

TEA Concerns Take Center Stage at House Judiciary Committee Hearing on the EB-5 Program

The U.S. House Committee on the Judiciary last week held a hearing titled “Is the Investor Visa Program an Underperforming Asset?,” which signaled its ongoing efforts to achieve a passable EB-5 bill that would reauthorize the Regional Center Program (currently set to expire on September 30, 2016) contingent on comprehensive EB-5 program reforms. The February 11, 2016, hearing gave Committee members a fresh opportunity to publicly air their persisting concerns about the EB-5 program, in particular the “gerrymandering” of targeted employment areas (TEAs) by states under existing EB-5 regulations and policy. The Committee heard testimony from Nicholas Colucci, Chief of the Immigrant Investor Program (IPO); Rebecca Gambler, Director of Homeland Security and Justice Issues at the U.S. Government Accountability Office (GAO); Jeanne Calderon, Clinical Associate Professor of Business Law at NYU Stern School of Business; and a CEO of a U.S. company focusing on direct (non-regional center) EB-5 investments.

House Judiciary Committee Chairman Bob Goodlatte (R-VA, 6) opened the hearing by stating that he is a supporter of the EB-5 program and believes it has “contributed in real ways” to economic development in the U.S., but that the program has strayed far from what Congress envisioned when creating it 25 years ago. He criticized the “rampant gerrymandering” of TEAs—drawing the boundaries of a “high unemployment area” in a way that combines census tracts with qualifying high unemployment rates (150% of the national average) with those that do not have qualifying unemployment rates, in order to allow relatively prosperous areas to qualify for the reduced \$500,000 investment threshold afforded to TEAs. He further stated that the Department of Homeland Security has “facilitated” gerrymandering through USCIS’s policy of allowing state agencies to determine high unemployment area boundaries, and insisted that to revitalize rural and distressed urban areas as Congress intended, projects actually have to be located in those areas.

Rep. John Conyers (D-MI, 13), Ranking Member of the House Judiciary Committee, also underscored the need to reform current practices for drawing TEAs: “For those Americans living in urban poverty in my city of Detroit and many other cities across the country, manipulation of targeted employment areas has diverted a potential source of jobs and neighborhood improvement away from those it was intended to help.” Noting that the Congressional district he represents suffers from an unemployment rate of over 300 percent the national average, he said it is not enough to have development in more affluent areas to which low income workers might commute, “because the projects will still leave these communities of concentrated poverty no better off in terms of development and infrastructure after their conclusion.”

Rep. Darrell Issa (R-CA, 49) pointedly questioned Mr. Colucci on why, if USCIS has the authority to fix many of the ills in the EB-5 program through regulatory reform, the agency has not done so. Mr. Colucci explained that the agency was working on regulatory reforms in 2014, stalled in 2015 in anticipation of Congress passing a comprehensive EB-5 reform bill, but



reengaged its efforts after comprehensive legislative reform was not passed. When asked by Rep. Issa whether USCIS has the authority to deny state-designated high unemployment areas if the agency feels they include non-qualifying areas, Mr. Colucci said USCIS does not. In earlier testimony, Mr. Colucci said that USCIS plans to propose potential regulatory action including changes to make TEA designations more consistent, increase minimum investment amounts, and require business plan filings in advance of investor petitions.

The testifying CEO speaking on behalf of non-regional center EB-5 investments said that businesses that invest in distressed areas need an advantage to help get the attention of investors, who are largely uninterested in opportunities that are not “the fancy, gleaming tower in a large gateway city.” Professor Calderon, whose 2015 paper “Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects” has been cited by the GAO and various news media, testified that the gerrymandering of TEAs has rendered the 2-tier investment system created by Congress meaningless. Because virtually all projects can now qualify as being located in a TEA, she explained, all investors invest at the lower amount that was originally intended only for investments in rural and depressed inner city areas. Professor Calderon suggested that Congress incentivize not only certain investment locations but also certain types of projects, such as public infrastructure.

Rep. Zoe Lofgren (D-CA, 19), who is the Ranking Member of the House Judiciary Subcommittee on Immigration and Border Security, recommended that the House Judiciary Committee further explore the idea of incentivizing certain kinds of investments. “We have treated all investments and all job creation as identical basically, and I don’t know that that is the right approach,” she said. “We have the capacity to identify a menu of investments that provide the most benefit for the United States.”

In addition to TEAs, the hearing touched on other key concerns including the desire to raise the minimum investment amounts and the merit of current job allocation rules that allow EB-5 investors to take credit for jobs created by non-EB-5 capital.

On raising the minimum investment amounts, which is largely non-controversial, Rep. Goodlatte noted that the real value of EB-5 investments has diminished by almost 50 percent since 1990 because the amounts have never been adjusted for inflation. Rep. Sheila Jackson Lee (D-TX, 18) opined that \$500,000 for rich investors is “chump change” today and urged Mr. Colucci to have USCIS increase the minimum investment immediately through a regulatory fix.

With respect to job creation by projects that use both EB-5 and non-EB-5 capital sources, Rep. Goodlatte said that allowing EB-5 investors to take credit for jobs created by the non-EB-5 capital sources “makes a mockery” of the EB-5 program’s job creation goal. Rep. Conyers and Rep. Issa voiced similar disapproval on this point. According to Ms. Gambler, even the GAO has questioned the methodology because it makes it difficult to determine whether the EB-5 investment actually created U.S. jobs.

The TEA and other concerns raised at the House hearing echoed similar misgivings voiced a week earlier at the Senate Judiciary Committee’s EB-5 hearing on February 2, 2016 (titled “The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?”), which elicited

testimony from Mr. Colucci and Stephen L. Cohen, Associate Director of the SEC's Division of Enforcement. The Senate hearing focused more heavily on fraud issues, however.

A video recording of the House Judiciary Committee hearing and the written testimony of the four witnesses are available on the House Judiciary Committee's website

<http://judiciary.house.gov/index.cfm/hearings?ID=22D22033-1110-4DAD-BE27-7F65CC159384>



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