

# Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors

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## INTRODUCTION

In 1997, Kyung Kim, a former executive with a Korean insurance company, immigrated to the United States with his wife and children through an immigration program designed for foreign entrepreneurs known as the EB-5 program.<sup>1</sup> The program allows foreign-born entrepreneurs or investors with no family connection in the United States to immigrate to the United States, provided they make substantial human and capital investments.<sup>2</sup> In order to immigrate under the EB-5 visa, Kim invested in a company called AIS, which was formed by former Immigration and Naturalization Service (“INS”) officials to help troubled textile mills.<sup>3</sup> AIS attracted investors because it creatively structured its EB-5 deals, allowing foreign investors to put up only \$125,000 in cash and \$375,000 in the form of a promissory note, which would routinely be forgiven once the immigrant’s permanent residency application was approved.<sup>4</sup> This was an arrangement the INS had signed off on many times before, but shortly after Kim invested, an internal probe concluded that the promissory notes were an impermissible guarantee.<sup>5</sup> As a result, the INS abruptly changed its mind and

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<sup>1</sup> James Kelleher et al., *Special Report: Overselling the American Dream Overseas*, REUTERS, Dec. 22, 2010, available at <http://www.reuters.com/article/2010/12/22/us-usa-immigration-business-idUSTRE6BL2KJ20101222>.

<sup>2</sup> S. REP. NO. 101-55, at 10 (1989).

<sup>3</sup> Kelleher et al., *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

retroactively rejected hundreds of applications it had previously approved, including Kim's.<sup>6</sup> This retroactive decision left hundreds of immigrant investors and their families in legal limbo.<sup>7</sup> In 2003, Kim attempted to immigrate again to the United States under the EB-5 program; this time, however, he bought a specialty grocery store and went into business for himself.<sup>8</sup> He employed eighteen workers in total.<sup>9</sup> Kim's experience illustrates some of the difficulties the EB-5 program has faced, such as uncertainties with the adjudication process and the rigorous nature of the EB-5 application process.<sup>10</sup> The primary problem this Comment will address is that the EB-5 program has evolved into an immigration program that is contrary to its legislative intent and in need of reform, because rather than attracting true entrepreneurs like Kim, the program is attracting passive immigrant investors.<sup>11</sup>

Congress created the employment-based visa known as the EB-5 program in 1990.<sup>12</sup> The new visa program was intended to create jobs for U.S. workers and to infuse new capital into the U.S. economy.<sup>13</sup> The program required that an alien entrepreneur invest \$1 million or \$500,000 in a new commercial enterprise, "engage" in the management of the new enterprise through the exercise of day-to-day managerial control, and create ten full-time jobs for U.S. citizens or lawful permanent residents.<sup>14</sup> This part of the EB-5 program will be referred to as the direct-employment<sup>15</sup> creation program, or the entrepreneur's visa.

The 1993 Appropriations Act made an amendment to the EB-5 program to create the "Pilot Immigration Program," now referred to as the Immigrant Investor Pilot Program ("IIPP"), essentially to make the program more investor-friendly and to

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-256, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS 8-9 (2005), available at <http://www.gao.gov/products/GAO-05-256>.

<sup>11</sup> See *infra* Part III.B.

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> S. REP. NO. 101-55, at 21 (1989).

<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., EB-5 IMMIGRANT INVESTOR PILOT PROGRAM 8 (2011), available at [http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/EB-5\\_Immigrant\\_Investor\\_Pilot\\_Program.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/EB-5_Immigrant_Investor_Pilot_Program.pdf) ("Direct jobs are actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.").

stimulate investment of physical capital from foreign investors.<sup>16</sup> Out of the 10,000 visas available annually to EB-5 immigrants, Congress mandated allotment of only 3000 visas for IIPP immigrants.<sup>17</sup> Under the IIPP, an alien investor can currently immigrate to the United States by investing the same requisite amount, \$1 million or \$500,000, into an “economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”<sup>18</sup> The regulations refer to such economic units as “regional centers.”<sup>19</sup> The ability to invest in regional centers to satisfy the new commercial enterprise requirement affords the alien investors more flexibility in meeting the program’s stringent requirements, because now the alien investors can passively invest and indirectly create jobs through regional centers.<sup>20</sup>

The EB-5 program has been relatively underutilized since its inception nearly twenty-five years ago.<sup>21</sup> In 2012, only 3677 of the 10,000 EB-5 visas available annually were approved.<sup>22</sup> Overall, only about 0.6% of the total number of U.S. immigrants granted permanent resident status that year were granted status under the EB-5 category.<sup>23</sup> Practitioners and adjudicators have been grappling with the EB-5 program for decades, and finally the program is starting to gain momentum; alien investors admitted under the EB-5 program have nearly doubled from 2011 to 2012.<sup>24</sup> However, data released regarding the EB-5 program does not widely publicize which part of the program is actually being

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<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> 8 U.S.C. § 1153 (2012).

<sup>18</sup> 8 C.F.R. § 204.6 (2014).

<sup>19</sup> *Id.*

<sup>20</sup> See *infra* Part II.B.

<sup>21</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT’ OF HOMELAND SEC., FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR AND FORM I-829, PETITION BY ENTREPRENEUR TO REMOVE CONDITIONS AGENCY-WIDE RECEIPTS, APPROVALS, DENIALS FISCAL YEAR(S): 1991–2013 (THROUGH THIRD QUARTER) (2013), available at [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526-I829\\_performancedata\\_fy1991-2013\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526-I829_performancedata_fy1991-2013_qtr3.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2012, 2013 OFF. IMMIGR. STAT. ANN. FLOW REP.* 3 tbl.2, available at [https://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_fr\\_2012\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf).

<sup>24</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21. In fact, countries such as China will face retrogression as visas issued to applicants from China will be maxed out at the seven-percent-per-country limit under the EB-5 program. See Mona Shah & Yi Song, *EB-5 Retrogression for China in Mid-2014—Not Really a Reason to Be Alarmed?*, LEXISNEXIS VENTURE CAP. BLOG (Jan. 22, 2014, 4:45 PM), <http://www.lexisnexis.com/legalnewsroom/banking/b/venture-capital/archive/2014/01/22/eb-5-retrogression-for-china-in-mid-2014-not-really-a-reason-to-be-alarmed.aspx>.

utilized; statistics about job creation and total capital investments are typically released about the EB-5 program as a whole.<sup>25</sup> The sudden influx of immigrant investors proves the IIPP is successful in attracting foreign capital investments,<sup>26</sup> but there is no evidence that the program is at all successful in attracting immigrant entrepreneurs<sup>27</sup> as originally intended by Congress.<sup>28</sup> This is problematic because immigrant entrepreneurs are valuable labor assets that the United States cannot afford to ignore.

