United States Government Accountability Office

GAO

Report to Congressional Committees

April 2005

IMMIGRANT INVESTORS

Small Number of Participants Attributed to Pending Regulations and Other Factors

GAO-05-256

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GAO Accountability·Integrity·Reliability

Highlights

Highlights of GAO-05-256, a report to congressional committees

Why GAO Did This Study

In 1990, Congress established an investor visa category, referred to as EB-5, whereby immigrants are granted conditional residence and after 2 years, permanent residence status in the United States if they invest in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs. The Basic Pilot Program Extension and Expansion Act of 2003 (P.L. 108-156) mandates that GAO provide certain information regarding the EB-5 employment category. In response to the mandate, this report provides information on immigrant participation, including the number of participants, their countries of origin, and the number who sought U.S. citizenship. Also, this report includes information about the types of business established and where they were established.

What GAO Recommends

To better achieve the economic benefits of the EB-5 visa category, GAO recommends that the Secretary of the Department of Homeland Security finalize and issue regulations necessary to provide final adjudication to those cases dependent on these regulations.

In commenting on our recommendation, DHS stated that the regulations have been, and remain a priority within the department.

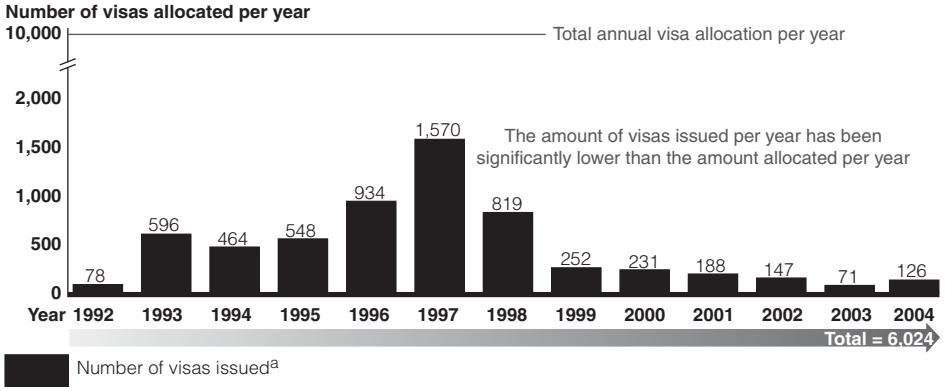
www.gao.gov/cgi-bin/getrpt?GAO-05-256.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Paul Jones at (202) 512-8777 or jonesp@gao.gov.

What GAO Found

The number of visas granted under the EB-5 category has been a small fraction of the approximately 10,000 allocated annually by the authorizing legislation. According to State Department records, a total of 6,024 visas have been issued to immigrant investors and their dependents since 1992. As of June 2004, 653 investors (not including dependents) had met this immigration category's requirements and received permanent legal resident status.

Number of Visas Issued by Year, Fiscal Years 1992 through 2004



Source: GAO analysis of State Department data.

[a]Since decisions for applications are not necessarily rendered the same year they are received, numbers of visas issued in a year may be from applications submitted in prior years.

The immigration officials and lawyers who represent immigrant investors that we interviewed attribute the low participation to the rigorous application process and the uncertainty of meeting the requirements that can result in the permanent residency benefit. They also cited, as a potentially negative impact on future applicants, the failure to issue implementing regulations to adjudicate hundreds of EB-5 permanent residence applications that have left investors in conditional resident status—some for as long as 10 years. In 2002, Congress mandated that the regulations be issued by March 2003. The regulations were initially drafted but continue to be under review by the Department of Homeland Security. DHS cited many difficult and competing demands associated with establishing the new department and meeting its mission challenges as reasons the regulations have not been completed.

About 83 percent of investors and their dependents who were granted permanent resident status through the EB-5 category are from Asia. EB-5 participants have invested an estimated $1 billion in a variety of businesses (e.g., hotels/motels, manufacturing, restaurants, real estate, and farms). GAO estimates that 41 percent of the businesses were established in California.

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Abbreviations

AAO	Administrative Appeals Office
CLAIMS	Computer Linked Application Information Management System
DHS	Department of Homeland Security
DOJ	Department of Justice
EB-5	employment-based visa category, fifth preference
INS	Immigration and Naturalization Service
IVAMS	Immigrant Visa Allocation Management System
MFAS	Marriage Fraud Amendment System
RFE	request for evidence
USCIS	U.S. Citizenship and Immigration Services

GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

April 1, 2005

The Honorable Arlen Specter
Chairman
The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable F. James Sensenbrenner, Jr.
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

To promote job creation and encourage foreign investment in the United States, Congress created an additional employment-based immigrant visa category (preference benefit) as part of the Immigration Act of 1990, P.L. 101-649, as amended. This category, commonly referred to as EB-5, allows immigrant investors to receive conditional resident status in the United States for a 2-year period upon the investment of $1 million (or $500,000 in targeted employment areas) in a U.S. business that creates at least 10 full-time jobs. If the investors meet the requirements, they can apply for permanent legal resident status. The EB-5 immigrant investor category began in 1992 and is administered by the U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS). Under the authorizing legislation for the EB-5 category, approximately 10,000 immigrant investor visas may be issued each year.[1]

The Basic Pilot Program Extension and Expansion Act of 2003 (P.L. 108-156), mandates that we provide certain information regarding the EB-5 category. In accordance with the mandate, this report provides information on

[1]Under the law, this preference category allots up to 7.1 percent of the worldwide level of immigration (approximately 10,000 visas annually) to qualified investors and their spouses and children. The allocation is not a target or a goal. See 8 U.S.C. §1153(b)5.

- the level of participation, including (1) the number of individuals who have received immigrant investor visas in each year since the category's inception, (2) their country of origin, and (3) the number of immigrant investors who have sought U. S. citizenship, and

- the businesses established by immigrant investors, including (1) the types established, (2) their locations and whether they remained in the same location, and (3) the number of jobs created.

To perform our work, we reviewed applicable laws, including the Immigration Act of 1990 and the 21st Century Department of Justice Appropriations Authorization Act (P.L. 107-273 (2002)), as well as studies, analyses, and other relevant literature covering the EB-5 category. Also, we reviewed USCIS and Department of State policies and guidelines related to EB-5. We analyzed State Department data to determine the number of visas issued under the EB-5 employment category from 1992 through June 2004 as well as the immigrant investors' and their dependents' countries of origin. USCIS electronic databases do not include information on where immigrant investors established their businesses, the extent to which the businesses remained in the original location, the types of businesses established, the number of jobs created, or the number of immigrant investors who applied for U.S. citizenship. Therefore, to obtain this information, we conducted a manual review of a random probability sample of 90 case files. We also interviewed USCIS headquarters officials in Washington, D.C., as well as USCIS service center officials in California and Texas to obtain information about immigrant investor application processing procedures and their opinions on other EB-5 issues. Further, to obtain perspectives on the EB-5 category from nongovernmental sources, we interviewed four immigration lawyers in the private sector who were knowledgeable about the EB-5 application process. We did not independently corroborate the opinions provided by USCIS officials and immigration lawyers that we interviewed. Our selection of immigration lawyers was based primarily on the recommendations of the American Immigration Lawyers Association. We conducted our work from March 2004 to February 2005 in accordance with generally accepted government auditing standards. Appendix I presents more details about our objectives, scope, and methodology.

Results in Brief

The number of visas granted under the EB-5 category has been considerably less than the approximately 10,000 designated annually by the authorizing legislation. According to State Department data, a total

of 6,024 visas have been issued to alien entrepreneurs and their dependents since 1992. The annual number of visas issued peaked at 1,570 in 1997 and, since then, has declined. Our analysis of USCIS data indicates that as of June 2004, an estimated 653 investors (not including dependents) had met the EB-5 requirements and received permanent legal residency. The USCIS officials and immigration lawyers that represent EB-5 participants that we interviewed attribute the low participation to a series of factors that led to uncertainty among potential investors. These factors include an onerous application process; lengthy adjudication periods; and the suspension of processing on over 900 EB-5 cases—some of which date to 1995—precipitated by a change in USCIS's interpretation of regulations regarding financial qualifications.[2] In 2002, Congress mandated in the 21st Century Department of Justice (DOJ) Appropriations Authorization Act (P.L. 107-273) that USCIS issue regulations to implement congressional directives by March 2003 to address these pending cases. According to USCIS officials, they initially drafted the regulations. However, the regulations have been under review and revision primarily between USCIS and the Department of Homeland Security, Office of General Counsel, since March 2003. Many difficult and competing demands associated with establishing the new Department of Homeland Security and meeting its mission and management challenges were cited by DHS as a reason the regulations have not been issued.

Our analysis indicates that about 83 percent of applicants approved for the EB-5 category are from Asia, including Taiwan, South Korea, and China. We estimate that about 38 percent of the immigrant investors who have met the EB-5 requirements and been approved for permanent residence applied for U.S. citizenship, although seeking citizenship is not a requirement.

Immigrant investors invested in a variety of business types that have generally remained at their initial locations. The immigrant entrepreneurs invested primarily in hotels or motels, manufacturing companies, real estate companies, domestic sales companies, farms,

[2]At this time, USCIS functions were carried out by the Immigration and Naturalization Service (INS), an agency within the Department of Justice. As of March 1, 2003, INS ceased to exist, and its functions were transferred to the U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) within the Department of Homeland Security's Directorate of Border and Transportation Security as well as USCIS. See Homeland Security Act of 2002, P.L. 107-296 (2002).

import/export companies, restaurants, and technology companies. We estimate that 41 percent invested in businesses in California. Very few investors relocated their businesses to a state other than the one listed on the investor's initial EB-5 application. Specifically, of the 653 investors who have met the EB-5 requirements and been approved for permanent residence, we estimate that 644 (or 99 percent) of the businesses remained in the same state. We also estimate that from fiscal year 1992 through June 2004, immigrant entrepreneurs who completed the EB-5 benefit requirements and attained permanent legal residency, invested about $1 billion.

