vice President) Elbridge Gerry (Gerry + salamander = gerrymander)).

142. Patrick McGeehan & Kirk Semple, *Rules Stretched as Green Cards go to Investors*, N.Y. TIMES A1 (Dec. 18, 2011), available at <http://www.nytimes.com/2011/12/19/nyregion/new-york-developers-take-advantage-of-financing-for-visas-program.html>.

143. 8 U.S.C. §§ 1153(b)(5)(B)(ii)–(iii); 8 C.F.R. § 204.6(e)(ii).

144. *Select 2010 Census Tract Profile*, NEIGHBORHOOD INFO D.C., <http://www.neighborhoodinfodc.org/censustract10/census.html> (last visited Aug. 13, 2014).

145. *D.C. 2010 Tract Profile - Well-Being: Tract 65*, NEIGHBORHOOD INFO D.C., [http://www.neighborhoodinfodc.org/censustract10/Nbr\\_prof\\_trctb81.html#sec\\_2\\_employment](http://www.neighborhoodinfodc.org/censustract10/Nbr_prof_trctb81.html#sec_2_employment) (last visited Aug. 13, 2014).

146. Kate Kalmykov, *Determining if Your EB-5 Project is Located in a Targeted Employment Area (TEA)*, EB5 INVESTORS (Feb. 2, 2014), <http://www.eb5investors.com/blog/determining-if-your-eb-5-project-is-located-in-a-targeted-employment-area>.

147. EB-5 Investor Visa Program, CALIFORNIA GOVERNOR'S OFFICE OF BUSINESS & ECONOMIC DEVELOPMENT (2014), available at <http://www.business.ca.gov/International/EB5Program.aspx> (last visited Aug. 13, 2014).

148. David North, *Gerrymandering the Investor Visa*, CENTER FOR IMMIGRATION STUDIES (Nov. 11, 2013), <http://cis.org/north/gerrymandering-investor-visa>.

149. *Id.*

high unemployment area,” the American tradition of gerrymandering appears alive and well in the administration of EB-5.<sup>150</sup>

### C. Administrative Dilemmas

A Congressional Research Service report to Congress identified several areas of administrative weakness in the EB-5 program:

the rigorous nature of the LPR [Lawful Permanent Resident] investor application process and qualifying requirements; the lack of expertise among adjudicators; uncertainty regarding adjudication outcomes; negative media attention on the LPR investor program; lack of clear statutory guidance; and the lack of timely application processing and adjudication.<sup>151</sup>

A 2005 U.S. Government Accountability Office (“GAO”) report laid out succinctly the enduring problems that have plagued the EB-5 program from the outset, and noted the primary areas of deficiency as: (1) ambiguity and lack of clear guidance, (2) uncertainty and lack of timeliness, and (3) underutilization.<sup>152</sup>

#### 1. Ambiguity and Lack of Clear Guidance

Ambiguity thrives in the evolving and at times disjointed adjudication policy articulated in periodic USCIS attempts to synchronize its regulations with the employment-based immigration statute.<sup>153</sup> This less than steady hand on the tiller has manifested itself in the application of evolving job creation determination methodologies,<sup>154</sup> the wholesale revision of

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150. 8 C.F.R. § 204.6(j)(6).

151. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 10; CHAD C. HADDAL, FOREIGN INVESTOR VISAS: POLICIES AND ISSUES, CONGRESSIONAL RESEARCH SERVICE 8 (Jan. 29, 2007), available at <http://www.ilw.com/immigrationdaily/news/2007,0306-crs.pdf>.

152. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-256, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS 3–4 (Apr., 2005), [hereinafter GAO] available at <http://www.gao.gov/products/GAO-05-256>.

153. MICHAEL A. PEARSON, EXECUTIVE ASSOCIATE COMMISSIONER, OFFICE OF FIELD OPERATIONS, IMMIGRATION AND NATURALIZATION SERV., EB-5 FIELD MEMORANDUM NUMBER 9: FORM I-829 PROCESSING (2000), available at <http://www.uscis.gov/sites/default/files/pressrelease/EB530300a.pdf> (an adjudicators field manual regarding Immigrant Investor Petitions).

154. OFFICE OF THE DIRECTOR, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., OPERATIONAL GUIDANCE FOR EB-5 CASES INVOLVING TENANT OCCUPANCY (2012), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Interim%20EB-5%20Tenant-Occupancy%20GM.pdf> (facilitating adjudication of cases involving “tenant occupancy” methodology for establishing job creation in EB-5 cases).

previously published guidance,<sup>155</sup> and oscillating instructions to its own staff on issues ranging from the definition of “full-time” employment<sup>156</sup> to the establishment of “uniform standards governing all aspects of EB-5 matters.”<sup>157</sup> Overlay on this meandering adjudication a rigorous application process “designed” to regulate complex business and tax issues—applied at times retroactively. The result is an unsurprising, yet significant, deterrent to participation in EB-5 by potential immigrant entrepreneurs.

In addition, lack of clear guidance manifests itself notably in subjective criteria appearing in parts of the statute and subsequent USCIS Policy Memoranda. For example, USCIS states that one EB-5 requirement is that the business must benefit the U.S. economy.<sup>158</sup> However, the statute provides no guidance on what types of investments meet this criterion. Thus, adjudicators are generally left to their own judgment as to the value, or benefit, of the proposed investment.

## 2. Uncertainty and Lack of Timeliness

Since its inception, delay in the issuance of EB-5 rules, followed by dramatic and somewhat inconsistent changes in the interpretation of those rules, has led to uncertainty in the EB-5 program. Another substantial source of uncertainty with regard to the outcome of EB-5 adjudications is a result of the limited expertise of adjudicators, who lack experience with and knowledge of complex business and tax issues. At least the USCIS, operating under the mantle of DHS, appears well suited to oversee the immigration and national security components of EB-5.

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155. DONALD NEUFELD, ASSOC. DIR., U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATION OF EB-5 REGIONAL CENTER PROPOSALS AND AFFILIATED FORM I-526 AND FORM I-829 PETITIONS 1 (Dec. 11, 2009), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2009/adjudication-eb-5-regional-center-proposals-i-526-i-829.pdf> (Memorandum rescinding in its entirety the USCIS memorandum, *Establishment of an Investor and Regional Center Unit*, dated January 19, 2005, establishing new guidance, and addressing the issue of communicating case specific information with non-USCIS individuals or entities).

156. DONALD NEUFELD, ASSOC. DIR., U.S. CITIZENSHIP & IMMIGRATION SERVS., EB-5 ALIEN ENTREPRENEURS - JOB CREATION AND FULL-TIME POSITIONS 1 (2009), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/eb5\\_17jun09.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/eb5_17jun09.pdf) (providing instructions to USCIS personnel regarding timing of job creation and the meaning of “full-time” employment under EB-5).

157. WILLIAM R. YATES, ASSOC. DIR., U.S. CITIZENSHIP AND IMMIGRATION SERVS., ESTABLISHMENT OF AN INVESTOR AND REGIONAL CENTER UNIT (Jan. 19, 2005), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2005/eb5unit011905pub.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/eb5unit011905pub.pdf) (responding to the well documented abuses in the EB-5 program and addressing the need for effective oversight, coordination, and uniform standards governing all aspects of EB-5 matters).

158. USCIS POLICY MEMO, *supra* note 4, at 3.

But, critics note that with regard to issues of loans, mortgages, secured transactions, and other investments, USCIS has demonstrably less competence.<sup>159</sup> They note the increasing presence of SEC in the administration of EB-5 related sanctions, and they suggest the Department of Commerce or the Department of the Treasury might provide necessary expertise to vet and supervise the financial aspects of the program.<sup>160</sup>

The uncertainty surrounding EB-5 adjudications is further exacerbated by a lack of timeliness that negatively impacts both the processing and adjudication of EB-5 related applications. Immigration lawyers have testified that, in their experience, “it takes from 5 to 7 years for their clients to complete a program that is often advertised as a 2-year conditional residency program.”<sup>161</sup>

INS General Counsel’s interpretive guidance in the mid-1990s permitted investors to obtain status without actually committing their entire investment amount to the business.<sup>162</sup> This early guidance was received favorably by the private sector and the number of EB-5 immigrant visas that were issued increased from 583 in Fiscal Year 1993 to 1,361 visas in Fiscal Year 1997.<sup>163</sup>

Concern regarding insider access, suspicions of abuse, misrepresentation, and fraud began to surface in the mid-1990s at the same time that the EB-5 program was experiencing this significant expansion in use.<sup>164</sup> Some of these concerns were later proven in a federal court case leading to convictions for immigration fraud, wire fraud, money laundering, and conspiracy against the principals and officers of an EB-5 investment business.<sup>165</sup>

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159. Center for Immigration Studies Interviews, *Is DHS the Correct Institutional Home for the EB-5 Visa Program?*, YOUTUBE (Jan. 14, 2014), <https://www.youtube.com/watch?v=vu5KYabzIbE#t=61>.

160. *Id.* (Interview with Mr. David North where he suggests the SEC as the “correct institutional home” for the EB-5 Program).

161. GAO, *supra* note 152, at 11.

162. Memorandum from the Office of Gen. Counsel, Immigration and Naturalization Serv., to Paul W. Virtue, Executive Associate Commissioner, Office of Programs, Sections 203(b)(5) (EB-5) and 216(A) of the Immigration and Nationality Act (Dec. 19, 1997), *available at* <http://www.horitsu.com/html/docs/gceb5d.html#Anchor> (providing guidance disallowing such practices). As part of a major government reorganization following the September 11 attacks of 2001, the Homeland Security Act of 2002 (HSA) dismantled the former INS and most of its functions were transferred from the Department of Justice (DOJ) to three new entities—U.S. Bureau of Citizenship and Immigration Services (BCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP)—within the newly created Department of Homeland Security (DHS).

163. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 7.