This Comment identifies two main problems with the EB-5 program. First, the program cannot effectively target both immigrant entrepreneurs and investors under one framework. Second, using the program primarily as an investor's visa rather than as an entrepreneur's visa is contrary to legislative intent. Congress created the EB-5 program to stimulate the U.S. economy and create jobs through entrepreneurship and capital investment.<sup>29</sup> While immigrant investors are important for injecting foreign capital investments into the United States, immigrant entrepreneurs make both human and physical capital investments into an economy.<sup>30</sup>

In this Comment, Part I will discuss why immigrant entrepreneurs are important for the United States' economic growth and job creation. Part II will discuss current U.S. policies regarding immigrant entrepreneurs and investors, as well as the history and intent of the EB-5 program. Part III will discuss the success of, as well as the problems with, the EB-5 program. Part IV will discuss proposed legislation and provide recommendations for amending the EB-5 program to enable the United States to attract more entrepreneurs to make intellectual investments and physical capital investments in the United States. This Comment concludes that the U.S. EB-5 program should have separate program requirements for immigrant entrepreneurs and investors in order to properly incentivize and target each group.

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<sup>25</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; ICF INT'L, STUDY OF THE UNITED STATES IMMIGRANT INVESTOR PILOT PROGRAM (EB-5), at 6 (2010), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/EB-5/EB5-Report-2010.pdf>.

<sup>26</sup> See *infra* Part III.A.1.

<sup>27</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15.

<sup>28</sup> See *infra* Part II.A.

<sup>29</sup> See *infra* Part II.A.

<sup>30</sup> See *infra* Part I.

## I. IMMIGRANT ENTREPRENEURS AND ECONOMIC GROWTH

There is a fundamental difference between investors and entrepreneurs, which is why other countries, such as the United Kingdom, Canada, and Australia, have separate immigration programs with distinct requirements for immigrant investors and immigrant entrepreneurs.<sup>31</sup> Generally, the investor programs in those countries require a higher investment or net worth amount than do the entrepreneur or business owner programs, and unlike entrepreneurs, investors do not have job creation requirements.<sup>32</sup> The U.S. EB-5 program, however, does not clearly separate alien entrepreneurs from alien investors. The EB-5 program appears to work more as an umbrella program with uniform requirements, such as investment amount, job creation, and management of a new enterprise. This section discusses how investors differ from entrepreneurs in how they stimulate the economy, and why immigrants in particular are important for stimulating the economy.

### A. Investors vs. Entrepreneurs

Whether a person is an investor or an entrepreneur can be determined based on how a person intends to generate financial gain from his or her investments. An investor is defined as a person who commits capital for financial return or future benefit or advantage,<sup>33</sup> and an entrepreneur is a person who manages and assumes the risk of a business in order to make money.<sup>34</sup> For example, Australia named its immigrant entrepreneur visa the “Business Innovation and Investment visa,” and required that entrepreneur applicants “have a genuine and realistic

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<sup>31</sup> See ICF INT’L, *supra* note 25, at 55–56, 63.

<sup>32</sup> See *id.* at 71 tbl.14. In the United Kingdom, investors are required to deposit a minimum of £1 million (approximately US\$1.6 million) into a Financial Services Authority-regulated financial institution, or possess £2 million (approximately US\$3.2 million) with access to an additional £1 million in financing. *Id.* at 55. However, entrepreneurs are only required to demonstrate possession of at least £200,000 (approximately US\$325,000) during the initial application process. *Id.* at 56. In Canada, investors must have a minimum net worth of C\$1.6 million (approximately US\$1.4 million) and invest C\$800,000 (approximately US\$705,000) for five years into Provincial Government Funds. See *Investors*, GOV’T CAN., <http://www.cic.gc.ca/english/immigrate/business/investors/index.asp> (last modified July 11, 2014). However, entrepreneurs only need a net worth of C\$300,000 (approximately US\$277,000) and do not have an investment amount requirement. See ICF INT’L, *supra* note 25, at 62. In Australia, investors must commit to invest and maintain A\$1.5 million (approximately US\$1.3 million) and have a net worth of A\$2.25 million (approximately US\$2 million). However, entrepreneurs only need a net worth of business and personal assets of A\$800,000 (approximately US\$695,000). See DEPT OF IMMIGRATION & CITIZENSHIP, AUSTRALIAN GOV’T, BOOKLET NO. 10, BUSINESS INNOVATION AND INVESTMENT 17 (2013), available at [http://www.austarstudy.com/austar\\_download/adly-syymc.pdf](http://www.austarstudy.com/austar_download/adly-syymc.pdf).

<sup>33</sup> THE MERRIAM-WEBSTER DICTIONARY 384 (11th ed. 2004).

<sup>34</sup> *Id.* at 240.

commitment to be involved as an owner of a new or existing business in Australia,” whereas its “Investor visa” primarily required investor applicants to have sufficient assets and net worth.<sup>35</sup>

In general, economists believe long-term investments of physical and human capital stimulate the economy and sustain growth.<sup>36</sup> Investors stimulate the economy by investing physical capital, thereby creating a trickle-down effect on the economy. Business entities are able to use the capital investments to hire more workers and buy equipment to generate more business. Their workers can then spend money they have earned to buy goods and services to further stimulate the local economy and help to expand local businesses.<sup>37</sup>

However, entrepreneurs make even greater contributions to a country’s economic growth because they not only make physical capital investments, but they also make human capital investments. Studies have shown a “knowledge-based capital” approach<sup>38</sup> has more potential to stimulate the economy in the long run. Moreover, entrepreneurs contribute because: (1) they invest physical capital investments into their business; (2) they directly create jobs by hiring local workers to work in their business; (3) they create diverse products and services in various industries to meet the needs of their target market;<sup>39</sup> (4) they contribute to the global economy by selling their goods internationally; and (5) they continuously contribute to a country’s gross national product by operating their business.<sup>40</sup>

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<sup>35</sup> DEPT OF IMMIGRATION & CITIZENSHIP, *supra* note 32, at 16.

<sup>36</sup> See, e.g., Jeffrey Sachs, *Sow the Seeds of Long-Term Growth*, FIN. TIMES (July 21, 2010, 3:18 PM), <http://www.ft.com/cms/s/0/01d88b16-94cd-11df-b90e-00144feab49a.html#axzz2uwRPb0fR>.

<sup>37</sup> IMMIGRATION POLICY CTR., VALUE ADDED: IMMIGRANTS CREATE JOBS AND BUSINESSES, BOOST WAGES OF NATIVE-BORN WORKERS 1–2 (2012), *available at* [http://www.immigrationpolicy.org/sites/default/files/docs/Value\\_Added\\_updated\\_011212.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Value_Added_updated_011212.pdf).

<sup>38</sup> A knowledge-based capital approach is a growth policy that recognizes business innovation is more than good ideas; it is about an organization’s ability to execute and translate these ideas into new products, processes, and markets. See Charles Hulten, *Stimulating Economic Growth Through Knowledge-Based Investment* 3 (OECD Directorate for Sci., Tech. & Indus., Working Paper No. 2, 2013), *available at* <http://dx.doi.org/10.1787/5k46dbzqhj9v-en>.

<sup>39</sup> ROBERT W. FAIRLIE, SBA OFFICE OF ADVOCACY, NO. 334, ESTIMATING THE CONTRIBUTION OF IMMIGRANT BUSINESS OWNERS TO THE U.S. ECONOMY (2008), *available at* <http://archive.sba.gov/advo/research/rs334tot.pdf> (“Immigrants’ contributions differ across sectors of the economy. They own a large share—more than one-fifth—of businesses in the arts, entertainment, and recreation industry. They also contribute significantly to other services, transportation, and wholesale and retail trade.”).