We could not determine a reliable estimate of the number of jobs created by immigrant investors because, during the application review process, USCIS adjudicators only ensure that each business created the minimum requirement of at least 10 jobs but do not apportion the creation of additional jobs between EB-5 investors and non-EB-5 investors. For example, if there are non-EB-5 investors involved or the investment is part of a greater overall business expansion, USCIS credits the individual immigrant investor with all the jobs created, rather than trying to determine exactly how many jobs are attributable to the immigrant investor's portion of the investment.

Delay in issuing implementing regulations has left hundreds of visa holders in limbo for as long as 10 years, contributing to a negative perception of the employment-based category and potentially limiting investment in the United States.[3] Therefore, we recommend that the Secretary of the Department of Homeland Security finalize and issue the regulations necessary to provide final adjudication in these cases. In commenting on our recommendation, DHS stated that the regulations have been and remain a priority within DHS, they are working to resolve complex issues regarding the EB-5 implementing regulations, and they are working with the Department of Justice.

Background

Under the authorizing legislation for EB-5, approximately 10,000 visas may be issued each year to investors and their dependents. One category sets aside 3,000 visas for investors making investments in

[3]According to USCIS, the majority of the investors and their dependents can retain conditional resident status while their application for permanent resident status is pending, but they have to apply for an extension every year.

targeted employment areas.[4] Another category sets aside an additional 3,000 visas each year for a special pilot program.[5] This visa category is for alien entrepreneurs who make qualifying investments in a business located within a "regional center."[6] The remaining EB-5 visas are available to immigrant investors who do not invest in a targeted area or a regional center. Any of the approximately 10,000 immigrant investor visas not issued remain unused and do not carry over to subsequent years.

Figure 1 provides an abbreviated description of the application process immigrant investors must follow to be approved for the EB-5 category, obtain conditional resident status to establish the business, and complete the EB-5 requirements to attain permanent resident status. While not shown, after 5 years from the date conditional resident status is granted, the investor may apply to become a naturalized U.S. citizen.[7]

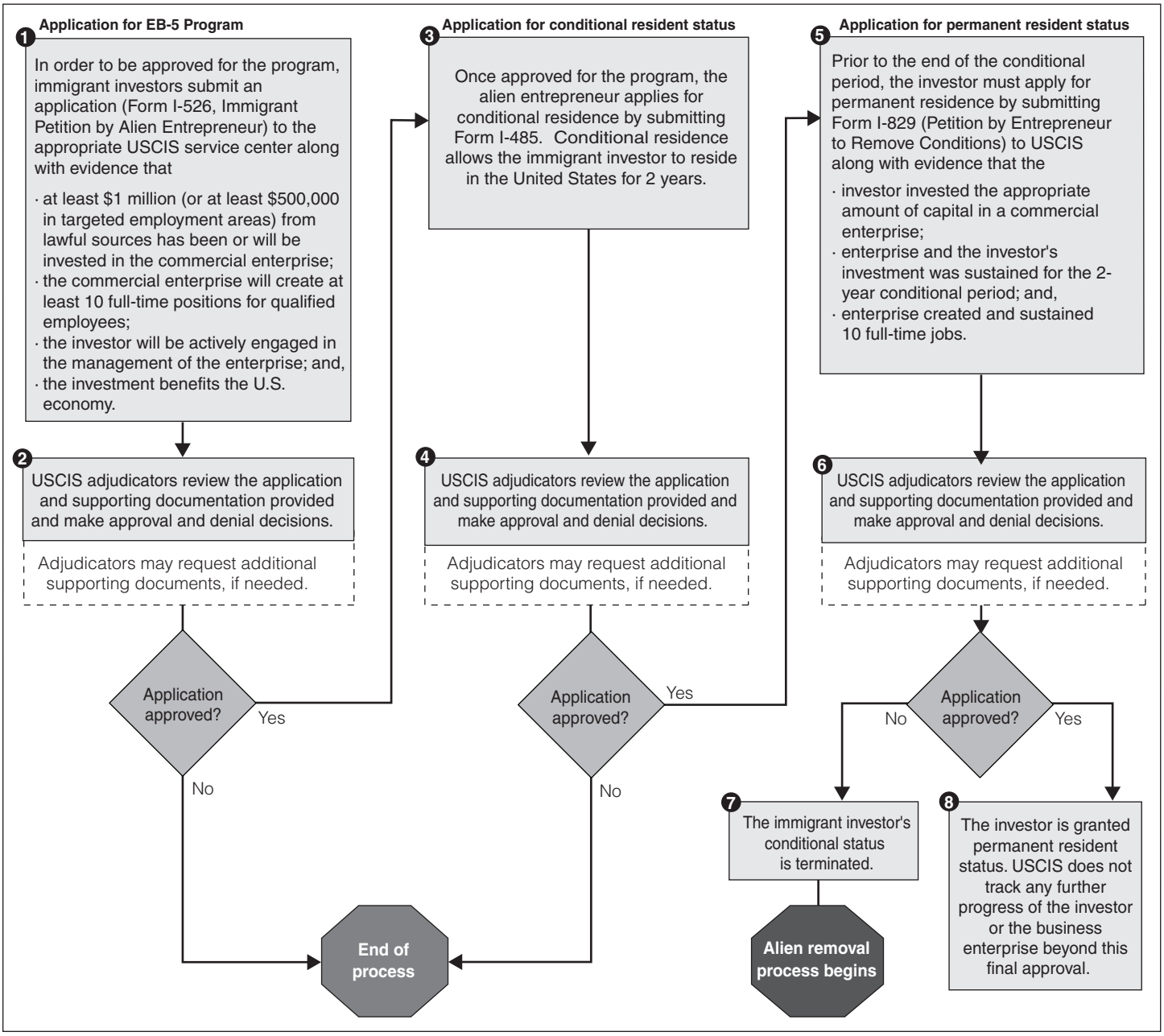
[4]8 U.S.C. 1153(b)(5)(B). Section 8 C.F.R. § 204.6(e) defines a targeted employment area as an area that, at the time of the investment, is either a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate.

[5]In 1992, P.L. 102-395 required the Secretary of State, together with the Attorney General, to establish this pilot program with an original allocation of 300 visas. In 1997, Congress expanded the number of permitted visas from 300 to 3,000 per year and in 2003, extended the program to October 1, 2008. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, P.L. 105-119 (1997) §116 (a); and the Basic Pilot Program Extension and Expansion Act of 2003, P.L. 108-156, §4(b).

[6]Section 8 C.F.R. § 204.6(e) defines a regional center as any economic unit, public or private, that is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. A regional center seeking USCIS approval must submit a proposal showing how it plans to focus on a geographical region within the United States and to achieve the required growth.

[7]Under the Immigration and Nationality Act, a legal permanent resident who has resided continuously in the U.S. for five years is eligible to apply for citizenship. 8 U.S.C. § 1427.

Figure 1: EB-5 Application Process



Source: GAO analysis of US CIS data.

[a]Immigrant investors may choose to immigrate from abroad by applying for a visa at the U.S. consulate in their home country. If the U.S. consulate denies the visa, no further action is taken.

Appendix II presents additional details about EB-5 processing procedures and the criteria USCIS uses to make approval and denial decisions.

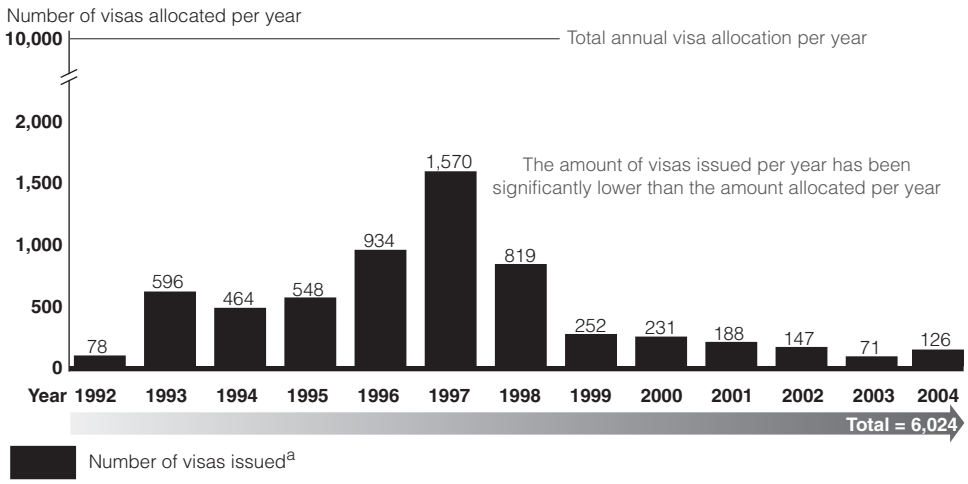
EB-5 Participation Is a Small Fraction of the Visa Allocation

The participation of immigrant investors (and their dependents) has been well below the annual EB-5 visa category cap of approximately 10,000. Our analysis of State Department and USCIS data show that, as of June 2004, 6,024 visas have been issued to immigrant investors including their dependents and an estimated 653 investors (excluding dependents) had met the EB-5 requirements and been approved for legal permanent resident status. Most immigrant investors who have been approved for the EB-5 category came from Asia.

The Number of Immigrant Investors Is Far Fewer than the Number of Allocated Visas

According to State Department data, a total of 6,024 visas have been issued to immigrant investors and their dependents under the EB-5 category since its inception in 1992 through fiscal year 2004. Approximately 10,000 EB-5 visas per year (potentially 130,000 visas through fiscal year 2004) have been authorized to be issued to individuals and their dependents if the principal investor agrees to make the required investment, establish a business in the United States, and create at least 10 full-time jobs. According to USCIS, there is no way to determine the number of potential applicants or the number of applicants who have applied for the category. Figure 2 shows that the number of visas approved under EB-5 since 1992 is a small fraction of the approximately 10,000 per year visa allocation set by its authorizing legislation.