164. *Id.*

165. *United States v. O’Connor*, 158 F. Supp. 2d 697, 723–38 (E.D. Va. 2001) The Interbank scandal: defendants attracted \$21 million in investment funds from foreign investors who were seeking to lawfully obtain green card status through the EB-5 program. The fraudulent investment

In 1998, the USCIS Administrative Appeals Office (“AAO”)<sup>166</sup> issued four new guidance documents.<sup>167</sup> These “precedent decisions” altered the previously issued guidance and substituted new and more restrictive interpretations of the law.<sup>168</sup> “These changes caused concern among EB-5 investors, and introduced new and significant uncertainties into the program.”<sup>169</sup>

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scheme involved the juggling of funds through an offshore financial institution, and the production and use of fake bank statements used in connection with underlying I-526 petitions filings. None of the individual 216 EB-5 investors were found complicit in the fraud. Most of these investors suffered a total loss of their funds and were not granted green cards.

166. *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-aoob> (last visited Aug. 13, 2014) (defining the AAO as the appellate body within USCIS with primary authority to review most service center decisions).

167. *In re Soffici*, 22 I. & N. Dec. 158 (1998) (precedent decision); *In re Izummi*, 22 I. & N. Dec. 169, 180–88 (1998) (interim decision); *In re Hsiung*, 22 I. & N. Dec. 206 (1998) (interim decision); *In re Ho*, 22 I. & N. Dec. 206 (1998) (interim decision).

168. *Precedent Decisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/laws/precedent-decisions> (last visited Apr. 12, 2014) “‘Precedent decisions’ are administrative decisions of the AAO, the Board of Immigration Appeals (“BIA”), and the Attorney General, which are selected and designated as precedent by the Secretary of the DHS, the BIA, and the Attorney General, respectively. The Department of Justice Executive Office for Immigration Review (“EOIR”) publishes precedent decisions in bound volumes entitled ‘Administrative Decisions Under Immigration and Nationality Laws of the United States.’ Precedent decisions are legally binding on the DHS components responsible for enforcing immigration laws in all proceedings involving the same issue or issues. However, precedent decisions may be modified or overruled by: the Attorney General, Federal Courts, later precedent decisions, and changes in the law.”

169. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 8.

Changes in Selected EB-5 Legal Guidance<sup>170</sup>

Issue	Pre-1998 AAO Decisions	Post-1998 AAO Decisions
Establishment of “new” enterprise	Business must be created after November 1990	Investor must personally be involved in the establishment of business <sup>C &amp; 171</sup>
Source of funds	General representation and proof of legal generation of funds accepted	Legal generation of funds must be traced with particularity <sup>A,C, &amp;D</sup>
Promissory notes	Considered at face value; no limit on duration; need not be perfected; foreign collateral accepted	Must prove fair market value; <sup>C</sup> Duration generally restricted to two years; <sup>C</sup> must be perfected; <sup>B</sup> foreign collateral must be seizable and marketable <sup>C</sup>
Guaranteed returns	Permitted generally	Prohibited <sup>C</sup>
Redemption provisions	Permissible but may not exercise until after two year conditions lifted	Impermissible to enter redemption agreement within two year <sup>C</sup> conditional period

<sup>A</sup> Matter of Soffici, 22 I. & N. Dec. 158 (1998).

<sup>B</sup> Matter of Hsiung, 22 I. & N. Dec. 206 (1998).

<sup>C</sup> Matter of Izummi, 22 I. & N. Dec. 169, 180–188 (1998).

<sup>D</sup> Matter of Ho, 22 I. & N. Dec. 206 (1998).

### 3. Underutilization

After these four AAO precedent decisions, EB-5 visa applications and subsequent approvals significantly decreased. “Between [Fiscal Year] 1998 and [Fiscal Year] 2008, USCIS had an average EB-5 approval rate of approximately 44%.”<sup>172</sup>

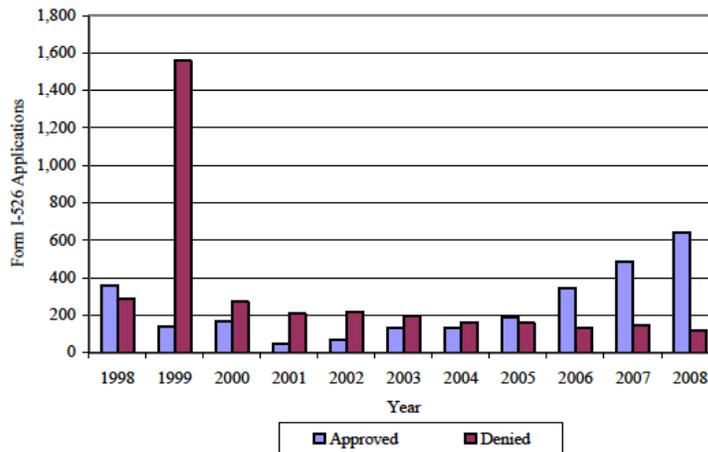
170. *Id.*

171. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758, (2002) (Congress abolished the establishment criterion through legislative action in 2002 returning to the pre-1998 standard).

172. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 8.

Form I-526 Approvals and Denials by USCIS<sup>173</sup>

Figure 4: Form I-526 Approvals and Denials by USCIS (Principals Only), FY 1998-2008



Source: USCIS Performance Analysis System Data, as of October 2008.]

Many potential foreign investors withdrew their EB-5 applications.<sup>174</sup> USCIS even took action to remove some investors from the U.S. by retroactively applying the principles set forth in the four AAO precedent decisions.<sup>175</sup> “While most investors lost legal challenges, one group of affected investors did successfully challenge the retroactive application of these decisions in one federal court.”<sup>176</sup> In reversing the USCIS decisions, the court held:

[Investors] relied on their understanding that their business and investment plans conformed to the requirements of EB-5. They sold businesses, uprooted from their homelands, and moved to the U.S. . . . [They] sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain . . . they would obtain LPR status promised by the EB-5 program. This was not unreasonable . . . . The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5’s requirements cannot be relied

173. *Id.* at 9.

174. *Id.*

175. *Id.*

176. *Id.*

upon.<sup>177</sup>

In 2002 President George W. Bush<sup>178</sup>—and President Barack Obama again in 2011<sup>179</sup>—sought to rectify the EB-5 situation with special legislation.<sup>180</sup> Despite these efforts, new regulations are needed to implement this legislation.<sup>181</sup> “As a result, approximately 700 investors, most of whom are at the condition removal stage, had their immigration status placed on hold.”<sup>182</sup> This delay has negatively affected investors (and their family members) and likely contributed to the poor perception of the EB-5 program by other foreign investors.<sup>183</sup>

Meanwhile, in spite of its endemic deficiencies, EB-5 has attracted more interest and is once again experiencing a significant uptick in applications.<sup>184</sup> As observed earlier in this article, the cause of this growth in utilizing the EB-5 program is in large part due to all time low commercial credit availability and unprecedented growth in the number of foreign HNWI.

### III. EB-5 CONS

#### A. *General Factors*

Regardless of whose “jobs creation” expertise is fueled by EB-5 capital, USCIS efforts at program administration have proved vexing. As the SEC has learned in its own attempt to herd cunning financial cats, “past performance does not guarantee future results” and “current performance may be lower or higher than the performance data quoted.”<sup>185</sup>

Accounting for immigrant investor money has proven relatively easy compared to the quantification of domestic job growth and maintenance

177. *Chang v. United States*, 327 F.3d 911, 928–29 (9th Cir. 2003).

178. 21st Century Department of Justice Appropriations Authorization Act §§ 11031–37, Pub. L. 107-273 (Nov. 2, 2002). “Immigrant investors affected by the retroactively applied 1998 AAO decisions were provided an additional two years to demonstrate that they made a supplemental investment, and in combination, that they met the minimum required qualifying investment and created and/or preserved ten jobs.” OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 10.

179. PRESIDENT’S COUNCIL ON JOBS AND COMPETITIVENESS, TAKING ACTION, BUILDING CONFIDENCE: FIVE COMMON-SENSE INITIATIVES TO BOOST JOBS AND COMPETITIVENESS, INTERIM REPORT 35 (2011), *available at* [http://files.jobscouncil.com/jobscouncil/files/2011/10/Jobscouncil\\_InterimReport\\_Oct11.pdf](http://files.jobscouncil.com/jobscouncil/files/2011/10/Jobscouncil_InterimReport_Oct11.pdf).

180. OMBUDSMAN RECOMMENDATIONS, *supra* note 22, at 10.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 11.

185. 17 C.F.R. § 230.482(b)(3)(i) (2014).

associated with that money. Both factors have been confounded by the creativity of the immigrant investors and their domestic entrepreneurial legal counsel. USCIS has remained gamely in the mix, casting and recasting its rules for measuring the immeasurable—refining procedures to implement Congress’ substantive goals.

*B. Job Creation Paradox—The Number of Jobs Created by Immigrant Investors is Very Difficult to Estimate*

Through the first fifteen years of the EB-5 program even GAO was unable to determine how many jobs immigrant investors had established because of the way USCIS credited the number of jobs created by an investor’s business and/or investment.<sup>186</sup> This was despite the explicit charge from Congress that USCIS adjudicators ensure that each business create a minimum of at least 10 full-time jobs.<sup>187</sup>

From the outset of the program there was an issue with direct and indirect job creation accounting. The problem presented itself early on in circumstances where a mix of EB-5 and non-EB-5 investors were involved, or where the investment was part of a greater overall business expansion.<sup>188</sup> Initially, USCIS resolved this by crediting the EB-5 investors with the total of all jobs created, even though many of the jobs were not the result of their portion of the investment.<sup>189</sup>

For example, USCIS credited a single immigrant investor with creating 1,143 jobs based on a \$1,500,000 investment.<sup>190</sup> While this investment did not create all these jobs, for adjudicative purposes (as the immigrant investor was the only one seeking the immigration benefit), all 1,143 jobs were attributed to the EB-5 investor.<sup>191</sup> In this example, the immigrant investor’s capital infusion was only a small part of a multimillion-dollar expansion of an existing business involving multiple franchises and other non-EB-5 investors whose capital also fueled the enterprise.<sup>192</sup>

This job accounting method led to abuse, forcing USCIS to modify its job creation verification methodology.<sup>193</sup> In 2010, USCIS terminated the status of the Victorville Regional Center, which was sponsored by the city

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186. GAO, *supra* note 152, at 19.