<sup>40</sup> Amitabh Shukla, *5 Ways an Entrepreneur Stimulates the Economy*, PAGGU.COM (Sept. 7, 2009), <http://www.paggu.com/entrepreneurship/5-ways-an-entrepreneur-stimulates-the-economy/>.

These are reasons why “[s]mall businesses are the engine of job growth in our economy.”<sup>41</sup> Statistics have shown that almost half of U.S. jobs are created by small businesses having fewer than fifty employees.<sup>42</sup> Thus, entrepreneurs who create small businesses are vital to U.S. job creation, essential to stimulating the U.S. economy, and imperative to keeping the United States competitive in today’s global economy.<sup>43</sup>

## B. Why Immigrants Stimulate the Economy

### 1. Immigrants Are Innovative

Immigrants, particularly highly skilled immigrants, stimulate the economy because they are innovative.<sup>44</sup> Highly skilled immigrants are often highly educated in science, technology, engineering, and mathematics (“STEM”) fields with advanced degrees from U.S. universities,<sup>45</sup> and they are three times more likely to file patents than U.S.-born citizens.<sup>46</sup> Patents are often used by researchers to gauge inventions that ultimately contribute to an economy’s total factor productivity.<sup>47</sup> Therefore, immigrants’ patent activities may be used to indicate innovation and how much such innovation contributes to an economy.

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<sup>41</sup> *Supporting Small Businesses and Creating Jobs*, WHITE HOUSE, <http://www.whitehouse.gov/omb/factsheet/supporting-small-businesses-and-creating-jobs> (last visited Nov. 1, 2014).

<sup>42</sup> Press Release, ADP, ADP National Employment Report: Private Sector Employment Increased by 188,000 Jobs in June (July 3, 2013), *available at* <http://www.adpemploymentreport.com/2013/June/NER/docs/ADP-NATIONAL-EMPLOYMENT-REPORT-June2013-Final-Press-Release.pdf>.

<sup>43</sup> *See generally* VIVEK WADHWA ET AL., THE GRASS IS INDEED GREENER IN INDIA AND CHINA FOR RETURNEE ENTREPRENEURS (Kauffman Found., America’s New Immigrant Entrepreneurs Ser. Pt. VI, 2011), *available at* <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/the-grass-is-indeed-greener-in-india-and-china-for-returnee-entrepreneurs>.

<sup>44</sup> *See* VIVEK WADHWA ET AL., AMERICA’S NEW IMMIGRANT ENTREPRENEURS 4 (Kauffman Found., America’s New Immigrant Entrepreneurs Ser. Pt. I, 2007), *available at* <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/americas-new-immigrant-entrepreneurs>; MICHAEL GREENSTONE & ADAM LOONEY, THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT IMMIGRATION 11 (2010), *available at* [http://www.brookings.edu/~media/research/files/reports/2010/9/immigration%20greenstone%20looney/09\\_immigration.pdf](http://www.brookings.edu/~media/research/files/reports/2010/9/immigration%20greenstone%20looney/09_immigration.pdf).

<sup>45</sup> MADELINE ZAVODNY, AM. ENTER. INST. & P’SHIP FOR A NEW AM. ECON., IMMIGRATION AND AMERICAN JOBS 4 (2011), *available at* [http://www.aei.org/wp-content/uploads/2011/12/immigration-and-american-jobs\\_144002688962.pdf](http://www.aei.org/wp-content/uploads/2011/12/immigration-and-american-jobs_144002688962.pdf).

<sup>46</sup> GREENSTONE & LOONEY, *supra* note 44, at 11.

<sup>47</sup> Robert Shackleton, *Total Factor Productivity Growth in Historical Perspective 3* (Cong. Budget Office, Working Paper No. 1, 2013), *available at* [http://www.cbo.gov/sites/default/files/cbofiles/attachments/44002\\_TFP\\_Growth\\_03-18-2013.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/44002_TFP_Growth_03-18-2013.pdf).

Innovation stimulates economies because companies are able to take these new ideas and commercialize them.<sup>48</sup> Studies of regions in the United States with the most vibrant economies attribute the regions' rapid job growth and economic expansion to the development of high-tech industries.<sup>49</sup> Countries such as China and India are making significant investments into their technology related industries, and they are attracting highly educated and skilled workers from the United States to fuel innovation and growth in research and development.<sup>50</sup> Statistical analysis reveals that skilled immigrants encourage investments and promote specialization in high-tech industries.<sup>51</sup> U.S. businesses, particularly in the technology sector, are able to take advantage of skilled immigrants to assist in research and development and to produce innovative ideas to help their businesses create new products and services.<sup>52</sup>

## 2. Immigrants Are Entrepreneurial

Immigrants are an important source of human capital and a major contributing source of the entrepreneurial base in many countries,<sup>53</sup> which is why many developed countries have created special visas and incentive programs to attract immigrant entrepreneurs.<sup>54</sup> "Entrepreneurs are engaged with the economy on a daily basis in a visceral, immediate way . . ."<sup>55</sup> In today's knowledge-based economy, intellectual capital and

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<sup>48</sup> Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial?: Distinctions by Entry Visa* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 14920, 2009), available at <http://www.nber.org/papers/w14920>.

<sup>49</sup> Joshua Wright, *For Metros with Flourishing Economies, Tech Sector at Center of Job Growth*, FORBES (Sept. 13, 2013, 3:44 PM), <http://www.forbes.com/sites/emsi/2013/09/13/for-metros-with-flourishing-economies-tech-sector-at-center-of-job-growth/>.

<sup>50</sup> Vivek Wadhwa, *America's Other Immigration Crisis*, AMERICAN (July 11, 2008), <http://www.aei.org/publication/americas-other-immigration-crisis/>.

<sup>51</sup> Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, FRBSF ECON. LETTER (Fed. Reserve Bank of S.F., San Francisco, Cal.), Aug. 30, 2010, at 1, available at <http://www.frbsf.org/economic-research/publications/economic-letter/2010/august/effect-immigrants-us-employment-productivity/el2010-26.pdf>.

<sup>52</sup> Giovanni Peri, *Immigration, Labor Markets, and Productivity*, 32 CATO J. 35, 38 (2012), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2012/1/cj32n1-4.pdf>.

<sup>53</sup> Herbert J. Schuetze & Heather Antecol, *Immigration, Entrepreneurship and the Venture Start-Up Process*, in THE LIFE CYCLE OF ENTREPRENEURIAL VENTURES 107, 107 (Simon Parker ed., International Handbook Ser. on Entrepreneurship Vol. 3, 2007), available at <http://link.springer.com/book/10.1007%2F978-0-387-32313-8>.

<sup>54</sup> *Id.*; ICF INT'L, *supra* note 25.