Figure 2: Number of Visas Issued by Year, Fiscal Years 1992 Through 2004



Source: GAO analysis of State Department data.

[a]Since decisions for applications are not necessarily rendered the same year they are received; the number of visas issued in a year may include applications submitted in prior years.

Factors Contributing to Low Participation

USCIS officials and immigration lawyers that represent EB-5 participants attributed the low participation to a series of factors that contributed to uncertainty among potential investors. These factors included the suspension of processing of hundreds of EB-5 applications in 1998 and the subsequent issuance of several precedent setting decisions intended to clarify how adjudicators should interpret EB-5 regulations.

USCIS Views

USCIS officials cited several possible contributing factors as reasons for the low participation and approval rates as follows:

- *Rigorous nature of the EB-5 application process versus other employment-based visa applications*: According to agency officials, many potential immigrants may have other options to achieve lawful permanent resident status that are less difficult to qualify for, less expensive, and more certain. For example, other employment based immigrant visas do not require a substantial investment of money to establish a business and hire employees. Also, other employment visas, such as those for professionals with advanced degrees or priority workers including persons who have a well-documented and extraordinary ability in the sciences, arts, education, business, or athletics, may be easier for immigrants to obtain because the

immigrant's employer is responsible for completing the application and complying with the applicable USCIS regulations.

- *Lack of expertise among adjudicators*: USCIS officials said that prior to 1998, EB-5 adjudicators were not sufficiently trained to properly adjudicate EB-5 applications, which typically involve complex business and tax issues. After the additional guidance (discussed below) was issued, USCIS officials changed the EB-5 training curriculum to provide adjudicators with training that addressed the complexities of EB-5 applications and helped to ensure that appropriate decisions would be rendered in accordance with applicable statutes, regulations, and agency policy. According to agency officials, the improved training may have resulted in fewer applications being approved and, therefore, contributed to a lower approval rate.

- *Uncertainty of the outcome of adjudication*: The statute provides for a 2-year conditional residence period but does not guarantee investors lawful permanent resident status at the end of the period. The required investment and employment creation must be established to the satisfaction of USCIS prior to approving the investor for permanent legal resident status. Potential investors may be deterred by the uncertainty that USCIS may determine that they did not meet the EB-5 terms. Agency officials said that the 1998 changes in the USCIS interpretation of the EB-5 regulations (discussed below) have contributed to this uncertainty. Further, the undetermined status of hundreds of EB-5 applications waiting for promulgation of new regulations may have a negative effect on attracting new applicants. Also, a history of federal litigation prompted by the precedent decisions where the courts have taken

various positions may have contributed to uncertainty regarding the future interpretation of EB-5 law and regulations.[8]

- *Public awareness and media attention*: Publicity regarding EB-5 (also discussed below) has been negative and may have contributed to decreased interest in the EB-5 visa category and a resulting drop in the number of alien entrepreneurs applying for EB-5.

Immigration Lawyers' Views

All of the immigration lawyers we interviewed said that although immigrants still want to participate in the EB-5 category, the suspension of adjudications of hundreds of investors' applications has deterred participation. They also cited subjectivity within the adjudication process and the length of time it takes for USCIS to adjudicate the various petitions as having contributed to the decline in EB-5 participation. As a result the U.S. is not realizing the full economic potential of EB-5. Specifically, these lawyers noted the following:

- *Requirements may be too restrictive*: Overly restrictive and sometimes ambiguous requirements are a significant deterrent to participation by potential immigrant entrepreneurs. The 1998 decisions made it even harder to obtain approvals of EB-5 applications and have resulted in investors looking for other alternatives, such as other employment-based visa options that are not contingent on capital investment and job creation. Further, qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, and immigration law are required. In

[8]There has been extensive litigation in the courts regarding the government's denial of applications for both participation in the EB-5 category and permanent resident status upon completion of the category's requirements. In *R.L. Investment Limited Partners and Wanxuan Zou v. INS*, 86 F. Supp. 2d 1014 (D.C. Hawaii 2000) (RLILP), affirmed 273 F.3d 874 (9th Cir. 2001), the court upheld the government's denial of an application for an EB- 5 application for the program that was virtually identical to certain applications approved before the issuance of the precedent decisions. In *Chang v. U.S.*, 327 F.3d 911 (9th Cir. 2003), however, the court held that INS could not automatically apply its more restrictive interpretation retroactively to investors who had already received conditional resident status and who were trying to have those conditions removed. Instead, the court ruled that the agency must allow these investors an opportunity to show how such a retroactive application would hurt them. The court noted that the immigrant investors in *Chang* were not similarly situated to the RLILP plaintiffs, because, in *Chang*, prior to the issuance of the precedent decisions, their applications for the EB-5 category had already been approved and the investors had made significant commitments.

many cases it may be more practicable for investors to come to the United States through other visa categories or pursue immigrant investor programs in other countries such as Australia and Canada.

- *Rigorous documentation requirements*: The documentation USCIS requires from investors seeking entry through the EB-5 category is extensive. Potential investors are repeatedly required by the EB-5 adjudicators to provide additional evidence, making the process more difficult. The process of requesting and receiving additional evidence can add up to 4 months' processing time for each request.

- *Lack of clear guidance*: Some parts of the statute governing the EB-5 category are subjective and open to adjudicator interpretation. For example, one of the EB-5 requirements is that the business must "benefit the U.S. economy." However, the statute provides no guidance on what types of investments meet this criterion. Thus, adjudicators are generally left to their own judgement as to the value, or benefit, of the proposed investment.

- *The lack of timeliness in processing and adjudicating applications*: The lawyers said 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.

Precedent-Setting Decisions

According to USCIS officials, one factor that has contributed to reluctance of aliens to participate in the EB-5 employment category can be traced to program changes in 1998. The changes resulted from a series of events beginning in 1996 and 1997. During this period State Department consular officers and then Immigration and Naturalization Service (INS) EB-5 adjudicators began questioning the financial arrangements in some EB-5 applications. As a result, the INS General Counsel examined a sample of cases exhibiting the questionable financial arrangements and on the basis of this review determined that hundreds of EB-5 applications that had been approved contained the following financial characteristics:

- The businesses were financed with debt and not equity investments in the new business.

- The immigrant investor was not personally at risk for the required investment of money.

- The full statutory amount of capital was not made available for use by the business for employment creation or business operations.

- The promissory note used to meet the minimum capital requirement did not have a fair market value equivalent to the statutorily required investment amount.

- The guaranteed payment on the immigrant investor's cash contribution in the plan was allowed to be used to make payments on the promissory notes, resulting in an insufficient infusion of new capital into the business.

In December 1997, the INS General Counsel issued an opinion finding that the financial characteristics involving the debt arrangements and other mechanisms designed to limit the investors' risk did not comport with the statute and regulations governing EB-5. Further, the General Counsel concluded that INS was not bound by its previous decisions in adjudicating these EB-5 applications (i.e., Form I-526) and that it could revoke previously approved applications containing the business arrangements at issue.[9] As a result of this opinion, adjudicators were to determine if previously approved EB-5 applications comported with the law and identify which applications, if any, should be revoked. Also, the INS General Counsel opinion recommended that INS establish guidelines for adjudicating applications with the aforementioned business arrangements as well as future applications.

Hundreds of Prior Approved Applications Have Been on Hold for Years

In March 1998, INS suspended EB-5 processing on about 900 cases with an approved EB-5 application (i.e., Form I-526) and a pending application for permanent resident status (i.e., Form I-829) that reflected the business arrangements at issue. The suspension was to allow INS to develop guidance on how adjudicators should interpret the EB-5 regulations. As part of this process, the Administrative Appeals Office (AAO) selected a sample of the applications in question and adjudicated them using the INS General Counsel's legal opinion and other case law.[10] On the basis of its review of these applications, AAO

[9]The opinion concluded that INS failed to understand the true nature of the investment plans it reviewed and that it, therefore, misapplied its own statute and regulations. The opinion reasoned that the fact that INS had, in the past, favorably adjudicated a number of petitions involving the business plans at issue did not, as a matter of law, prevent INS from denying future petitions involving such plans. Memorandum, David A. Martin, General Counsel, December 19, 1997, reprinted in 75 Interpreter Releases 332, 343, 345 (March 9, 1998).

[10]AAO is the appellate body that considers cases under the appellate jurisdiction of the Associate Commissioner for Examinations. As such, AAO can overrule, modify, and distinguish a prior precedent.

determined that the financial arrangements included in hundreds of applications did not comport with the statute and EB-5 regulations. Therefore, in June and July 1998 AAO issued what has become known as "precedent-setting decisions" that clarify how adjudicators should interpret EB-5 regulations.[11] From this point forward, adjudicators were required to follow the new interpretation of the EB-5 regulations as described in these decisions when adjudicating EB-5 applications.

In August 1998, INS removed the hold on application processing and EB-5 adjudicators determined that most of the suspended applications should be denied. However, according to USCIS officials, the majority of the denial letters were never processed and the cases remained pending.

By 2002, those investors whose cases were pending continued to remain in conditional resident status waiting for action by USCIS. According to USCIS officials, there has been an increase in litigation stemming from delays in issuance of the implementing regulations. Many of the affected aliens have filed legal actions against the department. Further, investors who were affected by the changes resulting from the 1998 decisions lobbied Congress for help. In 2002, Congress addressed the pending applications through a provision in the 21st Century Department of Justice Appropriations Authorization Act[12] requiring USCIS to implement regulations that would allow those immigrant investors whose initial EB-5 application was approved between January 1995 and August 1998 to address deficiencies in their applications for permanent residence and amend them to comply with USCIS's new interpretation of the EB-5 regulations. Although the implementing regulations were to be issued within 120 days of the passage of the act (March 2003), as of March 2005, DHS had not issued the regulations.