187. Immigration and Nationality Act of 1990 § 203(b)(5), 8 USC § 1153(b)(5) (2012).

188. GAO, *supra* note 152, at 19.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Kenric Ward, *SEC Raids Illinois-Based Cash-For-Visa Program*, WATCHDOG.ORG, (Apr. 3, 2013), <http://watchdog.org/77761/sec-raids-illinois-based-cash-for-visa-program>.

of Victorville, California.<sup>194</sup> USCIS determined that most of the jobs being generated at the Regional Center, including jobs at a soft drink plant and a plastic packaging factory, could not be directly attributed to a \$30,000,000 wastewater plant.<sup>195</sup> This was the first time USCIS took action to address insufficient job creation.<sup>196</sup>

Victorville collected about \$7,500,000 from 15 EB-5 investors for the construction and operation of a waste treatment plant.<sup>197</sup> The city and its Regional Center filed suit to prevent termination of its status but withdrew the suit after an administrative appeal affirmed USCIS' decision.<sup>198</sup> These investors likely failed to obtain their Green Cards, but the city refunded some of their EB-5 investment funds.<sup>199</sup>

The El Monte Transit Village project suffered a fate similar to Victorville's.<sup>200</sup> This Regional Center was designed to develop a 65-acre mixed-use development at a bus station in the city of El Monte, California.<sup>201</sup> In 2011, USCIS terminated the Regional Center status of this project when it determined that the project was "no longer promoting job creation or the kind of local economic development for which it was initially certified to do."<sup>202</sup> To further complicate the situation, the FBI arrested two principals of the LLCs formed to develop the project.<sup>203</sup> The city has since moved on to a new developer and is advancing a scaled-down version of the project: El Monte Gateway.<sup>204</sup>

California is not the only state to experience woes with the EB-5 program. The City of New Orleans sponsored a Regional Center that was operated by NobleReach-NOLA, LLC.<sup>205</sup> The private placement issued in

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194. Eng, *supra* note 24, at 10.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Rebecca Kimitch, *Federal Officials Shut Down Foreign Investment Program in El Monte*, PASADENA STAR-NEWS (Oct. 5, 2011), available at <http://www.pasadenastarnews.com/general-news/20111005/federal-officials-shut-down-foreign-investment-program-in-el-monte> (last visited Aug. 13, 2014).

202. *Id.*

203. *Id.*

204. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, NOTICE OF FINAL TERMINATION, RE VICTORVILLE REGIONAL CENTER, (Oct. 20, 2010); Rebecca Kimitch, *El Monte Breaks Ground on Long-Awaited Housing, Retail Development*, SAN GABRIEL VALLEY TRIBUNE (Feb. 27, 2014), <http://www.sgvtribune.com/government-and-politics/20140227/el-monte-breaks-ground-on-long-awaited-housing-retail-development>; Eng, *supra* note 24, at 10.

205. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, MEMORANDUM, RE: CITY OF NEW ORLEANS REGIONAL CENTER, POST-KATRINA AMENDMENT 2 (Feb. 16, 2007), available at <http://usainvestmentcorp.com/files/dhs-approval-letter.pdf>.

connection with this Regional Center investment claimed that a fund was being formed to invest in the reconstruction of New Orleans and the surrounding coastal areas devastated by Hurricanes Katrina and Rita.<sup>206</sup> EB-5 foreign investors for this venture included citizens from China, Jamaica, New Zealand, Saudi Arabia, Singapore, Turkey, and the United Kingdom.<sup>207</sup> A complaint filed in 2012 included claims of fraud and violations of fiduciary duties, including the diversion of funds to pay allegedly exorbitant consulting fees to the general partners.<sup>208</sup>

In 2013, USCIS provided further guidance with regard to job creation evaluation via another Policy Memorandum (“PM”). These instructions state that a qualifying EB-5 commercial enterprise in a Regional Center context “may create jobs indirectly through multiple investments in corporate affiliates or in unrelated entities.”<sup>209</sup> However, an EB-5 investor cannot qualify by investing directly in those multiple entities.<sup>210</sup> “Rather, the investor’s capital must still be invested in a single commercial enterprise, which can then deploy that capital in multiple ways as long as one or more of the portfolio of businesses or projects can create the required number of jobs.”<sup>211</sup>

In order to show that a new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees, an immigrant investor must submit evidence such as: (1) documentation in the form of photocopies of relevant tax records, etc.; or (2) a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the requisite full-time employment that will result, including approximate dates, within the next two years, and when such employees will be hired.<sup>212</sup>

USCIS reviews each business plan submission to determine whether, more likely than not, the plan is comprehensive and credible.<sup>213</sup> The more detailed the business plan, the more likely USCIS will consider the plan comprehensive and credible. Detailed defense of the direct or indirect job creation claims may be demonstrated by using reasonable methodologies such as quantitative input/output modeling, a form of

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206. *Id.* at 2–4.

207. Complaint, *Sumpter v. Hungerford, Jr.*, No. 2:12-cv-00717-LMA-ALC at 6–9 (E.D. La. Mar. 15, 2012), available at <http://www.eb5insights.com/files/2012/03/New-Orleans-Complaint1.pdf>.

208. *Id.* at 1–6.

209. USCIS POLICY MEMO, *supra* note 4, at 7.

210. *Id.*

211. *Id.*

212. 8 C.F.R. § 204.6(j)(4)(i) (2012).

213. 8 C.F.R. § 204.6(j) (2012).

economic impact analysis recognized by USCIS.<sup>214</sup>

### C. *Quantitative Input/Output Modeling of Economic Impact*

To project the number of jobs created by the investment a quantitative input/output model assessing economic impact must be created. USCIS requires that this model must clearly apply approved methodologies to the project-specific data.<sup>215</sup> The model quantifies and calculates “the interdependencies between different industries in an economy.”<sup>216</sup> These relationships are then used to estimate the ripple effects of EB-5 investments and determine the total economic impact of an activity—the number of direct and indirect jobs created.<sup>217</sup>

“Direct jobs are actual, identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.”<sup>218</sup> “Indirect jobs are those jobs created collaterally or that result from capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.”<sup>219</sup>

Among the economic impact models approved by USCIS to evaluate EB-5 financing, the top three are: RIMS-II (Regional Input-Output Modeling System)<sup>220</sup>; IMPLAN (Impact Analysis for Planning)<sup>221</sup>; and REMI (Regional Economic Models, Inc.).<sup>222</sup>

“Each model uses as a primary foundation the US Department of Commerce Input-Output Account tables, which were first developed in the 1970s.”<sup>223</sup> “The simplest model is RIMS and the most complex is REMI, which layers econometric modeling techniques onto the basic input-output

214. 8 C.F.R. § 204.6(j)(4)(iii) (2012).

215. Impact DataSource, *EB-5 Economics* 101, EB-5 SERVICES, <http://www.impactdatasource.com/eb-5/> (last visited Sept. 14, 2014).

216. *Id.*

217. *Id.*

218. *EB-5 Immigrant Investor, Job Creation Requirements*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor> (last visited Sept. 1, 2014) [hereinafter *Investor*].

219. *Id.*

220. *U.S. Department of Commerce Bureau of Economic Analysis Regional Input Output Modeling System (RIMS II)*, OFFICE OF THE EXEC. VICE PRESIDENT, BOSTON UNIV., <http://www.bu.edu/esi/research-methodology/rims/> (last visited Sept. 3, 2014).

221. *Products*, IMPLAN, [http://implan.com/index.php?option=com\\_content&view=article&id=889&Itemid=508](http://implan.com/index.php?option=com_content&view=article&id=889&Itemid=508) (last visited Aug. 13, 2014) (Used by IIUSA for *Economic Impacts of the EB-5 Program 2012: Economic Development Program for the 21st Century*).

222. *The REMI Model*, REGIONAL ECONOMICS MODELS, INC., <http://www.remi.com/the-remi-model> (last visited Aug. 13, 2014).

223. AKRF, INC., IMPLAN, RIMS-II, AND REMI ECONOMIC IMPACT MODELS 1 (2013), available at <http://www.ilw.com/seminars/JohnNeillCitation.pdf> (last visited Sept. 3, 2014).

modeling, incorporating the IMPLAN system.”<sup>224</sup>

The RIMS and IMPLAN are the two most popular models used for EB-5 studies.<sup>225</sup> The U.S. Bureau of Economic Analysis, under the U.S. Department of Commerce, produces RIMS.<sup>226</sup> “IMPLAN is an economic impact modeling system created and provided by MIG Inc., a private company.”<sup>227</sup>

Economic impact models generate industry and geographic specific economic multipliers to apply to economic activity—output, employment, workers’ earnings, and so on.<sup>228</sup> The two most influential factors that affect the size of the resulting impact are “impact area geography” and “NAICS code.”<sup>229</sup> *Impact area geography*—Larger geographical areas or more populated areas tend to result in larger multipliers and therefore greater overall job creation. The urge to expand the geographical area must be balanced against the ability to provide justification for the impact area. The impact area must align with the geographical areas from which major inputs are purchased and/or where employees reside.