<sup>55</sup> KAUFFMAN FOUND. & LEGALZOOM, WHO STARTED NEW BUSINESSES IN 2013?, at 8 (2014), available at <http://www.kauffman.org/what-we-do/research/2014/01/who-started-new-businesses-in-2013>.



knowledge-based assets greatly contribute to the United States' competitive edge in the global economy.<sup>56</sup>

Immigrants, particularly highly skilled immigrants, stimulate the economy because they are entrepreneurial in nature<sup>57</sup> and are more likely to start businesses than native workers.<sup>58</sup> Studies have indicated a strong correlation between advanced education in a STEM-related field, entrepreneurship, and innovation,<sup>59</sup> which means these immigrants are more likely to start businesses based on their advanced technical knowledge<sup>60</sup> and create jobs.<sup>61</sup> Studies have found “[a]lmost 80% of immigrant-founded companies in the U.S. [are] within just two industry fields: software and innovation/manufacturing-related services.”<sup>62</sup> Immigrants have co-founded companies such as Google, Intel, eBay, and Yahoo.<sup>63</sup> Given these statistics, the United States should shape its immigration policies to attract highly skilled immigrants and entrepreneurs, and encourage them to make physical, intellectual, and human capital investments in the United States rather than abroad.

## II. THE HISTORY OF EB-5

In 1990, Congress passed the Immigration Act of 1990 to expand employment-based immigration because it recognized the increased demand for skilled workers and the contributions these workers make to the U.S. economy.<sup>64</sup> Although there are other immigration programs that allow for foreign-born entrepreneurs and highly skilled immigrants to immigrate to the United

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<sup>56</sup> VIVEK WADHWA ET AL., INTELLECTUAL PROPERTY, THE IMMIGRATION BACKLOG, AND A REVERSE BRAIN-DRAIN 2 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. III, 2007), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/intellectual-property-the-immigration-backlog-and-a-reverse-braindrain>.

<sup>57</sup> Schuetze & Antecol, *supra* note 53, at 107–08. “Immigrants are nearly 30 percent more likely to start a business than are nonimmigrants, and they represent 16.7 percent of all new business owners in the United States.” FAIRLIE, *supra* note 39.

<sup>58</sup> GREENSTONE & LOONEY, *supra* note 44; FAIRLIE, *supra* note 39.

<sup>59</sup> VIVEK WADHWA ET AL., EDUCATION, ENTREPRENEURSHIP, AND IMMIGRATION 14 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. II, 2007), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/education-entrepreneurship-and-immigration-americas-new-immigrant-entrepreneurs-part-ii>.

<sup>60</sup> Hunt, *supra* note 48, at 26.

<sup>61</sup> ZAVODNY, *supra* note 45, at 4; WADHWA ET AL., *supra* note 44, at 4.

<sup>62</sup> WADHWA ET AL., *supra* note 44, at 4.

<sup>63</sup> VIVEK WADHWA ET AL., AMERICA'S LOSS IS THE WORLD'S GAIN 1 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. IV, 2009), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/america-s-loss-is-the-worlds-gain-americas-new-immigrant-entrepreneurs-part-iv>.

<sup>64</sup> H.R. REP. NO. 101-723, pt. 1, at 37 (1990).

States,<sup>65</sup> this Comment will focus primarily on the employment-based fifth preference category (EB-5 program). The EB-5 program gives preference to qualified immigrants to obtain legal permanent residency status without the requirement of special skill, labor certification, the existence of a treaty, or employment by a multinational company.<sup>66</sup>

#### A. Immigration Act of 1990

The Immigration Act of 1990 created the EB-5 program to allow alien entrepreneurs<sup>67</sup> who satisfy the statutory requirements to be on a fast track to U.S. residency and citizenship.<sup>68</sup> The program allotted 10,000 visas annually for immigrants in the EB-5 category for the purpose of engaging in new<sup>69</sup> commercial enterprises.<sup>70</sup> The requirements are as follows: (1) the alien must have established the enterprise; (2) the alien must have invested,<sup>71</sup> or be in the process of investing, new capital in the amount of \$1 million or \$500,000 in targeted employment areas;<sup>72</sup> and (3) the enterprise must benefit the U.S. economy and create ten full-time qualifying jobs.<sup>73</sup> Furthermore, the Code of Federal Regulations interprets “engaging in” and “has established” to mean the qualified immigrant is to engage in the new commercial enterprise “through the exercise of day-to-day managerial control or through policy formulation, as

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<sup>65</sup> There are other visa programs that allow immigrants to remain and conduct business in the United States, such as the E-1 Treaty Trader and E-2 Treaty Investor visa, L visas for inter-company transferees of multinational corporations, the H-1B Specialty Occupation visa, and other employment-based visas (EB-1 Priority Worker's visa and EB-2 Advance Degree or Exceptional Abilities visa). See Margaret C. Makar, *Foreign Entrepreneurship in the United States*, COLO. LAW., Jan. 1994, at 35, 35–37.

<sup>66</sup> *Id.* at 36–37.

<sup>67</sup> *Id.* at 35. The Senate refers to aliens who receive benefits of the employment-generating investor visa as “alien entrepreneur[s].” Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A(f)(1), 104 Stat. 4978, 4993–94.

<sup>68</sup> Spouses and children of lawful permanent resident aliens may also immigrate under the EB-5 visa. Immigration Act, sec. 102, § 202(a)(4), 104 Stat. at 4983.

<sup>69</sup> “New means established after November 29, 1990.” 8 C.F.R. § 204.6(e) (2014).

<sup>70</sup> Immigration Act, sec. 121, § 203(b)(5), 104 Stat. at 4989. Establishment of a new commercial enterprise may consist of creation of an original business; purchase and restructuring of an existing business to create a new business; or a minimum of forty percent expansion of an existing business either in net worth or in the number of full-time employees. 8 C.F.R. § 204.6(h).

<sup>71</sup> “Invest means to contribute capital.” 8 C.F.R. § 204.6(e).

<sup>72</sup> Targeted employment area is defined as: “at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” Immigration Act, sec. 121, § 203(b)(5)(B)(ii), 104 Stat. at 4990.

<sup>73</sup> “Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States . . . . This definition does not include the alien entrepreneur, [or] the alien entrepreneur's spouse [or children] . . . .” 8 C.F.R. § 204.6(e).

opposed to maintaining a purely passive role in regard to the investment.”<sup>74</sup>

Once the alien entrepreneur has made the requisite capital investment in a U.S. commercial enterprise, the person may begin the EB-5 application process.<sup>75</sup> The alien entrepreneur may receive conditional resident status, which allows the immigrant to reside in the United States for two years.<sup>76</sup> At the end of the two years, so long as the statutory requirements are still met, the immigrant entrepreneur can apply to have the condition removed to become a lawful permanent resident of the United States.<sup>77</sup>

Congress’s intention to attract immigrant entrepreneurs through the EB-5 visa is evinced by the language used in the statute and the requirements of the EB-5 program. First, Congress used the words “alien entrepreneur” in the Immigration Act of 1990.<sup>78</sup> Second, Congress eliminated the labor certificate requirement that is required for other employment-based programs for EB-5 immigrants, because the immigrants are supposed to be entrepreneurs “engaging in” and “establish[ing]” their own businesses,<sup>79</sup> not employees of an existing business. Third, the EB-5 visa has “entrepreneur-like” requirements, such as the investment of at least \$1 million in new capital, direct establishment of a new commercial enterprise, and the continuous creation of at least ten full-time jobs for Americans or lawful permanent residents.<sup>80</sup> The requirement of active

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<sup>74</sup> *Id.* § 204.6(j)(5).