According to USCIS officials, they initially drafted regulations that would allow the department to implement congressional directives in the 2002 act. These draft regulations have been under review and

[11]Under INS regulations, decisions relating to the administration of immigration law may be designated as precedents in future proceedings. Precedent decisions are binding on all service employees in the administration of the INA. They are to be published and made available to the public. 8 C.F.R. § 103.3(c).

[12]P.L. 107-273 (2002).

revision primarily between USCIS and the Department of Homeland Security, Office of General Counsel, since March 2003. A spokesman for the DHS Office of General Counsel stated that the size and complexity of the government reorganization necessary to establish the new Department of Homeland Security and the resulting need to prioritize among competing demands with limited staff has delayed work on the new EB-5 regulations. Further, the DHS Office of General Counsel said that there are outstanding issues regarding the promulgation of the regulations but that these issues are considered to be ongoing internal department deliberations which they would not discuss.

Until implementing regulations are established, the 2002 act does not allow USCIS to deny any of the applications on hold for permanent residency or place any applicant in removal proceedings. As a result, according to USCIS officials, some immigrant investors have been in the United States for over 10 years without completing the EB-5 requirements and being granted permanent legal resident status. Further, immigration lawyers that we interviewed told us that failure to issue the new regulations has deterred potential investors from participating and caused hardships for some of the investors forced to remain in conditional resident status. For example, to maintain their conditional residency in this country, investors who had their cases suspended must obtain an extension of their legal resident documentation annually (commonly referred to as their green card) from USCIS. According to these immigration lawyers, this in itself is not an easy process.

Most Immigrant Investors Are from Asia

Most EB-5 investors have immigrated from Asia. As table 1 shows, 39 percent of the EB-5 visas have been issued to individuals from Taiwan. Overall, 83 percent of immigrant investor visas were issued to individuals from Asia.

Table 1: Number of EB-5 Visas Issued, by Country of Origin, Fiscal Year 1992 through 2004

Country (or geographical area) of origin[a]	Number	Percentage of total
Asia[b]		
Taiwan	2,323	39
South Korea	839	14
China (mainland)	752	12
Hong Kong Special Administrative Region (S.A.R.)	395	7
India	130	2
Japan	66	1
All other Asia	476	8
Total for Asia	**4,981**	**83**
All other countries by geographic area		
Europe	546	9
South America	143	2
Africa	122	2
North/Central America[c]	214	4
Australia/New Zealand	18	[d]
Total	**6,024**	**100**

Source: GAO analysis of Department of State data.

[a]Immigrant visas are numerically limited by category and by country of origin, which in most cases is a person's country of birth rather than his or her current citizenship.

[b]Turkey is included as part of Asia.

[c]North America excludes the United States but includes Canada, Greenland, Mexico, all the countries of Central America, and the island countries and dependencies of the Caribbean.

[d]Less than 0.5 percent.

Immigrant Investors May or May Not Apply for U.S. Citizenship

As previously mentioned, seeking U. S. citizenship is not a requirement of the EB-5 category. Also, USCIS does not track the status of immigrant investors once they have completed the EB-5 requirements and been approved for permanent residence. However, as shown in table 2, we estimate that 38 percent of approved immigrant investors had applied for U.S. citizenship, 61 percent had not applied, and

1 percent were ineligible to apply, as of the time of our review.[13] Our methodology for these estimates is explained in appendix I.

Table 2: Estimated Number of Immigrant Investors Who Have Sought U.S. Citizenship, Fiscal Years 1992 through June 2004

	Estimated number	Estimated percentages
Applied for U.S. citizenship	247	38
Did not apply for U.S. citizenship	399	61
Ineligible to apply for U.S. citizenship[a]	7	1
Total	**653**	**100**

Source: GAO review of USCIS files.

[a]This estimate results from one case in our sample in which the alien was ineligible to apply for U.S. citizenship because she had previously renounced her citizenship. She reentered the United States as an immigrant through the EB-5 category.

Immigrant Entrepreneurs with Permanent Resident Status Have Invested an Estimated $1 Billion in a Variety of Businesses, Primarily in California

Over the life of the EB-5 employment category immigrant investors have established a variety of businesses and on the basis of the sample of cases we reviewed, we estimate that a total of $1.04 billion was invested through 2004 by immigrant investors who have been granted permanent residency. Of the estimated 653 investors who have met the EB-5 requirements and been approved for permanent residence, most maintained their business in the same state during the 2-year conditional period, with 41 percent establishing their businesses in California. USCIS officials did not have reliable data indicating the total number of jobs created solely as a result of investments by EB-5 participants.

Immigrant Investors Established a Variety of Businesses by Investing an Estimated $1 Billion

Hotels and motels make up an estimated 19 percent of all businesses created by immigrant investors granted permanent resident status (123 of 653 businesses). We classified the various types of businesses into 10 broad categories. Table 3 shows the estimated number of businesses established in each category. To provide additional insights into the types of businesses established under EB-5, we also recorded for each broad category, where applicable, the types of products

[13]All percentage estimates from the sample have been rounded to the nearest percent and have margins of error of plus or minus 10 percent unless otherwise noted.

manufactured, sold, imported or exported, or produced as well as the types services offered.

Table 3: Types and Estimated Number of Businesses Established by Immigrant Investors with Permanent Resident Status, Fiscal Years 1992 through June 2004

Business category	Examples of business category components	Estimated number	Estimated percentage of total
Hotel/motel		123	19
Manufacturing	Clothing, cabinets, computer equipment, convertible beds, corrugated boxes, food, furniture, health supplements, knit goods, rubber and plastics, telephone equipment, textiles, woven bags	116	18
Real estate	Property management, development, construction	94	14
Domestic sales	Clothing, airplane parts, artificial turf, granite, new cars, pharmaceuticals, toys, hair salons, retail food stores	65	10
Farms	Almonds, fish, fruit	58	9
Import/export	Airplane parts, clothing, gems/jewelry, home appliances, household decorator goods, seafood, textiles	58	9
Restaurants		44	7
Retirement homes		22	3
Technology	Computer services, long-distance telephone service provider, wireless cable television development	22	3
Other businesses	Car wash, child care center, meat processing plant, nightclub, nursing home, security broker	51	8
Total		**653**	**100**

Source: GAO review of USCIS files.

To provide a measure of the EB-5 category's benefit to the U.S. economy, we obtained information about the dollars invested by immigrant investors. On the basis of the case files we reviewed, we estimate that the total of investments made by the 653 immigrant investors granted permanent resident status from fiscal year 1992 through June of 2004 is $1.04 billion. Using a 95 percent confidence level, we estimate that the investment amount is between $784 million and $1.3 billion.[14]

[14]Additional money was invested by alien entrepreneurs who ultimately did not complete the EB-5 benefit process or have yet to have their petition for permanent legal resident status approved. We did not obtain investment data on immigrant investors who had not met all of the EB-5 requirements at the time of our review.

Immigrant Investors with Permanent Resident Status Established Business Operations Predominantly in California, and the Businesses Seldom Relocated

We estimate that 41 percent (265 of 653) of immigrant investors with permanent resident status established their businesses in California. Table 4 shows the states where approved immigrant investors established their businesses as well as our estimate of the number of businesses established in each state.

Table 4: States Where Immigrant Investors Established Business Operations, Fiscal Years 1992 Through June 2004

State	Estimated number	Estimated percentage of total
California	265	41[a]
Maryland	71	11
Arizona	53	8
Florida	44	7
Virginia	44	7
Washington	35	5
Michigan	26	4
Colorado	18	3
Hawaii	18	3
Nevada	18	3
Georgia	9	1
Minnesota	9	1
Nebraska	9	1
New Jersey	9	1
Texas	9	1
Utah	9	1
Vermont	9	1
Totals	**653**	**100**

Source: GAO review of USCIS files.

Note: Estimated numbers and percentages may not total because of rounding.

[a]The confidence interval in this case exceeds plus or minus 10 percent and is 30 percent to 51 percent.

We also found that few immigrant investors with permanent resident status relocated their businesses during the 2-year conditional period. Of the 653 approved investors, we estimate that 99 percent, or 644, maintained business operations in the same state throughout the 2-year conditional period. Specifically, we estimate that

- 79 percent, or 515, of the immigrant investors' businesses remained in same city and state;[15]
- 20 percent, or 129, of the immigrant investors' businesses remained in the same state, but moved to a new city;[16] and
- 1 percent, or 9, of the immigrant investors' businesses moved to a new city and state.

The Number of Jobs Created by Immigrant Investors Could Not Be Estimated

We could not determine how many jobs immigrant investors have established because of the way USCIS credits the number of jobs created by an investor's business. During the adjudication process, USCIS adjudicators ensure that each business creates the minimum requirement of at least 10 full-time jobs. But if there are non-EB-5 investors involved or the investment is part of a greater overall business expansion, USCIS credits the single EB-5 investor with the total of all jobs created even though many of the jobs are not the result of his portion of the investment.[17] In one such example, USCIS credited a single immigrant investor with creating 1,143 jobs based on a $1.5 million investment. While this investment did not create all 1,143 jobs, for adjudicative purposes, when the immigrant investor is the only one seeking the immigration benefit, all jobs are attributed to that investor, even if the capital of others is fueling the enterprise. In this example, the immigrant investor's capital infusion was only a small part of a multimillion dollar expansion of an existing business that involved multiple franchises and other non-EB-5 investors.