*NAICS Code*—The NAICS code refers to the North American Industry Classification System code, which classifies the economic activity with its corresponding direct/indirect job multiplier factor. Manufacturing industries tend to have larger multipliers than other industries, for example retail or food service. Ultimately, the business activity will dictate the appropriate NAICS code classification.<sup>230</sup>

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224. *Id.*

225. Impact DataSource, *supra* note 215.

226. *Id.*

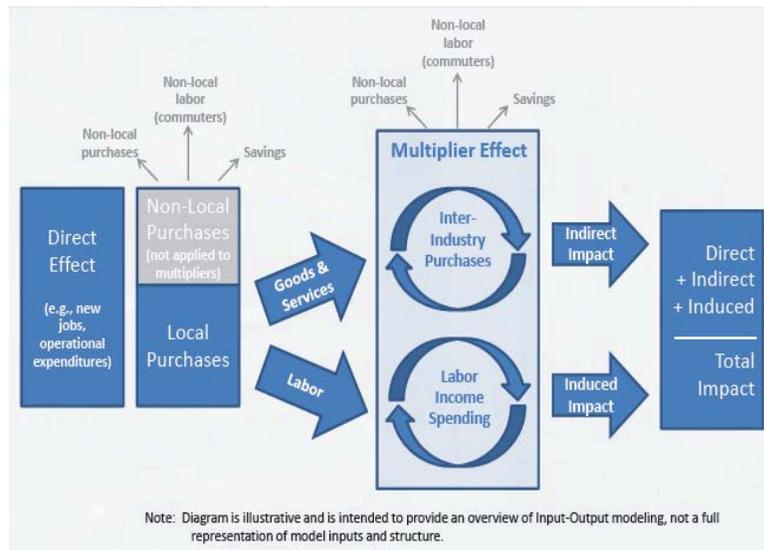
227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

IMPLAN, RIMS-II, and REMI Economic Impact Models: Comparison  
in Context of EB-5 Analysis<sup>231</sup>



#### D. Time Frame

The EB-5 program requires that the jobs be created within two years.<sup>232</sup> Even with a well-received economic impact analysis and expeditious USCIS adjudication, most conventional commercial development projects are hard pressed to put enough people to work quickly enough to satisfy the requirements of the EB-5 program. As we learned to our dismay in implementing the American Recovery and Reinvestment Act of 2009 (“ARRTA”),<sup>233</sup> even “shovel-ready” projects—those that virtually everyone thought would put people to work right away—can take longer than expected to break ground.<sup>234</sup> Investments in worthwhile long-term projects, on the other hand, were often rushed to meet arbitrary deadlines, resulting in shoddy outcomes that tarnished the projects’ image.<sup>235</sup>

231. AKRF, Inc., *supra* note 223, at 4.

232. 8 C.F.R. § 204.6 (j)(4)(i)(B) (2012).

233. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (ARRTA is also known as Division B of the American Recovery and Reinvestment Act of 2009, which is commonly referred to as ARRA or “the Stimulus Bill”).

234. Michael Grabell, *Op-Ed., How Not to Revive an Economy*, N. Y. TIMES, Feb. 11, 2012, at SR8.

235. Garrett Jones & Daniel M. Rothschild, *No Such Thing as Shovel Ready: the Supply Side of the Recovery Act*, MERCATUS CENTER AT GEO. MASON U. 10 (Sept. 2011), available at

## IV. EB-5 PROS

A. *General Factors*

Though issued as an ex poste response to the Hurricane Sandy disaster, President Obama's November 1, 2013 Executive Order ("EO") "Preparing the United States for the Impacts of Climate Change" dovetails well with the proposed ex ante renovation of EB-5 as an instrument of sustainable capitalism.<sup>236</sup> Specifically, section 2 of the EO's directive was to,

[M]oderniz(e) Federal Programs to Support Climate Resilient Investment. (a) To support the efforts of regions, States, local communities, and tribes, all agencies, consistent with their missions and in coordination with the Council on Climate Preparedness and Resilience (Council) established in section 6 of this order, shall:

(i) identify and seek to remove or reform barriers that discourage investments or other actions to increase the Nation's resilience to climate change while ensuring continued protection of public health and the environment; . . .

(iii) identify opportunities to support and encourage smarter, more climate-resilient investments by States, local communities, and tribes, including by providing incentives through agency guidance, grants, technical assistance, performance measures, safety considerations, and other programs, including in the context of infrastructure development as reflected in Executive Order 12893 of January 26, 1994 (Principles for Federal Infrastructure Investments), my memorandum of August 31, 2011 (Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review), Executive Order 13604 of March 22, 2012 (Improving Performance of Federal Permitting and Review of Infrastructure Projects), and my memorandum of May 17, 2013 (Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures).<sup>237</sup>

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[http://mercatus.org/sites/default/files/publication/No\\_such\\_thing\\_as\\_shovel\\_ready\\_WP1118.pdf](http://mercatus.org/sites/default/files/publication/No_such_thing_as_shovel_ready_WP1118.pdf); *The Myth of "Shovel Ready" Jobs*, NATIONAL CENTER FOR POLICY ANALYSIS (Sept. 8, 2011), [http://www.ncpa.org/sub/dpd/?Article\\_ID=21066](http://www.ncpa.org/sub/dpd/?Article_ID=21066).

236. OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, EXECUTIVE ORDER – PREPARING THE UNITED STATES FOR THE IMPACTS OF CLIMATE CHANGE (2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/11/01/executive-order-preparing-united-states-impacts-climate-change>.

237. *Id.*

Other important positive factors that make EB-5 investments via a Regional Center program an ideal investment vehicle for foreign investors are: priority standing within the immigration process resulting in an accelerated path to Green Card procurement; freedom to live anywhere in the U.S. once a conditional Green Card has been granted; and the ability to make a passive investment with no required direct management responsibilities (other than a limited partner policy making role).<sup>238</sup>

### *B. Program Growth*

Estimates for spending associated with EB-5 investor households for 2010-2011 indicated that these investors contributed over \$2,600,000,000 to the U.S. economy and supported over 33,000 local jobs.<sup>239</sup> In February 2014, a peer reviewed report, prepared for a national EB-5 trade association, estimated that spending associated with EB-5 investors contributed \$3,390,000,000 to U.S. GDP and supported over 42,000 U.S. jobs during 2012.<sup>240</sup> This represents a 30% increase in EB-5 investments and a 27% increase in jobs created in a single fiscal year. Based on preliminary data, program growth continues to accelerate, with 6,678 EB-5 visas issued by USCIS in Fiscal Year 2012 and 7,312 in Fiscal Year 2013.<sup>241</sup> Thus, it appears that the program may soon reach its full congressionally authorized annual quota of 10,000 visas. At full utilization, it is estimated that the EB-5 program will contribute \$6,600,00,000 to the U.S. economy annually and support 83,000 local jobs for U.S. citizens.<sup>242</sup> Linear projections indicate that, if the government expands the program beyond the annual quota, it can anticipate proportionate growth in investment and jobs.

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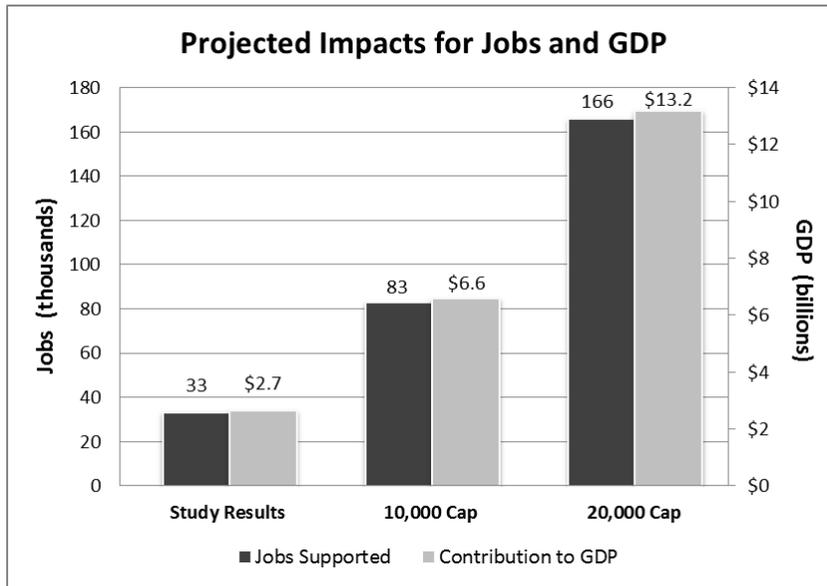
238. Ivener and Fullmer, *supra* note 64, at 99.

239. IMPLAN, [http://implan.com/index.php?option=com\\_content&view=article&id=877:eb-5-announcement&catid=149:front-pages](http://implan.com/index.php?option=com_content&view=article&id=877:eb-5-announcement&catid=149:front-pages) (last visited Sept. 28, 2014).

240. AILA/IIUSA *EB-5 Report Highlights Economic Impacts, Security Requirements of EB-5 Program*, IIUSA (Mar. 31, 2014), <https://iiousa.org/blog/press-room/ailaiiusa-eb5-report-highlights-economic-impacts-security-requirements-eb5-program/>.

241. BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE 2013, TABLE VI (PART IV), PREFERENCE VISAS ISSUED, FISCAL YEAR 2013 (2014), *available at* <http://www.usainvestco.com/blog/wp-content/uploads/2014/02/FY13AnnualReport-TableVI-PartIV.pdf>; BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE 2012, TABLE VI (PART I), PREFERENCE VISAS ISSUED, FISCAL YEAR 2012 (2013), *available at* <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2012AnnualReport/FY12AnnualReport-TableVI.pdf>.

242. IMPLAN, *supra* note 221.

Projected Job Creation and Subsequent Raises in GDP<sup>243</sup>

Common sense and life experience indicate that straight linear projections are of limited value in predicting future results. Below, the article will explore how an expanding EB-5 program might be managed to optimize both income and value.

### *C. EB-5 is a Bargain*

#### 1. Historic Pricing

Since its inception in 1990, the price associated with the EB-5 immigrant investor program has remained fixed at one million dollars, with a qualifying Regional Center at-risk investment set at \$500,000. Based on Bureau of Labor Statistics inflation data, \$500,000 in 2014 has the same buying power as \$270,544 in 1990.<sup>244</sup> Expressed another way, \$500,000 in 1990 has the same buying power as \$924,064 in 2014.<sup>245</sup>

243. *Id.*

244. *Inflation Calculator*, DOLLARTIMES, <http://www.dollartimes.com/calculators/inflation.htm> (last visited Sept. 3, 2014) (showing annual inflation over this period was 2.59%).

245. *Id.*

Thus, at the \$500,000 level, and given improving and more consistent adjudication, many investors appear to be concluding that an EB-5 Regional Center petition is an increasingly affordable option for obtaining permanent residence in the U.S.