<sup>75</sup> The alien investor would submit an application, Form I-526, along with supporting documents as evidence that the applicant’s investment plan satisfies the EB-5 program requirements. Supporting documents should demonstrate that: (1) the capital investment meets the requisite amount; (2) the investment funds were legally obtained; (3) the requisite number of jobs have been created; and (4) the applicant’s active managerial role in the new enterprise—for example, corporate officer or board member—has been outlined. *See* ICF INTL, *supra* note 25, at 79.

<sup>76</sup> *Id.* at 54.

<sup>77</sup> Once the applicant’s I-526 is approved, (1) if the applicant is already residing in the United States, the applicant may submit an Adjustment of Status request by submitting Form I-485; or (2) if the applicant is outside of the United States, the applicant may apply for a visa through the U.S. Department of State. After a conditional visa is granted, the applicant has a two-year period to meet the conditions set forth in Form I-526. Within ninety days of the expiration of conditional residence, the immigrant investor may submit Form I-829 and supporting documentation to the United States Citizenship and Immigration Services to remove conditions placed on status if the EB-5 requirements have been satisfied. Once the condition is removed, the individual will become a lawful permanent resident. *Id.* at 80.

<sup>78</sup> Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A(f)(1), 104 Stat. 4978, 4993–94 (defining “alien entrepreneur[s]” as aliens who obtain legal permanent residence status under EB-5 program); *see also* S. REP. NO. 101-55, at 21 (1989). The word “entrepreneur” is also used throughout the language in the proposed amendment to the Immigration and Nationality Act. *Id.* at 47–51.

<sup>79</sup> S. REP. NO. 101-55, at 41.

<sup>80</sup> *Id.* at 5.

engagement in the new enterprise is aimed at targeting an entrepreneur's human capital investment contribution; this demonstrates Congress's intent to attract entrepreneurs and not merely investors. The Senate Report also reveals specifically that the purpose of the EB-5 program was to create jobs for U.S. workers and to infuse new capital into the U.S. economy, "not to provide immigrant visas to wealthy individuals."<sup>81</sup>

#### B. 1993 Appropriations Act

In 1992, the Appropriations Act tweaked the EB-5 program, ostensibly to make it more investor-friendly and allow U.S. companies to directly solicit money from foreign investors.<sup>82</sup> Section 610 of the 1993 Appropriations Act created the "Pilot Immigration Program" (also known as the Immigrant Investor Pilot Program, or "IIPP"), which involves putting capital investment into "a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."<sup>83</sup> In the case of the IIPP, the ten full-time jobs can be created indirectly<sup>84</sup> through investment in the new commercial enterprise, which is called a "regional center."<sup>85</sup> The United States Citizenship and Immigration Services ("USCIS") allows for "reasonable methodologies" to determine the number of jobs indirectly created by the capital investment.<sup>86</sup> The capital investment amount remains the same: \$1 million or \$500,000 for regional centers in a targeted employment area.<sup>87</sup>

Regional centers wishing to participate in the IIPP may submit proposals to USCIS which: (1) clearly describe how the regional center will promote economic growth in the specific geographical region; (2) provide in verifiable detail how jobs will

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<sup>81</sup> *Id.* at 21.

<sup>82</sup> Kelleher et al., *supra* note 1.

<sup>83</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, § 610(a), 106 Stat. 1828, 1874 (1992). At least 3000 visas are reserved per year for investors who invest in commercial enterprises affiliated with regional centers. 8 U.S.C. § 1153(b)(5)(B)(i) (2012).

<sup>84</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 11. Indirect jobs are jobs "created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor." *Id.* at 8.

<sup>85</sup> 8 C.F.R. § 204.6(e) (2014).

<sup>86</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610(c), 106 Stat. at 1874. "[Reasonable] methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment." 8 C.F.R. § 204.6(m)(7)(ii).

<sup>87</sup> 8 C.F.R. § 204.6(f)(1)-(2).

be created indirectly through increased exports; (3) provide the amount and source of capital committed to the regional center; (4) contain a detailed prediction regarding the manner in which the regional center will have a positive impact on the economy; and (5) are supported by economically or statistically valid forecasting tools.<sup>88</sup>

The 1992 amendment to the EB-5 program implicitly created an investor's visa, but Congress did not intend for the EB-5 program to become primarily an investor's visa. Congress's intent to limit the use of an investor's visa within the EB-5 program is evidenced by the following: (1) the 1992 amendment as well as the Immigration Act of 1990 do not mention the word "investor," instead only the phrase "alien entrepreneur" is used;<sup>89</sup> (2) the name "Pilot Immigration Program" implies the program was meant to be a test program that was temporary in nature;<sup>90</sup> (3) the IIPP on its face maintains the same requirements as the direct-employment creation program of the EB-5 in terms of the investment amount, the engagement in a new commercial enterprise, and the job creation requirement;<sup>91</sup> and (4) Congress did not create a new employment-based category like it did for alien entrepreneurs; instead, it allotted a portion of the EB-5 visas intended for entrepreneurs to allow immigrant investors to participate in the program.<sup>92</sup> This umbrella structure and the fact that Congress did not change any of the EB-5 requirements on its face indicates Congress's objective was to remain focused on alien entrepreneurs, but at the same time to attract some immigrant investors.

Congress's slight tweak to the original EB-5 requirements made significant differences in its ability to attract immigrant entrepreneurs versus investors. The IIPP allows immigrants to invest in regional centers rather than establishing a new enterprise themselves and create jobs indirectly rather than

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<sup>88</sup> *Id.* § 204.6(m)(3). Investors may find a list of approved regional centers on USCIS's website as part of conducting business and financial due diligence prior to making an investment. See *Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers> (last updated Oct. 22, 2014); Mark Ivener & Gary S. Wolfe, *EB-5 Investor Visa and U.S. Tax Issues*, PRAC. TAX LAW., Fall 2013, at 13, 14–15.

<sup>89</sup> Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A, 104 Stat. 4978, 4990–94; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153 (2012).

<sup>90</sup> THE MERRIAM-WEBSTER DICTIONARY, *supra* note 33, at 403.

<sup>91</sup> Immigration Act, sec. 121, § 203(b)(5), 104 Stat. at 4989; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153(b)(5).

<sup>92</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153(b)(5)(B)(i).

directly.<sup>93</sup> This means the EB-5 immigrant is no longer required to be physically present in the new enterprise's location, because the immigrant is no longer required to "actively" manage day-to-day operations.<sup>94</sup> Therefore, an EB-5 immigrant can now immigrate to California by passively investing in a regional center located in a targeted employment area in, say, Kansas for the amount of \$500,000. Since the requirements for the IIPP are more easily met, the IIPP has transformed the EB-5 visa—intended for immigrant entrepreneurs—into an investor's visa, which is contrary to Congress's intent in creating the program.

### III. SUCCESS OF, AND PROBLEMS WITH, THE EB-5 PROGRAM

In recent years, the EB-5 program has started to gain popularity,<sup>95</sup> but only as an investor's visa and not as an entrepreneur's visa.<sup>96</sup> According to USCIS, the EB-5 application rate grew by fifty-eight percent from 2011 to 2012, and nearly all of the applicants were admitted through the IIPP.<sup>97</sup> However, the EB-5 program is not actually attracting many immigrant entrepreneurs.<sup>98</sup> Amending the program to address the lack of entrepreneurs participating as immigrant entrepreneurs may potentially provide long-term human and physical capital investments in the United States and create more jobs in the long run.