Conclusions

At the time the 1998 precedent decisions were published, more than 900 EB-5 participants' applications were placed on hold, resulting in immigrant investors residing in the United States for as long as 10 years

[15]As a result of data limitations, the confidence interval for this estimate exceeds plus or minus 10 percent and is 68 percent to 88 percent.

[16]As a result of data limitations, the confidence interval for this estimate exceeds plus or minus 10 percent and is 11 percent to 31 percent.

[17]8 C.F.R. 204.6(g)(2) states that the number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the act or among non-natural persons (e.g., corporations), either foreign or domestic.

under conditional residency status. According to immigration lawyers, the failure to issue the new regulations is creating hardships for the investors whose cases are on hold and has been a deterrent to new investors, thereby limiting the economic benefit to the United States. USCIS cannot act on the pending applications for permanent resident status or place any of those applicants in removal proceedings until the required regulations are promulgated. Despite a congressional mandate in 2002 that USCIS and DHS provide implementing regulations by March 2003 to address the pending applications, the regulations have not been issued. Drafted regulations have been under review between USCIS and DHS since March 2003. DHS officials stated that the transformations of legacy agencies into its department and related management and mission demands have contributed to the delay in issuing the regulations. However, they could not provide any assurance when the regulations would be issued.

Recommendation

Given the undetermined status and potential hardships imposed on hundreds of EB-5 applicants awaiting the promulgation of implementing regulations and that 2 years have passed since Congress required DHS to issue regulations for adjudicating these EB-5 applications, and to better achieve the economic benefits of the EB-5 category, we recommend that the Secretary of the Department of Homeland Security finalize and issue these regulations.

Agency Comments and Our Evaluation

We provided the Department of Homeland Security and the Department of State with a draft of this report for review and comment. The Department of State had no comments on the draft. In commenting on our recommendation, DHS stated that the regulations have been, and remain, a priority within DHS and that it is working with the Department of Justice to resolve complex issues regarding the EB-5 implementing regulations.

DHS also identified recent steps taken by USCIS to improve the administration of the EB-5 foreign investor program. Steps cited were the creation of the Investor and Regional Center Unit and plans to set a standard for timeliness in processing EB-5 cases.

According to DHS, the Investor and Regional Center Unit will establish a nationwide and coordinated program and will have oversight for all policy and regulation development, field guidance, form design, case auditing, and training regarding the EB-5 program. DHS said it believes

this new unit will strengthen and protect the integrity of the program by guarding against past abuses and promoting the intent of Congress to encourage investment and increase employment within the United States.

DHS said the objective of the timeliness standard is to provide a reliable time frame from filing and adjudicating the petition to enter the program through to the targeted adjudication of the subsequent petition to remove conditions on the investor's residency.

DHS referred to the creation of the regional centers as a significant change to the EB-5 category. However, the first EB-5 regional center was approved in 1993, and the vast majority of regional centers were approved prior to 1998. Also, the option for a foreign investor to make a reduced investment of $500,000 in a targeted employment area, a rural area, or an urban area of less than 20,000 people is not unique to the regional centers. Foreign investors in regional centers are credited with jobs created directly or indirectly as a result of their investment whereas foreign investors in the regular EB-5 process must create at least 10 jobs directly in their commercial enterprise. The full text of DHS comments are provided in appendix III.

We are sending copies of this report to interested congressional committees and subcommittees. We will also make copies available to others on request. In addition, this report will be available at no charge on GAO's Web site at http://www.gao.gov.

If you or your staff have any questions about this report or wish to discuss the matter further, please contact me at (202) 512-8777 or Bill Crocker at (202) 512-4533. Other key contributors to this report are listed in appendix IV.

Paul L. Jones
Director, Homeland Security and Justice

Appendix I: Objectives, Scope, and Methodology

Objectives

As mandated by the Basic Pilot Program Extension and Expansion Act of 2003 (P.L. 108-156), we reviewed the fifth employment-based visa category (EB-5) for immigrant investors that was created in 1992 and is currently administered by U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security.[1] Specifically, this report provides information on

- the level of participation, including (1) the number of individuals who have received immigrant investor visas in each year since the EB-5 category's inception, (2) their country of origin, and (3) the number of immigrant investors who have sought U.S. citizenship, and
- the businesses established by immigrant investors, including (1) the types of commercial enterprises established, (2) the businesses' locations and whether they remained in this location, and (3) the number of jobs created by the immigrant investors' businesses.

Overview of Our Scope and Methodology

We reviewed applicable laws, including the Immigration Act of 1990 (P.L. 101-649 (1990)) and the 21st Century Department of Justice Appropriations Authorization Act (P.L. 107-273 (2002)), as well as studies, analyses, and other relevant literature covering the EB-5 category. Also, we reviewed USCIS and Department of State policies and guidelines relating to EB-5.

To obtain information on our objectives, we reviewed a random probability sample of 90 approved EB-5 cases (discussed in more detail below). We also conducted interviews and site visits with USCIS headquarters officials as well as service center officials in California and Texas—the two USCIS service centers that process immigrant investor applications. Further, to obtain perspectives from nongovernmental sources, we interviewed four immigration lawyers in the private sector

[1]Aliens are allowed to enter the United States under immigrant and nonimmigrant visas. Immigrant visas are for those who wish to obtain permanent resident status in the United States and are categorized as either family or employment visas. Within each category, USCIS established a preference whereby certain visas are processed before others. For example, the first priority of employment-based visas (EB-1) refers to those deemed by USCIS to be priority workers—that is, a person who has a well-documented and extraordinary ability in the sciences, arts, education, business, or athletics. EB-5 refers to the fifth employment-based preference category. Nonimmigrant visas are for those aliens (such as students or those traveling for business or pleasure) who wish to enter the United States on a temporary basis.

who were knowledgeable about the EB-5 category. We did not independently corroborate all of the opinions provided by USCIS officials and immigration lawyers that we interviewed. Our selection of immigration lawyers was based primarily on the recommendations of the American Immigration Lawyers Association.

More details about the scope and methodology of our work are presented in the following sections.

Number of Immigrant Investors and Country of Origin

USCIS's Computer Linked Application Information Management System (CLAIMS), the initial source of data entry for information from EB-5 applications, has a documented history of unreliability.[2] Therefore, we obtained information on the number of immigrant investor visas and country of origin from an alternative source—the Department of State's Immigrant Visa Allocation Management System (IVAMS). The State Department is required by statute to maintain a complete, current, and accurate accounting of the number and origin of aliens within all visa categories.

We obtained State Department data to determine the number of visas issued (to both alien entrepreneurs and their dependents) under the EB-5 category by year since the its inception in 1992 through fiscal year 2004. We also analyzed the data by the country of origin to determine the countries with the most visas issued.

Immigrant Investors and Their Businesses

Because reliable data for addressing these objectives were not available in electronic format from either USCIS or the State Department, we conducted a file review of EB-5 cases that had been approved for permanent residence. Because of the labor-intensive nature of the case file review, it was not feasible to individually review the files for all approved immigrant investors since the EB-5 category's inception in 1992. As a basis for selecting a sample, we obtained from USCIS an electronic list of all EB-5 participants who have received permanent residence approval since

[2]GAO, *Homeland Security: Risks Facing Key Border and Transportation Security Program Need to Be Addressed*, GAO-03-1083 (Washington, D.C.: Sept. 19, 2003); *Homeland Security: INS Cannot Locate Many Aliens because It Lacks Reliable Address Information*, GAO-03-188 (Washington, D.C.: Nov. 21, 2002); and *Immigration Benefits: Several Factors Impede Timeliness of Application Processing*, GAO-01-488 (Washington, D.C.: May 4, 2001).

the category's inception in 1992 and selected a simple random probability sample from these approved applicants. We identified the sample cases from the agency's Marriage Fraud Amendment System (MFAS)—an electronic database used to manage and process EB-5 applications for permanent residence.[3] MFAS tracks EB-5 participants by name, file number, home address, and other information.

At the time of our sample selection of case files, the MFAS database reflected 1,893 EB-5 cases. Of these, according to USCIS data, 804 had an approved application for permanent legal resident status (Form I-829). Another 866 EB-5 cases were shown to have applications for permanent legal residency in pending status. The remaining 223 cases were primarily shown to be denied, closed, or otherwise terminated.

We planned to draw our sample from the population of 804 approved case files. An initial review of the data showed that 93 files belonged to dependents, so we eliminated these files from consideration leaving a total population of 711 approved immigrant investors. Of the 711 approved investors, we randomly selected a probability sample of 111 case files for review.

The physical files are not maintained in one location. Some files may be at the Texas or California service centers, while others may be located at one of the 33 USCIS district offices across the country, while still others may be located at the USCIS records storage facility in Missouri. Therefore, USCIS officials agreed to locate and retrieve the files we randomly selected as our sample and ship them to the Texas Service Center for our review. In examining the files as they were retrieved, still more files that the USCIS database showed were investors were actually dependents of investors.

From our probability sample of 111 immigrant investor files, we identified 8 ineligible files (4 of these files belonged to dependents and 4 did not contain a Form I-829). From the remaining 103 files in the sample, we obtained 90 usable files. This represented an overall response rate of 87 percent. USCIS was not able to provide the remaining 13 files during the course of our fieldwork. We were able to get information from all

[3]According to USCIS officials, the Marriage Fraud Amendment System is used to process EB-5 applications because, like those immigrating upon marriage, EB-5 participants must undergo a conditional period prior to being granted permanent residence status.

90 usable files on most of the items we measured. For some items, we were not able to get information from a small proportion of the 90 usable files. In conducting our analysis, we assumed that missing information would be similar to information we obtained on the items we measured. Our estimates may be biased to the extent that the information differs. The response rates to individual items varied among items. Considering the error rate in the MFAS database regarding the proportion of files that were actually dependents and not investors, we estimated that the total population of approved immigrant investors is approximately 653.