## 2. Present Value

Among the western developed democracies that offer citizenship for sale, the U.S. appears at the lower end of the spectrum in terms of price per visa.

### International Comparison of Visa Prices<sup>246</sup>

Nation	Euro	Pounds	Canada Dollars	US Dollars
United States (TEA)				\$500,000
Macedonia	€400,000			\$548,600
Spain (EU)	€500,000			\$685,75
Canada (Canada suspended its national program in July 2012)			800,000CAS	\$724,638
Malta (EU)	€546,000			\$78,839
United Kingdom (EU)		£1,000,000		\$1,658,900

## 3. Price/Value Optimization

As the EB-5 program begins to reach optimal utilization at 10,000 visas per year, Congress will be confronted with another contentious, yet not altogether unpleasant, dilemma: whether to increase the number of visas in the EB-5 program and/or increase the price associated with participation in the program.

An alternative to either raising the bridge or lower the river is available via a “third way” of pricing the EB-5 program: an auction. This method would have two clear advantages: (1) the number of visas could be easily capped, and (2) they would sell for an optimal market-driven price. In the interest of revenue-maximization the federal government could institute an

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246. Tom Meltzer, *Want to Buy Citizenship? It Helps If You're One of the Super-Rich*, Posted in *ShortcutsBlog*, THE GUARDIAN (Dec. 10, 2013, 10:34 AM), <http://www.theguardian.com/uk-news/shortcuts/2013/dec/10/want-to-buy-citizenship-super-rich-malta-passports>.

auction based on single sealed bids. Under this approach a ceiling (“cap”) of 10,000 visas would be auctioned off with a reserve price (a “floor”) of \$1,000,000 to \$500,000 (based on existing program investment criteria) but with the winners paying a not-to-be-disclosed premium above that.

Under this scenario, optimal utilization based on rising demand and improving USCIS internal processes in effect guarantees the projected minimum of \$6,600,00,000 associated with a fully implemented 10,000 annual visa program, plus whatever premium the bidders place on assuring their selection for participation in the program. This enables Congress to establish a mechanism for expanding the program as a function of immigration and economic policy that integrates market fluctuation.

#### 4. Equitable Division

In the interest of fair and equitable distribution of the infusion of immigrant investor wealth, the initial distribution of these 10,000 visas among the states could be prorated based on population and/or economic activity. Regional Centers and private developers would still compete for these visas by providing the most attractive projects. Unused visas could be redistributed among the states via a national EB-5 Transfer Development Authority (“TDA”). This process is similar to those established by states and municipalities for the equitable distribution of Transferable Development Rights, and is used to provide effective and flexible land use control.<sup>247</sup>

For example, based on calculations using U.S. Department of Commerce, Bureau of Economic Analysis data, Vermont’s Real Total GDP was approximately .18% of the U.S.’ in 2012.<sup>248</sup>

#### Vermont’s Percentage of the USA’s GDP

	GDP (Millions of chained 2005 Dollars)	% of Total
Vermont	\$27,723	0.18%
U.S.	\$15,526,715	100.00%

247. Denise L. Evans & O. William Evans, *Transferable Development Rights*, FREE DICTIONARY, <http://financial-dictionary.thefreedictionary.com/TRANSFERABLE+DEVELOPMENT+RIGHTS> (last visited Aug. 13, 2014).

248. *Widespread But Slower Growth in 2013, Advance 2013 and Revised 1997–2012 Statistics of GDP by State, Related Links, Tables Only*, BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, [http://www.bea.gov/newsreleases/regional/gdp\\_state/gsp\\_newsrelease.htm](http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm) (last visited Aug. 13, 2014).

Thus, Vermont's pro rata guaranteed share of the annual EB-5 visas would be 18 (0.018 x 10,000), with a conservative minimum annual value of \$9,000,000 (18 x \$500,000 minimum per EB-5 visa = \$9,000,000). Based on total tax collections (federal and state) in Vermont for Fiscal Year 2013 of \$2,878,930,000, this EB-5 revenue would represent a 3% increase in state revenue at no cost to taxpayers.<sup>249</sup> As posited above, any unused Vermont EB-5 visas could be re-distributed through a national EB-5 TDA.

#### *D. EB-5 in Vermont*

In Fiscal Years 2012-2013 there were four EB-5 Regional Center projects certified by Vermont ACCD: (1) Jay Peak Resort: a \$225,000,000 partnership, led by Bill Stenger and Ari Quiros, which includes a mixed use ski resort, water park, accommodations, and tourist amenities project; (2) AF Cell Medical: a \$10,000,000 biotech company that provides amniotic tissue membrane for surgical use; (3) Trapp Family Lodge: an historic resort hotel; and (4) EB-5 American Dream Fund: the resurrection of DreamLife.<sup>250</sup>

In addition to the projects listed above, in March 2013, the *Burlington Free Press* reported the following Regional Center projects utilizing EB-5 investments in Vermont: (1) Burke Mountain, a \$150,000,000 Stenger-Quiros partnership investing in hotel accommodations and amenities; (2) Newton, a \$160,000,000 downtown block including a hotel and conference center; (3) AnC Bio, a \$110,000,000 biotech company; (4) Country Home Products (DR Power Equipment), which raised \$12,000,000 in EB-5 investments over a three year period (2009-2012) as a qualified "troubled business," and which manufactures log splitters, lawnmowers, brush mowers, chippers, stump grinders, power tillers, and more under the DR Power Equipment name brand; and (5) Sugarbush Resort, raised \$20,000,000 in EB-5 investments over a three-year period (2009-2012) as another qualified "troubled business."<sup>251</sup>

To round out a report of EB-5 activity in Vermont, the following projects have previously expressed interest in, but have not yet availed themselves of the program: (1) Quechee Lakes, (2) Seldon Technologies,

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249. *State Government Tax Collections: 2013, 2013 Annual Survey of State Government Tax Collections*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

250. DEPARTMENT OF ECON., HOUSING AND CMTY. DEV., FISCAL YEAR 2014 BUDGET, STRATEGIC OVERVIEW AND PROGRAM PERFORMANCE NARRATIVE 8 (2014), available at [http://www.leg.state.vt.us/jfo/appropriations/fy\\_2014/Agency%20of%20Commerce%20-%20DEHCD%20-%20Narrative.pdf](http://www.leg.state.vt.us/jfo/appropriations/fy_2014/Agency%20of%20Commerce%20-%20DEHCD%20-%20Narrative.pdf); D' Ambrosio, *supra* note 52.

251. D' Ambrosio, *supra* note 52.

and (3) WhistlePig.<sup>252</sup>

Quechee Lakes is a multi-million dollar investment in high-end residential development by Taurus New England Investments, LLC, a privately held Boston real estate company that bought The Quechee Lakes Co. in 2005.<sup>253</sup> Taurus plans to build 60 residential units as well as two 18-hole golf courses, 12 tennis courts, 35 miles of trails, and a polo field.<sup>254</sup>

Seldon Technologies, operating out of Windsor, was approved for \$20,000,000 in EB-5 financing to invest in research, development, and expansion.<sup>255</sup> Seldon creates water purification systems for both military and residential use.<sup>256</sup>

WhistlePig is a small whiskey company located on a 500-acre farm in Shoreham that grows grain and also raises livestock.<sup>257</sup> Although the company has been approved as an EB-5 project, WhistlePig has not yet “pursued anything related to EB-5.”<sup>258</sup>

On its state website, Vermont notes that, “[t]he ACCD Vermont Regional Center projects have shown great success to investors with a 100% petition approval to date.”<sup>259</sup>

#### V. SUSTAINABLE CAPITALISM AS ECOLOGICAL MODERNIZATION<sup>260</sup>

Ecological Modernization (“EM”) is a term of environmental academic discourse and policy strategy. EM manifests itself in a school of thought that argues regenerative engagement with the environment yields economic benefits.<sup>261</sup> The underlying concepts of EM have their origins in the

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *EB-5 Investors, The EB-5 Visa Investment Program - The Vermont Regional Center*, VT. AGENCY OF COM. & CMTY. DEV., DEP’T OF ECON. DEV., [http://accd.vermont.gov/business/relocate\\_expand/eb5/investors](http://accd.vermont.gov/business/relocate_expand/eb5/investors) (last visited Aug. 13, 2014).

260. WILLIAM LITTLE ET AL., *OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES*, 2205 (Onions, C.T. ed., 3rd ed. 1973) (explaining that the word sustainability is derived from the Latin *sustinere*. *Tenere*, which means “to hold”, *sus* means “up,” and *sustain* can mean “maintain,” “support,” or “endure”).

261. JOHN T. LYLE, *REGENERATIVE DESIGN FOR SUSTAINABLE DEVELOPMENT* 311 (John Wiley & Sons, Inc. ed. 1994) (explaining that “regenerative technologies tend to employ more people; that is, they involve more jobs for equal amounts of capital invested than do industrial technologies serving the same functions. This is especially so in the areas of energy, agriculture, and waste management. At the same time, being generally smaller in scale, regenerative technologies require lower levels of capital investment for each enterprise”—or more diffuse investment).

pioneering work of Maarten Hajer,<sup>262</sup> the present head of the PBL Netherlands Environmental Assessment Agency.<sup>263</sup>

EM is an integral component of sustainable capitalism, which is “a long-term and responsible form of capitalism” that posits a pragmatic solution-driven approach to development.<sup>264</sup> This strategy would encourage the construction of infrastructure to anticipate climate vulnerability. As such, it carries a positive message of the current institutional order being able to accommodate the challenge of ecological sustainability.<sup>265</sup>

Capitalism’s strength is grounded in wealth creation based on efficient allocation of resources—matching supply and demand.<sup>266</sup> This in turn unlocks human potential “with ubiquitous, organic incentives that reward hard work, ingenuity, and innovation.”<sup>267</sup> Sustainable capitalism builds upon this foundation by modifying the system’s inherent weaknesses. These weaknesses include: (1) short-termism, (2) over-reliance on GDP growth as a primary metric of prosperity, and (3) diverting wealth into shadow banking and financial engineering and away from addressing real needs.<sup>268</sup> Sustainable capitalism, integrating EM, and provides a framework for organizing economic activity. This structure maximizes long-term economic value by considering all costs and integrating Environmental Social Governance (“ESG”) criteria<sup>269</sup> into economic decision-making processes.<sup>270</sup>

In the U.S., two of sustainable capitalism’s most visible proponents are Michael Braungart and William McDonough. Their 2002 book, *Cradle to*

262. See generally HAJER, M.A., *THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNIZATION AND THE POLICY PROCESS* (Oxford Univ. Press ed. 2005).