Problems associated with the EB-5 program include: (1) lack of expertise in the adjudication process; (2) lack of clear guidance regarding the adjudication process; (3) uncertainty in the outcome of adjudication; (4) lack of timeliness in processing and adjudication; (5) restrictive requirements and high burden of proof; and (6) the rigorous nature of the EB-5 application process versus other employment-based visa applications.<sup>99</sup> First, this section will discuss the success of the EB-5 program in terms of attracting foreign capital investments and the benefits such investments have on the U.S. economy. Second, this section will address problems with the EB-5 program, particularly how the IIPP has rendered the EB-5 requirements superfluous, and how the program has transformed into an investor's visa, which is inconsistent with the legislative intent.

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<sup>93</sup> 8 U.S.C. § 1153(b)(5)(B)(i).

<sup>94</sup> Ivener & Wolfe, *supra* note 88, at 13–14.

<sup>95</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21.

<sup>96</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

<sup>97</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

<sup>98</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

<sup>99</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 8–11.

## A. Success of the EB-5 Program

### 1. The IIPP Is Successful in Attracting Foreign Capital Investment

The Immigrant Investor Pilot Program has been successful in attracting foreign capital investments, which create jobs, increase tax revenue, and stimulate the overall U.S. economy. The program's ability to allow passive investment into regional centers has made the EB-5 program more attractive to immigrant investors. The number of applicants has grown from the low hundreds annually to over 6000 in 2012.<sup>100</sup> The number of USCIS-approved regional centers has also grown rapidly.<sup>101</sup> According to USCIS, 174 regional centers were approved in 2011,<sup>102</sup> and as of April 1, 2014, approximately 480 regional centers have been approved.<sup>103</sup> Since the program's inception, a total of 16,157 conditional visas have been approved,<sup>104</sup> which means based on the minimum investment amount of \$500,000, approximately \$2.65 billion in capital may have been injected into the U.S. economy.<sup>105</sup> The rapid growth in the overall application rate indicates the program is working, which means investors are willing to invest a substantial amount of capital to immigrate to the United States.

### 2. EB-5 Investors' Foreign Capital Investments Create U.S. Jobs

The Association to Invest in the USA ("IIUSA"), a national nonprofit industry trade association for the EB-5 Regional Center Program, teamed up with Minnesota IMPLAN Group, Inc. ("MiG") to conduct research on the economic impact of the EB-5 program.<sup>106</sup> The research study found that from 2010 to 2011, the EB-5 program generated over 33,000 jobs.<sup>107</sup> Regional centers

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<sup>100</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21. The number of applications grew from 3805 in 2011 to 6041 in 2012—an increase of fifty-eight percent. *Id.*

<sup>101</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., NUMBER OF APPROVED EB5 REGIONAL CENTERS FISCAL YEAR(S): 2007–2012 (2012), *available at* [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_I924\\_I829\\_performancedata\\_qtr43.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_I924_I829_performancedata_qtr43.pdf).

<sup>102</sup> *Id.*

<sup>103</sup> Based on results published on USCIS's website as of April 13, 2014. *See Immigrant Investor Regional Centers, supra* note 88.

<sup>104</sup> *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21.

<sup>105</sup> Press Release, IIUSA, IIUSA Announces Results of Economic Study, Confirms EB-5 Regional Center Program Leads to U.S. Job Creation, GDP Growth and Tax Revenue (Sept. 27, 2013), *available at* <http://www.prweb.com/pdfdownload/11168367.pdf>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

create jobs because they are able to match up foreign investors with local commercial projects primarily located in targeted employment areas.<sup>108</sup> Many of the regional centers are commercial real estate builders looking for alternative sources of funding to keep their projects alive during a time when sources of domestic capital have dried up.<sup>109</sup> Once the regional centers receive capital investments from EB-5 investors,<sup>110</sup> they are able to complete their real estate projects by hiring more construction workers. After the construction project is completed, the regional centers are able to sell the commercial project or lease out the spaces to retailers. Subsequently, these retail businesses will hire local workers for their operations and stimulate local consumer spending, thereby stimulating local economic growth.

### 3. The EB-5 Program Generates Tax Revenue

The MiG study also found that the EB-5 program has generated \$346 million in federal tax revenue and \$218 million in state and local tax revenue.<sup>111</sup> The study looked at both direct investment and indirect economic factors, such as immigrant investors' household spending, moving costs, and other various immigration expenses, including attorney fees.<sup>112</sup> EB-5 investors' capital investments into regional centers generate tax revenue because the government benefits from additional social insurance taxes, indirect business taxes, corporate profits taxes, and personal taxes.<sup>113</sup>

### 4. EB-5 Investors' Capital Investments Stimulate the U.S. Economy

The IIPP has been successful in attracting foreign capital investments into the United States, which have substantial and tangible benefits on the U.S. economy.<sup>114</sup> Foreign capital investments are crucial for the U.S. economy, especially during

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<sup>108</sup> Nick Leiber, *The EB-5 Program: Create American Jobs, Get a Green Card*, BLOOMBERG BUSINESSWEEK (Aug. 4, 2011), <http://www.businessweek.com/printer/articles/862-the-eb-5-program-create-american-jobs-get-a-green-card>.

<sup>109</sup> Kelleher et al., *supra* note 1.

<sup>110</sup> For instance, American Redevelopment Solutions, LLC is a regional center aimed at attracting EB-5 investors to invest in "targeted economic areas" of Southern California—for example, cities like Temecula, Murrieta, and Ontario. The regional center purports to look for commercial real estate projects in these areas that promote economic growth, create jobs, provide low risk and stable investment opportunities, and allow timely and secure exit strategies to meet the requirements of immigrant investors. See AM. REDEVELOPMENT SOLUTIONS LLC, [http://www.arregionalcenter.com/Eng\\_pr-Murrietta\\_retail.php](http://www.arregionalcenter.com/Eng_pr-Murrietta_retail.php) (last visited Nov. 2, 2014).

<sup>111</sup> Press Release, IIUSA, *supra* note 105.

<sup>112</sup> *Id.*

<sup>113</sup> ICF INT'L, *supra* note 25, at 23.

<sup>114</sup> Press Release, IIUSA, *supra* note 105.



an economic downturn when domestic lending is less accessible for businesses.<sup>115</sup> EB-5 investors provide capital investments, which allow U.S. commercial enterprises to obtain funding, complete their projects, hire workers, and stimulate local economies. Furthermore, regional centers generate federal, state, and local tax revenue that benefits the U.S. government and its citizens.<sup>116</sup>

## B. Problems with the EB-5 Program

While the Immigrant Investor Pilot Program part of the EB-5 program is successful, the direct-employment creation part is not working; the United States is not actually attracting many immigrant entrepreneurs.<sup>117</sup> This is often overlooked because the EB-5 program is usually assessed as a whole,<sup>118</sup> even though there are clearly two distinct parts at work. This section will discuss problems with the IIPP, the lack of entrepreneurship in the EB-5 program, and why the EB-5 program as currently implemented is not consistent with legislative intent.