With our probability sample, each member of the population had an equal and nonzero probability of being selected. Each sampled application was subsequently weighted in the analysis to account for selection probabilities and nonresponse. Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval. This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn. As a result, we are 95 percent confident that each of the confidence intervals in this report will include the true values in the sample population.

All percentage estimates from the sample have been rounded to the nearest percent and have margins of error of plus or minus 10 percent unless otherwise noted. The 95 percent confidence interval for the estimated total of $1.04 billion invested ranges from $784 million to $1.3 billion.

We used a data collection instrument in our file review to record information from the following USCIS forms filed by the EB-5 applicants:

- Form I-526 (Immigrant Petition by Alien Entrepreneur) is an application submitted to USCIS by an entrepreneur who is applying for the EB-5 category.

- Form I-485 (Application to Register Permanent Residence or Adjust Status) is an application submitted to USCIS by an immigrant who is residing in the United States and who wishes to obtain permanent resident status. If USCIS approves this form, the immigrant is issued a conditional green card. In the case of the EB-5 category, USCIS places a 2-year condition on the resident status to give the investor sufficient

time to establish his business in accordance with the EB-5 requirements.

- Form I-829 (Petition by Entrepreneur to Remove Conditions) is submitted to USCIS by a conditional resident who obtained such status through the EB-5 category and who wishes to apply for permanent resident status as a result of satisfying all the EB-5 requirements.

- Form N-400 (Application for Naturalization) is an application submitted by immigrants who wish to become U.S. citizens.

For a small proportion of the 90 case files, some data items were not filled in. In those few cases we assumed that the missing data, if filled in, would be proportional to similar data available in the universe of case files. Therefore, our estimates may be biased to the extent that the actual data, if available, may have differed.

Where Immigrant Investors Established Business Operations and whether the Business Remained in That Location

Where immigrant investors established their businesses and whether the businesses remained in these localities was determined from the business addresses listed on two forms that applicants file during the EB-5 process. We recorded the city and state of the business at (1) the time the applicant applied for the EB-5 category using the Form I-526 and (2) the time the applicant applied for permanent residence using the Form I-829. Using these business addresses, we determined the cities and states where applicants established their businesses when they applied for EB-5 status and whether the applicants' businesses remained in these locations while completing the EB-5 requirements. Our analysis is limited by the fact that this conditional period typically lasts 2 years and does not cover the time period after immigrants have been approved for permanent residency. Using this information, we statistically projected the tendency of all businesses established by EB-5 applicants to remain in their original locations.

Types of Commercial Enterprises Established, Investment Amounts, and Number of Jobs Created

We determined the types of commercial enterprises established, the dollars invested, and the number of jobs created based on the information supplied by applicants on Form I-829 (Petition by Entrepreneur to Remove Conditions) and various supporting documents (such as bank statements, federal or state income tax returns, quarterly tax statements, payroll records, and employment tax documents).

Number of Immigrant Investors Who Have Sought Permanent U.S. Citizenship

USCIS computerized systems (CLAIMS) had data on the number of EB-5 applicants who have been approved for permanent U.S. citizenship. However, as mentioned previously, information in the CLAIMS database was not always accurate. Therefore, during our file review, we determined if applicants sought U.S. citizenship by the presence of a Form N-400 (Application for Naturalization) in the file and whether this application was approved by USCIS. We statistically projected these results.

Processing of Immigrant Investor Visa Applications at the Two USCIS Service Centers and Criteria Used for Approvals and Denials

To determine how immigrant investor visa applications were processed, we interviewed USCIS managers and EB-5 adjudicators; reviewed relevant statutes, policy guidance, and training manuals; and visited the USCIS service centers in California and Texas. During the site visits, we paid particular attention to differences, if any, between the two service centers regarding processing procedures and the criteria used for approvals and denials.

Views of Immigration Lawyers

To obtain perspectives on the EB-5 category from nongovernmental sources, we interviewed four immigration lawyers in the private sector who were knowledgeable about EB-5 application process. Our selection of interviewees was based primarily on the recommendations of the American Immigration Lawyers Association. Because we interviewed a nonprobability sample of immigration lawyers, the views and opinions of these lawyers cannot be regarded as representative of the views and opinions of all immigration lawyers.

Data Reliability

To assess the reliability of State Department data on the number of individuals who have received visas under the Immigrant Investor Program and their country of origin, we interviewed knowledgeable agency officials about the data and electronically tested the data to identify obvious problems with completeness or accuracy. On the basis of these steps, we determined that the State Department visa data were sufficiently reliable for the purposes of this report.

To examine the reliability of the data contained in USCIS EB-5 files, we conducted independent checks of selected data from 20 immigrant investor files that were pending USCIS review by undertaking online

searches on the respective firms in the Lexis-Nexis and Dunn and Bradstreet databases. We also visited four of the investor businesses and interviewed the alien entrepreneurs who had met the EB-5 requirements and been approved for permanent residence to verify the veracity of the information contained in the files that we used in the report. We also interviewed knowledgeable agency officials about the data. To ensure accurate recording and entry of the EB-5 file data into our database, each entry was double-checked against the relevant case file by an analyst who had not initially entered the data. We determined that the EB-5 case file data were sufficiently reliable for the purposes of this report.

Appendix II: Immigrant Investor Program Application Process

To participate in the Immigrant Investor Program—or EB-5 employment category----an individual must seek and obtain approval from the U.S. Citizenship and Immigration Services.[1] Participation in the program occurs after approval at three major steps in the application process.

- First, the immigrant investor applies for the EB-5 category (while either residing abroad or residing in the United States) by submitting USCIS Form I-526.

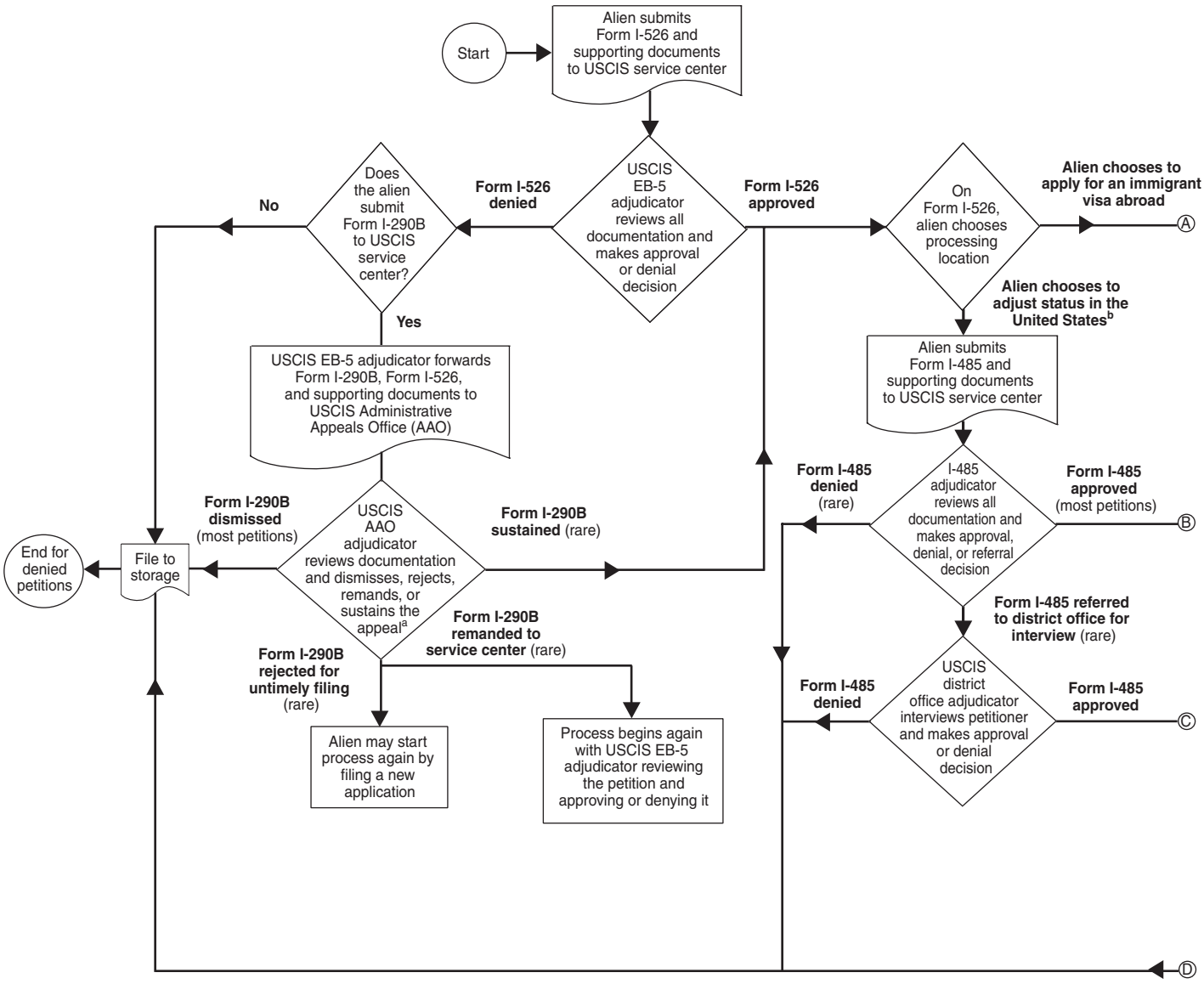
- Second, the immigrant investor applies for conditional resident status after the Form I-526 is approved either by submitting a Form I-485 or by filing paperwork with the State Department. After obtaining conditional resident status, immigrant investors have a 2-year probationary period to establish their business and meet the EB-5 requirements.

- Finally, the immigrant investor applies for permanent resident status by submitting USCIS Form I-829. When eligible, immigrant investors may apply for U. S. citizenship. However, this is not a requirement of the program.