263. Home, PBL NETHERLANDS ENVTL. ASSESSMENT AGENCY, <http://www.pbl.nl/en> (last visited August 13, 2014); Maarten Hajer, PBL NETHERLANDS ENVTL. AGENCY, <http://www.pgl.nl/en/aboutpbl/employees/maarten-hajer> (last visited Aug. 29, 2014).

264. Al Gore & David Blood, Op-Ed., *Toward Sustainable Capitalism*, WALL STREET J., <http://online.wsj.com/articles/SB10001424052748704853404575323112076444850> (last updated June 24, 2010).

265. Gyoergy Pataki, *Ecological Modernization as a Paradigm of Corporate Sustainability*, 17 SUSTAINABLE DEV. 2, 82–91 (2009), available at <http://search.proquest.com/docview/21384299?accountid=84147>.

266. Gore & Blood, *supra* note 264.

267. *Id.*

268. See generally *id.* (explaining some of the weaknesses of capitalism).

269. *Environmental, Social and Governance (ESG) Criteria*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp> (last visited Aug. 13, 2014) (defining an ESG as “a set of standards for a company’s operations that socially conscious investors use to screen investments. Environmental criteria look at how a company performs as a steward of the natural environment. Social criteria examine how a company manages relationships with its employees, suppliers, customers and the communities where it operates. Governance deals with a company’s leadership, executive pay, audits and internal controls, and shareholder rights. Investors who want to purchase securities that have been screened for ESG criteria can do so through socially responsible mutual funds and exchange-traded funds.”).

270. GENERATION INVESTMENT MANAGEMENT LLP, SUSTAINABLE CAPITALISM 2, 6 (2012), available at <http://www.generationim.com/sustainability/report>.

*Cradle: Remaking the Way We Make Things*, is widely acknowledged as one of the most important environmental manifestos of our time.<sup>271</sup>

Building upon this concept, this article proposes expanding EB-5 as an instrument of ethically financing sustainable capitalist development. This method provides access to an untapped reserve of foreign investors who might welcome the opportunity to secure their “green cards” via investment as an alternative to conventional private sector real estate development. These alternative projects would be rooted in environmental development policies that manifest in regenerative community based sustainable capitalism. Thus re-conceptualized, EB-5 becomes a financial engine for the application of sustainable capitalism; a model for application of domestic anticipatory design, rapid prototyping, and construction of green infrastructure in the United States. Set upon this bedrock ethical foundation, the reanimated program becomes one that privileges jobs per dollars invested, and redefines “return on investment.” A welcome by-product might be the elevation of EB-5 above the scrum of partisan politics, with the program becoming a beacon on the course towards a more enlightened immigration policy. This demonstrates that governance via rational policy making is possible.

An ideal application of this new EB-5 would be to assist state and municipal government authorities in fulfilling environmental protection mandates, specifically for compliance with Phase 2 of the National Pollutant Discharge Elimination System (“NPDES”) permit program for Municipal Separate Storm Sewer Systems (“MS4”).<sup>272</sup> These MS4 permits require holders to implement storm water control and flow restoration practices by the end of the first permit term, which is typically a 5-year period.<sup>273</sup>

These are ideal EB-5 investor projects involving low cost, low technology storm water quantity, and quality installations to regenerate and sustain an ecologically healthy environment and create perpetual local employment. EPA states that there are approximately 6,700 Phase II MS4s spread throughout all fifty states.<sup>274</sup> An additional benefit of this application is the development of a scalable suite of financing, implementation, and

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271. WILLIAM McDONOUGH & MICHAEL BRAUNGART, *CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS* (North Point Press ed. 2002).

272. The Clean Water Act of 1972, 33 U.S.C. § 1342(p) (2012).

273. OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, *STORMWATER PHASE II FINAL RULE, AN OVERVIEW 3* (2000), available at <http://www.epa.gov/npdes/pubs/fact1-0.pdf>.

274. *Municipal Separate Storm Sewer System (MS4) Main Page*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm> (last updated July 14, 2014).

stewardship of Best Management Practices (“BMPs”) for regenerative projects and sustainable development. This is discussed further below.

## VI. PUBLIC PRIVATE PARTNERSHIPS (“PPPs”)

For the purpose of administering the EB-5 program, USCIS defines a qualifying commercial enterprise as “any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to: a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, and business trust or other entity, which may be publicly or privately owned”<sup>275</sup>

“This definition includes a commercial enterprise consisting of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business.”<sup>276</sup>

The proposed evolution of the EB-5 program as an instrument for sustainable capitalism requires the creation of ethically based, and pragmatically organized relationships between public sector bodies, non-profit/not-for-profit organizations, and for-profit private entities. PPPs are an ideal vehicle for bringing about this objective because they emphasize value for money over the lifetime of a project, rather than only the lowest first cost.<sup>277</sup> This encourages a focus on the cost implications of a whole life cycle.<sup>278</sup> Combining a mature EB-5 program with a green application of the PPP agenda has the potential to revolutionize the provision of public infrastructure throughout the nation.

In a PPP, design, construction, financing, operations, and maintenance are combined under one contractor, rather than as separate functions as occurs with traditional public procurements.<sup>279</sup> This integration (“bundling”) within a long-term PPP framework provides financial motivation for all stakeholder parties to think beyond the design stage and build energy-reducing and waste-minimizing/harvesting features.<sup>280</sup> This methodology may cost more initially but can result in lower operating costs, delivering cost effectiveness and revenue over time.<sup>281</sup>

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275. *Investor*, *supra* note 218.

276. *Id.*

277. DARRIN GRIMSEY & MERVYN K. LEWIS, PUBLIC PRIVATE PARTNERSHIPS: THE WORLDWIDE REVOLUTION IN INFRASTRUCTURE PROVISION AND PROJECT FINANCE 1 (2004), *available at* <http://blog.pucp.edu.pe/media/avatar/757.pdf>.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

PPPs are strongly incentive-compatible contracting arrangements that allow private parties to participate in, or provide support for, the provision of public infrastructure.<sup>282</sup> A PPP project results in a contract for a private entity to deliver public infrastructure-based services. These contracts take the form of multi-year design-build-finance-operate (“DBFO”) agreements that are awarded to private sector entities in a long-term partnership arrangement.<sup>283</sup>

In the service of sustainable capitalism, this article proposes project-level partnerships focused on specific sites and/or situations, such as storm water quantity and quality control mechanisms, to assist communities in complying with EPA’s NPDES MS4 requirements.

## VII. VERMONT AS LABORATORY

Nationally, nonpoint source pollution is the leading cause of water quality degradation.<sup>284</sup> Vermont Department of Environmental Conservation (“DEC”)<sup>285</sup> Commissioner David Mears regards water quality improvement as his department’s “highest priority.”<sup>286</sup> In unparalleled government-speak, EPA defines nonpoint sources of pollution as “sources that do not meet the Clean Water Act’s legal definition of point source.”<sup>287</sup> A more useful understanding of nonpoint source water pollution is provided via examples that include sheet runoff from developed areas, construction sites, and agricultural operations.

Many streams and rivers in Vermont’s urbanized areas (“UA’s”) suffer from polluted runoff from impervious surfaces such as buildings, parking lots, and roads, all of which contain metals, oil, grease, and nutrients. In addition, this runoff can cause serious erosion and cause damage to fish and wildlife living in and along streams. This culminates in negative impacts to recreational and fishing opportunities. The sediment and nutrients associated with this erosion wash downstream, and eventually much of this

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282. *Id.* at 6.

283. *Id.* at 1.

284. *Nonpoint Source Pollution: The Nation’s Largest Water Quality Problem*, U.S. ENVTL. PROT. AGENCY <http://water.epa.gov/polwaste/nps/outreach/point1.cfm> (last updated Aug. 22, 2014).

285. *Welcome to the DEC*, VT. DEP’T OF ENVTL. CONSERVATION, <http://www.anr.state.vt.us/dec/dec.htm> (last visited Aug. 13, 2014) (discussing the DEC’s responsibilities of collecting and analyzing data, monitoring the quality of the air, as well as water and ecosystem health. It is also charged with preserving, enhancing, restoring and conserving Vermont’s natural resources, and protecting human health for the benefit of current and future generations.).

286. Gail Osherenko, *Understanding the Failure to Reduce Phosphorous Loading in Lake Champlain: Lessons for Governance*, 15 VT. J. OF ENVTL. LAW 323, 351 (2014), available at [http://vjel.vermontlaw.edu/files/2014/01/Issue-2\\_Osherenko.pdf](http://vjel.vermontlaw.edu/files/2014/01/Issue-2_Osherenko.pdf).

287. *What is Nonpoint Source Pollution?*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/nps/whatis.cfm> (last visited Aug. 13, 2014).

pollution impacts Vermont's Lake Champlain Watershed.