### 1. The IIPP Has Rendered the EB-5 Requirements Superfluous

First, the IIPP has rendered the EB-5 program requirements superfluous because the job creation requirement cannot be accurately measured or attributed to EB-5 investors. EB-5 investors are admitted as conditional residents when USCIS has determined that the requisite investment amount has been invested into an approved regional center and ten full-time jobs have been created.<sup>119</sup> In reality, however, USCIS's staff does not directly monitor the marketing, success, or failure of the regional centers.<sup>120</sup> The agency can only attempt to verify that the regional centers receiving money do actually create the jobs they promise based on a mathematical forecast,<sup>121</sup> because the

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<sup>115</sup> Kelleher et al., *supra* note 1.

<sup>116</sup> ICF INT'L, *supra* note 25, at 23–24.

<sup>117</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15 (stating that approximately ninety to ninety-five percent of EB-5 investors are investing in the IIPP program).

<sup>118</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; ICF INT'L, *supra* note 25.

<sup>119</sup> See *supra* Part II.B.

<sup>120</sup> AUDREY SINGER & CAMILLE GALDES, IMPROVING THE EB-5 INVESTOR VISA PROGRAM: INTERNATIONAL FINANCING FOR U.S. REGIONAL ECONOMIC DEVELOPMENT 10 (2014), available at [http://www.brookings.edu/~media/research/files/reports/2014/02/05%20eb5/eb5\\_report](http://www.brookings.edu/~media/research/files/reports/2014/02/05%20eb5/eb5_report).

<sup>121</sup> Kelleher et al., *supra* note 1; 8 C.F.R. § 204.6 (2014). However, since the number of jobs boasted is based on “reasonable methodologies,” regional centers like American Redevelopment Solutions, LLC can forecast job creation numbers based on the square

regional centers cannot accurately measure the number of jobs created as a direct result of the EB-5 investment. Additionally, the U.S. Government Accountability Office (“GAO”) cannot “determine a reliable estimate of the number of jobs created by immigrant investors” because USCIS attributes all of the jobs created by an enterprise to the individual EB-5 investor even if non-EB-5 investors are involved.<sup>122</sup> Thus, aside from the actual amount of capital investment invested by each EB-5 applicant, economic impact studies regarding the EB-5 program can only estimate the indirect economic impact induced by the capital investment.<sup>123</sup>

Second, the IIPP has rendered the \$1 million investment amount superfluous because the program provides little incentive for investors to invest more than the \$500,000 minimum investment amount. Since the IIPP allows EB-5 investors to passively invest,<sup>124</sup> the natural thing to do is invest the minimum amount required, \$500,000, to obtain legal permanent residency. The \$1 million investment requirement is misleading because although the requirement suggests that some investors are investing \$1 million, USCIS’s data does not distinguish how many EB-5 investors invest \$1 million and how many invest \$500,000. Therefore, the total amount of investments received by the United States from the EB-5 program may be manipulated by both advocates and critics to persuade the public on the pros and cons of the EB-5 program, depending on their agenda.<sup>125</sup>

Third, Congress lowered the investment amount for targeted employment areas to entice immigrant entrepreneurs to immigrate and establish businesses in certain geographic areas with high unemployment rates; however, the IIPP has rendered this incentive moot. Although EB-5 investments are being directed into targeted employment areas, the goal was to promote long-term economic growth rather than short-term economic stimulus into these areas.<sup>126</sup> Statistics show more than half of EB-5 investors are immigrating to major metropolitan areas in the United States, mostly to New York and California,<sup>127</sup> yet

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footage of the project. See *Job Creation*, AM. REDEVELOPMENT SOLUTIONS LLC, [http://www.arregionalcenter.com/Eng\\_JobCreation.php](http://www.arregionalcenter.com/Eng_JobCreation.php) (last visited Oct. 26, 2014).

<sup>122</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 10, at 4, 19.

<sup>123</sup> See Press Release, IIUSA, *supra* note 105.

<sup>124</sup> See *supra* Part II.B.

<sup>125</sup> Compare ERIC A. RUARK & ANIQA MOINUDDIN, FED’N FOR AM. IMMIGRATION REFORM, *SELLING AMERICA SHORT: THE FAILURE OF THE EB-5 VISA PROGRAM 3* (2012), available at [http://www.fairus.org/site/DocServer/FAIR-EB5-2012\\_rev.pdf](http://www.fairus.org/site/DocServer/FAIR-EB5-2012_rev.pdf), with Press Release, IIUSA, *supra* note 105.

<sup>126</sup> Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 203(b)(5), 104 Stat. 4978, 4989–90.

<sup>127</sup> Monger & Yankay, *supra* note 23, at 4 tbl.4, 5 tbl.5.

there are 480 regional centers operating in all fifty states, as well as Puerto Rico and Guam.<sup>128</sup> The discrepancy between where EB-5 investors are living and the rapid increase of regional centers all over the United States clearly indicates that EB-5 investors are not living in the targeted employment areas where they are investing. Immigrant entrepreneurs that invest in the targeted employment areas where they live arguably make a greater and long-term economic impact on the areas, because these are the areas where they establish their businesses, purchase their homes, work, go to school, and make most of their living and business expenditures. By contrast, an immigrant investor's one-time capital injection into an area only has a short-term effect on the area.

## 2. The IIPP Has Transformed the EB-5 Program from an Entrepreneur's Visa into an Investor's Visa

As discussed above, since the EB-5 requirements no longer serve much purpose after the IIPP, the program has become predominantly an investor's visa because there is little incentive for immigrants to participate in the direct-employment creation program. The EB-5 program is essentially an investor's visa because the program in its present form is too stringent to attract entrepreneurs, but is relatively easier for investors to adhere to.<sup>129</sup> Immigrant investors can passively invest the minimum amount of \$500,000, then apply for an EB-5 visa, and be on the path to becoming lawful permanent residents in the United States within two years.<sup>130</sup> The investment amount required by the EB-5 program is the lowest in comparison to other developed countries,<sup>131</sup> and IIPP investors do not need to be actively managing an enterprise, nor are they required to directly create jobs. IIPP investors can easily satisfy the EB-5 requirements by simply becoming a limited partner in a limited partnership that invests in a regional center, which indirectly creates jobs<sup>132</sup> that are attributable to the EB-5 investor.<sup>133</sup>

On the other hand, for immigrant entrepreneurs, the EB-5 program requirements are difficult to meet because not only is

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<sup>128</sup> *Immigrant Investor Regional Centers*, *supra* note 88.

<sup>129</sup> RUARK & MOINUDDIN, *supra* note 125.

<sup>130</sup> *See supra* Part II.B.

<sup>131</sup> *See* ICF INT'L, *supra* note 25.

<sup>132</sup> Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 203(b)(5), 104 Stat. 4978, 4989-90. Looking at American Redevelopment Solutions, LLC again, this regional center was approved by USCIS without creating any direct jobs. The "reasonable methodology" in this case calculates job creation based on square footage developed by the project. *See Job Creation*, *supra* note 121.

<sup>133</sup> 8 C.F.R. § 204.6 (2014).

the \$500,000 investment an enormous amount to be put at risk in a new commercial enterprise, but also the enterprise must have directly created ten full-time jobs before the immigrant entrepreneur may apply for conditional residency under the EB-5 program. Based on the EB-5 application process,<sup>134</sup> in order to invest in and establish a new commercial enterprise, the immigrant entrepreneur would first need to obtain legal status by other means,<sup>135</sup> and then build up the business to create ten full-time jobs prior to becoming eligible for the EB-5 program. Therefore, immigrant entrepreneurs are less likely to be taking advantage of EB-5's direct-employment creation program.