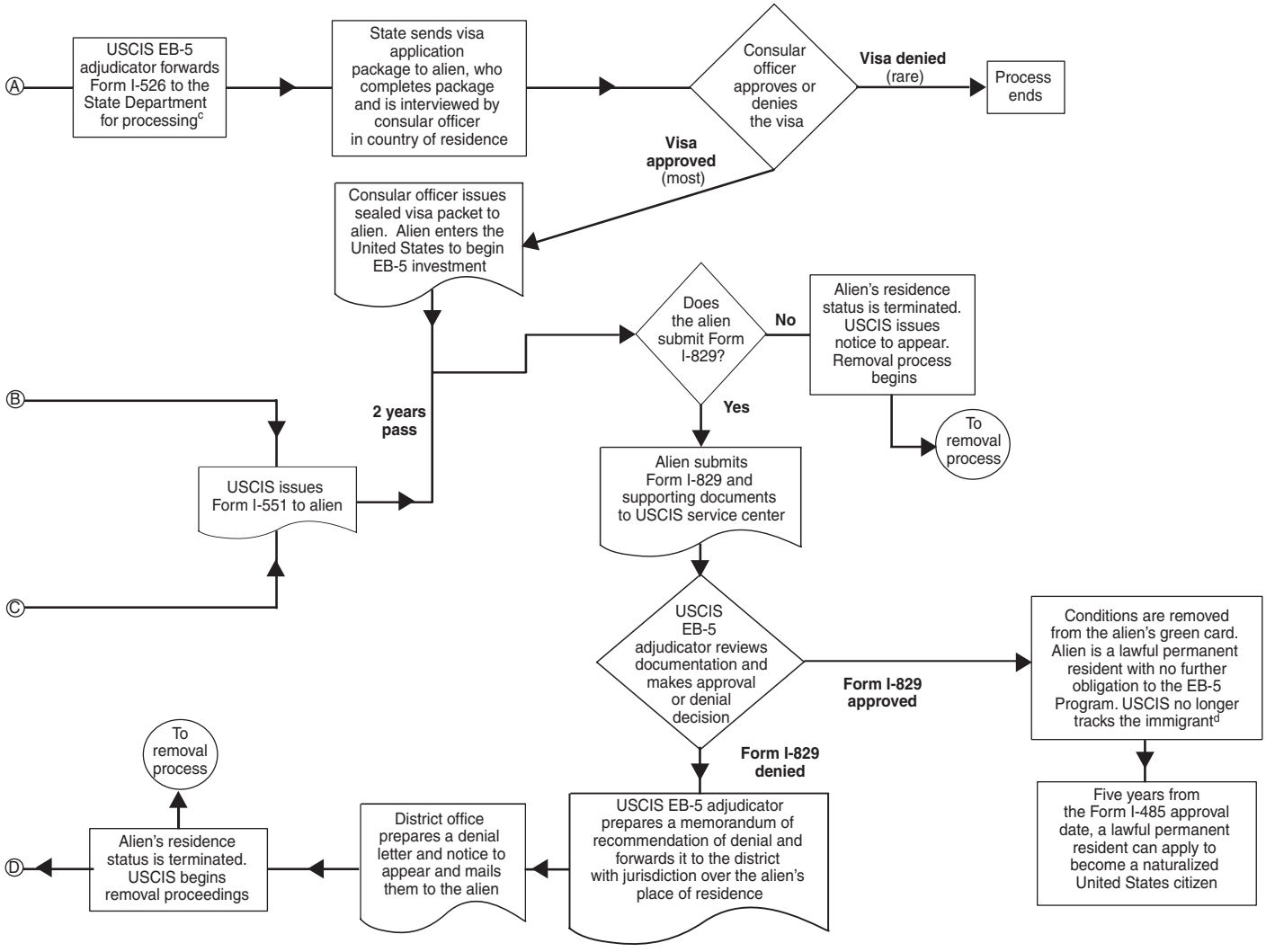
Figure 3 shows the application process for the Immigrant Investor Program.

[1]Aliens are allowed to enter the United States under immigrant and nonimmigrant visas. Immigrant visas are for those who wish to obtain permanent resident status in the United States and are categorized as either family or employment visas. Within each category, USCIS established a preference whereby certain visas are processed before others. For example, the first priority of employment-based visas (EB-1) refers to those deemed by USCIS to be priority workers—that is, a person who has a well-documented and extraordinary ability in the sciences, arts, education, business, or athletics. EB-5 refers to the fifth employment-based preference category. Nonimmigrant visas are for those aliens (such as students or those traveling for business or pleasure) who wish to enter the United States on a temporary basis.

Figure 3: EB-5 Application Processing Flow



Source: GAO analysis of USCIS and Department of State data.



Legend of USCIS forms:

Form I-526 (Immigrant Petition by Alien Entrepreneur)

Form I-485 (Application to Register Permanent Residence or Adjust Status)

Form I-829 (Petition by Entrepreneur to Remove Conditions)

Form I-290B (Notice of Appeal to the Administrative Appeals Office)

Form I-551 (Alien Registration Card)

[a]The Administrative Appeals Office adjudicator can deny (dismiss) the appeal, approve (sustain) the appeal by overturning the service center's decision, return (remand) the appeal to the service center if new issues surface during the appeal review, or reject the appeal if it is not submitted by the deadline.

[b]Adjustment of status refers to the USCIS procedure allowing individuals in the United States to apply for permanent residence by filing Form I-485.

[c]The Department of State's National Visa Center is the central processing point for immigrant visas issued abroad.

[d]Lawful permanent residents are immigrants who are legally allowed to reside permanently in the United States.

Processing of immigrant investor applications occurs at two of USCIS's service centers—the California Service Center, located in Laguna Niguel, California, and the Texas Service Center, located in Dallas, Texas. Adjudicators review the pertinent forms and make approval and denial decisions at each step in the process. We found that both the California and Texas service centers use the same processing procedures and review criteria when reviewing immigrant investor applications. The following narrative provides more detail on the information adjudicators consider when reviewing EB-5 applications.

Immigrant Investors' Initial Application

The initial application Form I-526 must be accompanied with additional documentation supporting (1) the business proposal, (2) the investment of money, (3) the number of full-time jobs to be created, and (4) the applicant's management role in the business.

- *Business proposal*—The application should clearly outline and describe the type of business, where it is to be located, how it is to be financed, the investor's banking relationships, and information about the business (e.g., its customer base, number of employees, and source of inventory or raw materials). Although the immigrant investor is not required to submit specific supporting documents, USCIS officers will likely require a comprehensive business plan or other documents outlining the business proposal with Form I-526. Also, if the business already exists, articles of incorporation, a set of audited financial statements, or, if in the proposal stage, pro forma financial statements should be part of the proposal package.

- *Investment of money*—Documents supporting the investment must show evidence that the investor has the funds to meet the program's requirement, $1 million (or $500,000 for investment in targeted employment areas).[2] Speaking anecdotally, an adjudicator said this requirement is often the weakest part of the proposal. The documents need to show the source of the funds and that the immigrant investor is personally at risk for the money. In addition, the investor must show that the money is from legitimate sources, such as a lending institution. Investors may also be expected to provide copies of past income tax returns, including tax returns from their country of origin, to show their history of financial resources. Other documents supporting this section of the proposal would include personal bank statements; sales documents if, for example, the money was being obtained from the sale of other property; documents showing the transfer of money; and letters of reference from financial institutions. An officer noted that many of the applications he sees do not adequately document the investment criterion. For example, many investors find it difficult or are unwilling to show the source of funds. Also, some immigrant investors structure the financing arrangements so that the financial risk is to the business and not the immigrant investor himself. Finally, some immigrant investors fail to show investment or proposed investment of the required amount of funds.

- *Creation of jobs*—Immigrant investors must document that the proposed business venture will generate at least 10 full-time jobs. Current regulations allow for job sharing. However, the number of full-time positions must still equal 10. If the business is operating at the time the application is submitted, the immigrant investor should provide documentary evidence of employment with submission of payroll records, state employment records, and copies of Internal Revenue Service Form I-9, Employment Eligibility Verification, for each employee.

- *Applicant's role in the business*—Immigrant investors must be actively involved in managing their businesses. Documentation proving this role would include, for example, copies of board minutes appointing the immigrant investor to a management position, copies of stock certificates, copies of tax records, or copies of articles of incorporation.

[2]Section 8 C.F.R. § 204.6(e) defines a targeted employment area as an area that, at the time of the investment, is either a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate.

According to USCIS officials, because of the wide differences in the types and sizes of businesses involved, there is no single checklist or procedure to follow in reviewing petitions. However, as noted above, adjudicators stressed that the review of the application focuses on a feasible plan for the business, the immigrant investor's investment in the business meeting the required dollar amount, the creation of the required number of jobs, and the immigrant investor's role in the management of the business. A significant part of the training for adjudicators for reviewing petitions for this program centers on knowledge of business principles.

Throughout the application review process, if deficiencies in the petition or supporting documents are noted, the adjudicator summarizes them in a memo, a request for evidence (RFE), which is sent to the investor after the initial review is completed. The immigrant investor is granted 12 weeks plus 30 days to respond to the RFE. While waiting for the response, the case is placed on hold. Once the RFE is returned to USCIS with the information needed, the adjudicator completes the review of the petition. According to USCIS officials we interviewed, most Forms I-526 require that an RFE be sent to the investor.

If an application is to be denied, the adjudicator prepares a letter (signed by the service center director) describing the reason for denial and mails it to the investor. The letter details the specific reasons for the denial decision and cites the applicable sections of 8 C.F.R. § 204.6 (the regulations governing adjudications of Form I-526) that the investor's petition violated.