In December 2012, the Vermont DEC issued an updated MS4 general permit requirement.<sup>288</sup> This permit, designed to address pollution from storm water runoff, applies to thirteen municipalities and three institutional entities in the Lake Champlain Watershed.<sup>289</sup> "Communities already subject to the MS4 permit include Burlington, Colchester, Essex, Essex Junction, Milton, Shelburne, South Burlington, Williston and Winooski, as well as the non-municipal entities of the Burlington International Airport, University of Vermont, and Vermont Agency of Transportation within the geographical boundaries of these municipalities."<sup>290</sup> "In addition to these communities, which will have to meet the new requirements of the updated permit, the DEC has designated Rutland town and city, and St. Albans town and city as new MS4s subject to the requirements of the permit."<sup>291</sup>

A Water Quality Remediation, Implementation, and Funding Report, presented to Vermont's DEC in January 2013, estimated the average annual cost of reducing nonpoint source pollution at \$91,799,000 annually over ten years. By all evidence, this total exceeds normal expenditures for nonpoint source reduction.<sup>292</sup> This same Report states that although storm water, drinking water, and wastewater infrastructures represent significant costs for municipalities, the annual costs associated with these systems are "unknown" and the current lack of information represents a "substantial planning challenge."<sup>293</sup>

## VIII. THE PLAN

### A. Phase I—Initiating

To establish a pilot program for utilizing EB-5 investments to assist state and municipal government authorities in complying with federally mandated state NPDES MS4 Phase 2 Municipal Storm Water Permit

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288. *Vermont Department of Environmental Conservation Issues Permit to Reduce Water Pollution in Vermont Communities*, VTDIGGER (Dec. 5, 2012), <https://vtdigger.org/2012/12/05/vermont-department-of-environmental-conservation-issues-permit-to-reduce-water-pollution-in-vermont-communities/>.

289. *Id.*

290. *Id.*

291. *Id.*

292. VT. DEP'T OF ENVTL. CONSERVATION, WATER QUALITY REMEDIATION, IMPLEMENTATION AND FUNDING REPORT 49 (Jan. 14, 2013), [http://www.watershedmanagement.vt.gov/erp/docs/erp\\_act138report](http://www.watershedmanagement.vt.gov/erp/docs/erp_act138report) (last visited Aug. 13, 2014).

293. *Id.* at 23.

requirements, Vermont's ACCD and DEC must closely cooperate.<sup>294</sup> In addition, the program can capitalize on the inherently iterative PPP process to develop a suite of financing, implementation, and stewardship practices that can serve as a model for future application to regenerative projects and sustainable development nationwide.

### B. Phase II—Prototyping

Developers should use projects kick-started by EB-5 financing to develop and fine tune prototypical PPP BMP mechanisms for implementation of “Structural” Low Impact Development (“LID”) solutions<sup>295</sup> to meet mandated EPA requirements for “regulated small” MS4’s in compliance with Total Maximum Daily Load (“TMDL”) storm water management criteria.<sup>296</sup>

To begin, developers should select a qualifying municipality/entity for prototypical design-build execution of high priority stormwater management projects. This includes adopting basin-wide stormwater flow management strategies, and protecting and restoring stream side vegetation via daylighting (restoring down-cut stretches of stream).<sup>297</sup> These

294. VT DEP’T OF ENVTL. CONSERVATION, STRATEGIC PLAN 2013-2015, at 13–15, available at <http://www.anr.state.vt.us/dec/co/documents/DECStrategicPlan2013-2015.pdf>; see generally OFFICE OF WATER, *supra* note 273.

295. DEP’T OF DEF., UNIFIED FACILITIES CRITERIA (UFC): LOW IMPACT DEV., 6–7 (Nov. 15, 2010), available at [http://www.wbdg.org/ccb/DOD/UFC/ufc\\_3\\_210\\_10.pdf](http://www.wbdg.org/ccb/DOD/UFC/ufc_3_210_10.pdf); *Water: Best Mgmt. Practices, Menu of BMP Background*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/npdes/swbmp> (last visited Aug. 13, 2014); *Low Impact Dev. (LID)*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/green> (last visited Aug. 13, 2014) [hereinafter *LID*] (defining Structural LID solutions, examples of which include: storage practices such as wet ponds and extended-detention outlet structures; filtration practices such as grassed swales, sand filters, and filter strips; and infiltration practices such as infiltration basins and infiltration trenches).

296. 40 C.F.R. § 122.34 (1999); OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE, REGULATED SMALL MS4S 4-1 to 4-49 (2000), available at <http://nepis.epa.gov/Exe/ZyNET.exe/P10010KT.TXT?ZyActionD=ZyDocument&CliCli=EPA&Index=2000+Thru+2005&Docs=&Query=&Time=&EndTime=&SearchMSearc=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieExtQ=0&XmlQuery=&File=D%3A%5CzyCzyfi%5CIndex%20Data%5C00thru05%5CCTx%5C00000023%5CP10072KT.txt&UseU=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7Cf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActiZyA&BackDesc=Results%20page&MaximMaximum=1&ZyEntry=1&SeekPage=x&ZyZyPU> (last visited August 13, 2014).

297. RICHARD PINKHAM, ROCKY MOUNTAIN INSTITUTE, DAYLIGHTING: NEW LIFE FOR BURIED STREAMS iv–vi (2000), available at [http://www.rmi.org/Knowledge-Center/Library/W00-32\\_DaylightingNewLifeBuriedStreams](http://www.rmi.org/Knowledge-Center/Library/W00-32_DaylightingNewLifeBuriedStreams). This report reviews the benefits, challenges, and costs of exposing formerly culverted or buried streams. Water quality specialists, engineers, and officials recommend recreating more natural channels for the streams by means of evolving methods for restoring streams via “daylighting,” or “puffing” buried culverts out of the ground. The suite of techniques includes meandering turns, natural pools for insects and fish, stabilized stream banks, small

procedures essentially rebuild floodplains. Further examples of such “shovel ready” projects could be planting trees along public rights-of-way, planting on other public lands, and by creating green belts and mini parks along stream, river, lake, and pond frontages. The list of simple acts that can solve watershed problems includes breaking up pavement, using decomposed granite and other porous surfaces, and planting site-appropriate trees. Design, installation, and maintenance of bioswales, rain/gravel gardens, infiltration galleries, and other low-impact BMPs help to reduce runoff, recharge the water table, and improve the quality of storm water entering local water bodies.

The MS4 permit mandates the generation and adoption of existing, as well as new, approaches to improve dry weather and storm water runoff.<sup>298</sup> At their essence, the strategies suggested above incorporate naturalistic BMPs that mimic a site’s undeveloped hydrologic processes. These cost-effective ways to retrofit existing sites, engineer new solutions to reduce storm water runoff, and improve the water quality of run-off that does enter the watershed become the models upon which to base scaled up applications.

### C. Phase III—Scaling Up

Next, developers should scale up and road test the PPP model via phased application to Vermont’s thirteen municipalities and three institutional entities, as defined above. The statewide design, implementation, and maintenance of these programs can and should be paid for on a “pay-as-you-go” (“PayGo”) basis, with continued kick-start funding provided by the EB-5 program.<sup>299</sup> This will enable the EB-5 program to fulfill Congress’ promulgating intent; further stimulating the U.S. economy through job creation and capital investment by foreign investors. The EPA endorses the PayGo concept and offers the following mechanisms as sources of “permanent financing” for stormwater management projects such as those contemplated in this article:<sup>300</sup>

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wetlands and increased floodplain areas to help prevent flooding and filter pollutants from runoff. Greenways expand these restored waterways for pedestrian and cyclist enjoyment, as well as educational opportunities.

298. *LID*, *supra* note 295.

299. TAX POLICY CTR., URBAN INST. AND BROOKINGS INST., THE TAX POLICY BRIEFING BOOK: A CITIZEN’S GUIDE FOR THE 2012 ELECTION AND BEYOND at I-2-6 (2007), available at <http://www.taxpolicycenter.org/upload/Background/I-2TheBudgetProcess.final.pdf>.

300. U.S. ENVTL. PROT. AGENCY NEW ENGLAND, FUNDING STORMWATER PROGRAMS, EPA 901-F-09-004 at 1–2 (Apr. 2009), available at <http://water.epa.gov/infrastructure/greeninfrastructure/upload/FundingStormwater.pdf>.

- Service Fees (including Stormwater Utilities)
- Property Taxes/General Fund (a Pigovian tax<sup>301</sup> based on a unit charge approach for “municipal environmental services.”)<sup>302</sup>
- Special Assessment Districts or Regional Funding Mechanisms
- System Development Charges (“SDCs”)
- No and Low-Interest Loans (under the current law, affected communities will be eligible to apply for zero interest loans to defray the costs of planning efforts.)<sup>303</sup>
- Grants<sup>304</sup>
- Tax Increment Financing (“TIF”)
- Stormwater Utilities

Highlighted for the purposes of this article are TIF and Stormwater Utilities. TIF is a method for financing the costs of development, primarily for the costs associated with public infrastructure.<sup>305</sup> It relies upon future gains in the taxes of surrounding properties to subsidize current improvements.<sup>306</sup> The Natural Resources Defense Council (“NRDC”) has determined that “green infrastructure,” and specifically stormwater management features such as those proposed in this article, creates economic value.<sup>307</sup> The NRDC lists the benefits associated with this type of infrastructure for private and commercial property owners. This list includes increased rental and property values, increased retail sales, energy savings, and stormwater fee credits, along with other financial incentives.<sup>308</sup>

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301. *Pigovian Tax*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/pigoviantax.asp> (last visited Sept. 3, 2014) (“A special tax that is often levied on those that pollute the environment or negative externalities. In a true market economy, a Pigovian tax is the most efficient and effective way to correct negative externalities . . . Pigovian taxes are applicable only because market economies often fail to provide a proper incentive to reduce negative externalities.”).

302. Robert N. Stavins, *Experience with Market-Based Environmental Policy Instruments*, in 1 HANDBOOK OF ENVIRONMENTAL ECONOMICS 356, 379 (Karl-Göran Mäler & Jeffrey R. Vincent eds., Elsevier 2003).

303. VTDIGGER, *supra* note 288.

304. *Available Grants*, VT. CMTY. FOUND., <http://www.vermontcf.org> (last visited Aug. 13, 2014); *The Economics of Investing in Green Solutions to Stormwater Management*, BRIDGING THE GAP (Sept. 22, 2013), <https://www.bridgingthegap.org/economics-investing-green-solutions-stormwater-management/> (showing private Program Related Investment (PRI) Grants from Foundations/Trusts whose charters (a tax status under IRS rules) mandate a focus on storm water management); see *Funders and Partners*, VERMONT LAND TRUST <http://www.vlt.org/about-vlt/vlt-funders> (last visited Aug. 13, 2014).

305. Richard Dye & David Merriman, *Tax Increment Financing, A Tool for Local Economic Development*, 18 LAND LINES 2, 2 (2006), available at [https://www.lincolnst.edu/pubs/dl/1076\\_Jan2006-Final.pdf](https://www.lincolnst.edu/pubs/dl/1076_Jan2006-Final.pdf).

306. *Id.* at 2-4.

307. JANET CLEMENTS ET AL., NATURAL RESOURCES DEFENSE COUNCIL, THE GREEN EDGE: HOW COMMERCIAL PROPERTY INVESTMENT IN GREEN INFRASTRUCTURE CREATES VALUE 4 (2013), available at <http://www.nrdc.org/water/files/commercial-value-green-infrastructure-report.pdf>.

308. *Id.*

Further benefits include increased mental health and worker productivity for office employees, as well as reductions in infrastructure costs, costs associated with flooding, water bills, and crime.<sup>309</sup>

Thus, these gains in the values of surrounding properties will generate additional property tax revenues. This increased value is “captured” via tax increments and pays for the public project. TIF refers to the funding mechanism, Tax Increment Districts (“TIDs”) refer to the specific geographic areas in which the redevelopment using TIF is to occur.<sup>310</sup>

As of December 2013, the Vermont General Assembly suspended the Vermont Economic Progress Council’s (“VEPC”) authority to approve any additional tax increment financing districts beyond the districts already established.<sup>311</sup> This article proposes that this suspension be revisited in light of the concept presented: utilizing EB-5 financing to kick-start and underwrite required MS4 stormwater improvements. EB-5 backed TIF financing in designated TIDs will capture the tax revenues derived from the increase in underlying and surrounding property values associated with these projects. Vermont, in line with its historic New England traditions, may choose to use these revenues to pay back EB-5 immigrant investors over time. This will also fund future projects and associated maintenance. This perpetual maintenance, and by inference the employment associated with it, makes these projects sustainable.

There are three basic methods that stormwater utilities use to calculate service fees.<sup>312</sup> These are sometimes modified slightly to meet unique billing requirements. Impervious area, the most important factor influencing stormwater runoff, is a major element in each method. The three basic methods are: Equivalent Residential Unit (“ERU”) or Equivalent Service Unit (“ESU”), Intensity of Development (“ID”), and Equivalent Hydraulic Area (“EHA”).

Of special note, the City of South Burlington (which is not eligible for EB-5 RC/TEA discounted funding, but qualified under the EB-5 program for \$1,000,000 immigrant investor participation) adopted the first stormwater utility program in Vermont.<sup>313</sup> This utility uses the ERU method

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309. *Id.*

310. Dye & Merriman, *supra* note 305, at 2–7.

311. VT. OFFICE OF THE LEG. COUNCIL, SUMMARY OF THE ACTS AND RESOLVES OF THE 2012 VERMONT GENERAL ASSEMBLY 65 (2012) (Act No. 80 (S.37)), available at <http://www.leg.state.vt.us/reports/2013ExternalReports/292522.pdf> (last visited Aug. 13, 2014).

312. U.S. ENVTL. PROT. AGENCY, FUNDING STORMWATER PROGRAMS 2 (2008), available at [http://water.epa.gov/polwaste/npdes/stormwater/upload/region3\\_factsheet\\_funding.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/region3_factsheet_funding.pdf).

313. SOUTH BURLINGTON STORMWATER UTILITY, AN INTRODUCTION TO VERMONT’S FIRST STORMWATER UTILITY 1–2 (2005), available at <http://www.sburlstormwater.com/wp-content/uploads/resources/flyer.pdf>.

to calculate and bill for its service fees.

The following lists EPA's recommendations include with a step-by-step outline of how to create a stormwater utility: develop a feasibility study, create a billing system, conduct a public meeting(s), roll out a public information program, and adopt an ordinance<sup>314</sup>

### CONCLUSION

Focusing on quantities to the exclusion of qualities, the presently configured EB-5 program equates something of inestimable value, U.S. citizenship, with commerce. DHS through USCIS attempts to fulfill the will of Congress by initiating regulations directed at oversight and vetting of investors that manifest in extensive procedural requirements, application forms, and evidence submissions. This works to the exclusion of substantive requirements. Absent an ethical armature on which to hang its EB-5 adjudicative processes, these agencies appear as a dog attempting to catch its tail. Over that past 24 plus years, many of EB-5's structural flaws have been corrected and immigrant investments have ebbed and flowed with a trend to growth that has finally exceeded Congress' initial expectations.<sup>315</sup> The circle is getting smaller but the dog is still spinning.

Missing is the larger goal of targeting these investments to assist in funding essential projects that serve communities, projects that can be readily funded with immigrant investor assistance. As a "proof of concept" this article proposes a specifically targeted application of EB-5 to solve an intractable national problem; nonpoint source<sup>316</sup> water pollution ("NPSWP"), the most significant single source of water pollution in the U.S.<sup>317</sup>

A recent report to the Vermont DEC on this issue estimates the average cost of reducing NPSWP for Vermont at \$91,799,000 annually over ten

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314. ENVTL. PROT. AGENCY, *supra* note 300, at 3-5.

315. Al Kamen, *An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In*, WASH. POST A1 (Sept. 29, 1991). The bill's supporters predicted that about 4,000 millionaire investors, along with family members, would sign up, bringing in \$4,000,000,000 in new investments and creating 40,000 jobs (annually).

316. *See generally* OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE (2007), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2007\\_10\\_15\\_305b\\_2002report\\_report2002305b.pdf](http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2007_10_15_305b_2002report_report2002305b.pdf). Nonpoint source ("NPS") pollution refers to both water and air pollution from diffuse sources. Nonpoint source water pollution affects a water body from sources such as polluted runoff from agricultural areas draining into a river, or wind-borne debris blowing out to sea. Nonpoint sources of pollution are sources that do not meet the Clean Water Act's legal definition of point source. Examples include runoff from developed areas (impervious surfaces), construction sites (erosion), and agricultural operations.

317. U.S. ENVTL. PROT. AGENCY, *supra* note 274.

years, a total that far exceeds normal state expenditures for NPSWP reduction.<sup>318</sup> Vermont's real total GDP was approximately .18% of the nation's total in 2013.<sup>319</sup> Assuming that this is a likely indicator of Vermont's proportional NPSWP contribution, extrapolation from these data indicates that the national annual cost of NPSWP is \$51,329,506,296, according to 2005 monetary rates. Projected annual capital inputs from immigrant investors associated with a fully subscribed EB-5 program would be \$6,600,000,000.<sup>320</sup>

The calculations represented in the table below are based on U.S. Department of Commerce, Bureau of Economic Analysis data, and EB-5 2013 revenue estimates. The calculations indicate that the presently configured EB-5 (10,000 visas) is capable of financing approximately 13% of the expenditure required to clean up nonpoint source water pollution in the U.S.; a substantial "kick-start" towards manifesting a solution to this unavoidable problem. Revisiting "pricing" of the visa, or expanding the program upward from its present 10,000 visa cap only makes this proposed application of the EB-5 program more attractive.<sup>321</sup>

Vermont's Percentage of the U.S.'s GDP and Costs of Nonpoint Source  
Water Pollution Remediation

	GDP (Chained 2005 Dollars)	Percent of Total GDP	Estimated Annual Cost of Nonpoint Source Water Pollution Remediation	Potential Percentage of EB-5 Contribution
Vermont	\$27,723,000,000	0.18%	\$91,649,000	
U.S.	\$15,526,715,000,000	100.00%	\$51,329,506,296	
Full Subscribed EB-5			\$6,600,000,000	12.86%

Placing immigrant entrepreneur's financial resources and commercial expertise in the service of American ingenuity provides the seed capital (and cunning) to fund the conception, design, construction, and maintenance of a nationwide system of regenerative sustainable storm water management and coastal/wetland protection and remediation projects. These projects are presently unfunded or underfunded, and, by their very

318. VT. DEP'T OF ENVTL. CONSERVATION, *supra* note 285.

319. BUREAU OF ECON. ANALYSIS, *supra* note 248.

320. IMPLAN, *supra* note 221.

321. *See* V. EB-5 Pros, C.

nature, are local and labor intensive. In addition, these durable slow and low-technology constructs (green infrastructure), obedient servants to the law of entropy, have the virtue of requiring routine maintenance in perpetuity.

Thus reconceived EB-5 can become the financial element for animating the laboratories of democracy to begin a grand research and development project to conceive, design, and develop regenerative solutions to this perpetual problem.<sup>322</sup> A collateral virtue of these technologies is that, while distinctly local to each watershed, their underlying concepts are eminently transportable throughout the world. The investments made by these entrepreneurs may well end up serving the very countries from which their personal wealth was derived.

A final, but in no way collateral, benefit of this new EB - 5 could be to provide a model component to promote a rational and comprehensive overall U.S. immigration policy with Vermont taking the lead in developing and bench testing these ideas.

The challenge posited by this article is to refashion the EB-5 program into one that leads by example, spearheading a pragmatic mission to reclaim and restore a significant component of our environment. With the assistance of EB-5 immigrant investors citizens and those that desire citizenship will embark on our own Herculean “fifth” labor, applying human ingenuity and commerce through the effective administration of a pilot program begun in the U.S. to tackle the ongoing and growing issue of nonpoint source pollution.<sup>323</sup>

While the dollar and job figures associated with this enterprise are not to be trifled at, they are in truth baby steps on the way to refashioning the world in a manner that achieves sustainability via regenerative development, redefining growth to meet “the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>324</sup>

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322. *New Sate Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

323. *The Augean Stables: Hercules Cleans Up*, PERSEUS DIGITAL LIBRARY, <http://www.perseus.tufts.edu/Herakles/stables.html> (“For the fifth labor, Eurystheus ordered Hercules to clean up King Augeas’ stables.”).

324. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, UN GENERAL ASSEMBLY, REPORT OF THE WORLD COMM’N ON ENV’T AND DEV: OUR COMMON FUTURE 41 (1987), available at <http://www.un-documents.net/our-common-future.pdf>.