If the immigrant investor's application is denied, the investor may appeal the decision by filing Form I-290B, Notice of Appeal to the Administrative Appeals Office, to the service center that made the unfavorable decision. The appeal is forwarded to the AAO at USCIS headquarters for review. AAO adjudicators use the same criteria when reviewing immigrant investor applications as those used by service center adjudicators. The AAO unit may approve, deny, or remand the case to the service center, or reject the case if the appeal is filed untimely. If the appeal is denied, there are no further appeal rights within USCIS. The only remaining appeal option for the immigrant investor is through the U.S. court system. If the appeal is remanded, the AAO directs the service center adjudicator to review the case again. The remanded case would be reviewed again following the same procedures as if it were initially received.

If the immigrant investor application is approved, the Form I-526 allows the immigrant investor to indicate his preferred option for applying for a

conditional 2-year visa. One option is applicable if the immigrant investor is already in the United States under some other legal status. In this case, the immigrant investor may apply for "Adjustment of Status," with submission of Form I-485. The second option, consular processing, is available if the immigrant investor applied from abroad or chooses to go abroad and obtain a visa from the State Department.

Application for Conditional Resident Status

As previously mentioned, immigrant investors can choose how they wish to obtain their conditional resident status either by completing Form I-485 and submitting it to USCIS or by completing a State Department visa application at a U.S. consulate abroad.

Form I-485 Processing

After the immigrant investor application is approved, the immigrant investor submits Form I-485 and supporting documents to the applicable USCIS service center. This procedure allows an eligible applicant to become a lawful permanent resident of the United States without having to go abroad and apply for an immigrant visa. The application process for Form I-485 is not exclusive to the Immigrant Investor Program because it is used to apply for adjustment of status under all types of visas.

The adjudicator in reviewing the Form I-485 and accompanying documentation (e.g., medical records, biographical information, the Federal Bureau of Investigation background check results, and the Form I 526, in the case of immigrant investors) may require an interview prior to application approval or denial. An adjudicator may request an interview for reasons such as evidence of criminal activity or unlawful residence status. USCIS policy requires that district offices handle all face-to-face contact, so these cases are referred to the USCIS district office with jurisdiction over the area where the investor applicant resides. After the interview, the district office makes a determination to approve or deny the Form I-485. If the Form I-485 is denied, the process is terminated and alien removal proceedings begin. If Form I-485 is approved, the investor is issued a conditional Form I-551, Alien Registration Card, which allows the investor 2 years' conditional residence to establish the business and meet the EB-5 requirements.

Throughout the review process, if deficiencies in the petition or supporting documents are noted, the adjudicator summarizes these questions in a memo, an RFE that he sends to the immigrant investor. The immigrant investor is granted 12 weeks plus 30 days to respond to the RFE. While waiting for a response, the case is placed on hold. Once USCIS

receives the response to the RFE, the adjudicator finalizes the review and makes the approval, denial, or referral decision.

Consular Processing

Investors who choose to apply for an immigrant visa abroad use consular processing. With consular processing, the investor does not submit an I-485. Under this procedure, the State Department forwards a visa application to the immigrant investor, who completes the application and submits it to the U.S. consular office in the country of residence. A U. S. consular officer interviews the immigrant investor and determines whether to approve or deny the application. If the application is denied, the process is terminated and the immigrant investor is not allowed to enter the United States. If the visa is approved, the investor is issued travel documents that are presented to U. S. immigration authorities upon arrival in the United States.

With approval of a conditional visa (either with an approved Form I-485 or through consular processing), the immigrant investor is granted 2 years of conditional residency. During the conditional period, immigrant investors are expected to initiate their business venture (if they have not already done so) and meet the expectations set out in their approved Form I-526.

Application to Change Conditional Residency Status to Permanent Residency Status

Within 90 days immediately preceding the second anniversary of the date that the immigrant investor was granted conditional status, the investor is to submit Form I-829. Otherwise, if immigrant investors do not file the application within the required time period, they will lose their conditional status, and removal proceedings will begin requiring the immigrant to leave the United States.

With the petition to remove conditions, the applicant must provide evidence that the enterprise met the terms of the originally approved Form I-526. Filing this application extends the investor's conditional status for 1 year while the petition is processed. The Form I-829 must be accompanied by evidence that the immigrant investor made (or is in the process of making) the required investment and created (or will create within a reasonable time) 10 full-time jobs. The immigrant investor must also show that these actions were sustained during the 2-year conditional period. This evidence should

- verify that the investor invested or was actively in the process of investing the required capital (either $1 million or $500,000) in a commercial enterprise;

- show that the investor sustained the enterprise and the investment in the business throughout the period of conditional permanent residence; and

- verify the number of full-time employees at the beginning of the investment and at present.

The immigrant investor should include other available documentation if it is relevant to the commercial enterprise.

Throughout the review process, if deficiencies in the petition or supporting documents are noted, the adjudicator summarizes these questions in an RFE that he sends to the immigrant investor. The immigrant investor is granted 12 weeks plus 30 days to respond to the RFE. Once the USCIS receives the response to the RFE, the adjudicator finalizes the review and approves or denies the application. According to USCIS officials we interviewed, most Form I-829s require that an RFE be sent to the immigrant investor.

If the adjudicator determines that the case should be denied, a memorandum of recommendation of denial is sent to the USCIS district office with jurisdiction over the immigrant investor's residence. The memorandum is a detailed description of why the adjudicator believes that the petition should be denied. The memorandum details the specific reasons the petition should be denied and cites the applicable sections of 8 C.F.R. § 216.6 (the regulations governing adjudications of Form I-829) that the investor's petition violated.

Once the district receives the memorandum of recommendation of denial, a district office adjudicator prepares the denial letter (based on the memorandum), which is signed by the district director. Once the immigrant investor receives the letter, removal proceedings begin. The immigrant investor may appeal the denial before the immigration judge who presides over the investor's removal proceedings. If the immigration judge does not overturn the USCIS decision, the immigrant investor's only other appeal option is through the U.S. court system. If the adjudicator approves Form I-829, the immigrant investor is granted permanent resident status, indicating the immigrant investor is a lawful permanent resident with no further obligations under EB-5. USCIS no longer tracks the immigrant investor after he or she becomes a lawful permanent resident.

Application for U.S. Citizenship

Five years from the date of approval of the Form I-485 or the date the investor entered the United States (if the investor chose consular processing), the immigrant investor is eligible to apply for citizenship if the Form I-829 is approved. If the investor wants to become a naturalized U.S. citizen, a Form N-400, is submitted to USCIS, and if it is approved, the immigrant investor is granted citizenship. Immigrant investors are not required to apply for citizenship.

Appendix III: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 18, 2005

Mr. Paul L. Jones
Director, Homeland Security and Justice
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Jones:

RE: Draft Report GAO-05-256, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors (GAO Job Code 440281)

The Department of Homeland Security (DHS), including U.S. Citizenship and Immigration Services (USCIS), appreciates the opportunity to comment on the Government Accountability Office's draft report and is pleased to report recent steps taken to improve the administration of the EB-5 foreign investor program.

The Government Accountability Office (GAO) recommended that DHS finalize and issue regulations that implement provisions of the Department of Justice Appropriations Authorization Act (P.L. 107-273) related to the EB-5 immigrant investor program. Those regulations have been, and remain, a priority within DHS. DHS is working to resolve the complex issues that must be addressed in the regulations, and is working with the Department of Justice with respect to their anticipated companion rulemaking.

On January 19, 2005, USCIS created the Investor and Regional Center Unit (IRCU), which will establish a nationwide and coordinated program. Given the documented past abuses in the alien investor program and the complexity and sensitivity of the issues and factors relating to investor cases, there is a need for centralized oversight and coordination, and uniform standards governing all aspects of EB-5 matters. DHS and USCIS believe this new unit will strengthen and protect the integrity of the program by guarding against past abuses, and promoting the intent of Congress to encourage investment and increase employment within the United States.

The IRCU has oversight for all policy and regulation development, field guidance, form design, case auditing and training regarding the EB-5 program. To carry out its mission, the IRCU will work closely with other offices within USCIS and the Department of State's Bureau of Consular Affairs in the administration of the law as well as in clarifying processing procedures regarding the adjudication of Form I-526, *Immigrant Petition by*

www.dhs.gov

Alien Entrepreneur, and related Form I-829, *Petition by Entrepreneur to Remove Conditions*. The IRCU will also work with USCIS' Office of Fraud Detection and National Security to best ensure EB-5 and regional center program integrity, fraud detection and prevention.

Although not covered within the scope of GAO's review, a significant change to the program was the creation of 26 Regional Centers. Of the 10,000 investor visas available annually, 3,000 are set aside for those who apply under a pilot program involving a USCIS "Regional Center." The foreign investor must demonstrate that a qualified investment is made in a new commercial enterprise located within an approved Regional Center and show that 10 or more jobs are created either directly or indirectly by the new commercial enterprise. In addition, the foreign investor may only have to devote $500,000 if the capital investment is in a Targeted Employment Area, a Rural Area, or a small urban area of less than 20,000 people within the Regional Center. Finally, USCIS is in the process of setting a standard for timeliness in processing EB-5 cases, with the objective of providing for a reliable time frame from filing and adjudicating the Form I-526 petition through to the targeted adjudication of the subsequent Form I-829 petition to remove conditions on the investor's residency. We believe such improvements will facilitate growth in the use of the EB-5 visa as intended by Congress.

Sincerely,

Steven Pecinovsky
Director
Departmental GAO/OIG Liaison Office

MMcP

Appendix IV: GAO Contacts and Staff Acknowledgments

GAO Contacts

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Staff Acknowledgments

In addition to the above, James D. Ashley, David P. Alexander, Leo M. Barbour, Grace A. Coleman, David S. Dornisch, Ann H. Finley, Kimberly Michael, Miguel A. Salas, Jerome T. Sandau, and Ellen Wolfe made key contributions to this report.

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