Furthermore, while the program is currently designed to attract immigrant entrepreneurs, it is actually discouraging immigrant entrepreneurs because EB-5 entrepreneurs take significantly higher risks than IIPP investors. Investors immigrating under the IIPP take the minimal risk of only losing a \$500,000 investment amount. While the regional centers cannot guarantee the return of the \$500,000 investment, return is possible usually within five years, and often a regional center's track record may indicate the amount of annual interest investors may expect.<sup>136</sup> Additionally, investors investing into regional centers will most likely attain permanent resident status because investors who exercise due diligence can easily access a list of established and USCIS-approved regional centers.<sup>137</sup> These regional centers have also been pre-approved for meeting the ten full-time jobs requirement even before the investors make the investment.<sup>138</sup> As soon as the IIPP investor makes the \$500,000 investment, the EB-5 investor has satisfied all of the EB-5 visa requirements; thus, the investor may apply for conditional residency. Although the IIPP investors' monetary investment may be at risk, their green cards are probably not at risk.

In comparison, immigrant entrepreneurs take substantial risk because their capital investment into a commercial enterprise under the direct-employment creation program does not automatically translate into ten full-time jobs like the investment does for IIPP investors. Under the direct-employment creation program, immigrant entrepreneurs must commit a

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<sup>134</sup> ICF INT'L, *supra* note 25, at 2.

<sup>135</sup> Makar, *supra* note 65, at 1.

<sup>136</sup> *Is There Usually a Return on EB-5 Investments?*, EB5INVESTORS, <http://www.eb5investors.com/qa/is-there-usually-a-return-on-eb5-investments> (last updated Dec. 3, 2012).

<sup>137</sup> 8 C.F.R. § 204.6.

<sup>138</sup> *See supra* Part II.B.

minimum of \$500,000<sup>139</sup> into a new commercial enterprise with no track record, and statistics show that fifty percent of small businesses fail during the first five years.<sup>140</sup> Immigrant entrepreneurs are not even eligible to apply for conditional residency under the EB-5 program until they have directly created ten full-time jobs.<sup>141</sup> Not only is the immigrant entrepreneur at risk of losing \$500,000, and possibly more, to sustain the business long enough to create ten full-time jobs, but the immigrant entrepreneur will likely leave the United States with a failed business and without a green card.

With all other requirements being equal, immigrant entrepreneurs will most likely choose to passively invest into a regional center rather than actively establish a new commercial enterprise. Immigration under the IIPP is thus more attractive because the investment amount is the same, the risk of business failure is much lower, and the chance of obtaining legal permanent residency is much higher.

### 3. EB-5 as an Investor's Visa Is Contrary to Legislative Intent

Currently, the United States is left with an immigration program intended to attract entrepreneurs, but being widely used by immigrant investors. Since the United States does not make distinct requirements for investors and entrepreneurs, it essentially disguises the fact that the EB-5 program may be construed as a "citizenship-for-sale" scheme.<sup>142</sup> Although a visa for the wealthy is clearly against legislative intent,<sup>143</sup> this is not necessarily bad, if the United States is accomplishing its economic goals in exchange for U.S. citizenship. As discussed above, physical capital investments are important in stimulating the economy.<sup>144</sup> Countries like the United Kingdom, Australia, and Canada have separate immigration programs to target

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<sup>139</sup> This is if the entrepreneur chooses to establish the new commercial enterprise in a targeted employment area. According to a small business survey that rated the friendliest cities for small businesses, counties in targeted employment areas are nowhere near the most advantageous cities that can help ease the difficulties in creating a successful business. See NATHAN ALLEN & SANDER DANIELS, 2013 THUMB TACK.COM SMALL BUSINESS FRIENDLINESS SURVEY: METHODOLOGY & ANALYSIS app. b, at 20 tbl.2 (2013), available at [www.kauffman.org/~media/kauffman\\_org/research%20reports%20and%20covers/2013/04/thumbtackmethodologypaper2013.pdf](http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2013/04/thumbtackmethodologypaper2013.pdf); IMPACTDATA SOURCE, EB-5 TEA LIST OF AREAS QUALIFYING AS HIGH UNEMPLOYMENT (2013), available at [http://www.impactdata.com/Download\\_Files/2012%20EB-5%20TEA%20High%20Unemp%20Areas.pdf](http://www.impactdata.com/Download_Files/2012%20EB-5%20TEA%20High%20Unemp%20Areas.pdf).

<sup>140</sup> See SBA OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1 (2014), available at [http://www.sba.gov/sites/default/files/FAQ\\_March\\_2014\\_0.pdf](http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf).

<sup>141</sup> 8 U.S.C. § 1153 (2012).

<sup>142</sup> RUARK & MOINUDDIN, *supra* note 125, at 4–5.

<sup>143</sup> S. REP. NO. 101-55, at 21 (1989).

<sup>144</sup> See *supra* Part III.A.

entrepreneurs and investors.<sup>145</sup> In these countries, investors must initially invest, on average, US\$1.2 million, and they must have a net worth of, on average, US\$2.2 million.<sup>146</sup> These countries understand the most important criteria to be the amount of physical capital invested and how much an investor can bring to the country, because other requirements, such as job creation or active management, are difficult to measure. Ultimately, these countries recognize capital investments will either directly or indirectly stimulate the overall economy.

While immigrant investor programs in other developed countries allow these countries to extract maximum value from investors who wish to immigrate to those countries, the United States has allowed sufficient flexibility in the IIPP to allow immigrant investors to take advantage of the EB-5 program for a comparatively low investment amount. Although “provid[ing] immigrant visas to wealthy individuals”<sup>147</sup> is clearly against legislative intent, the United States is now providing visas to wealthy individuals at an unjustifiable discount.

In order to maximize the potential of immigrant investors and entrepreneurs, the United States should revisit its EB-5 program and make targeted changes to its structure and requirements. The next section will discuss current proposals as well as recommend changes Congress could make to the EB-5 program to better incentivize and target each of the immigrant groups.

#### IV. PROPOSALS TO AMEND THE EB-5 PROGRAM

Currently, there is a “reverse brain drain” phenomenon where U.S.-educated entrepreneurs are returning to their home countries, such as China and India, to start their businesses.<sup>148</sup> U.S.-educated entrepreneurs are flocking to their home countries to take advantage of the lower cost and ease of starting a business in those countries, while maintaining their close ties with customers, collaborators, and sources of information in the United States.<sup>149</sup> The United States can benefit by restructuring its immigration policies to slow down the “reverse brain drain” phenomenon and encourage potential foreign-born entrepreneurs to start and maintain businesses in the United States.<sup>150</sup>

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<sup>145</sup> See ICF INT’L, *supra* note 25, at 54–75.

<sup>146</sup> *Id.*

<sup>147</sup> S. REP. NO. 101-55, at 21.

<sup>148</sup> WADHWA ET AL., *supra* note 43, at 3.

<sup>149</sup> *Id.* at 7.

<sup>150</sup> *Id.* at 8.

### A. Current Proposals: StartUp Visa Act of 2013

Senator Mark Udall (D-CO) introduced the StartUp Visa Act of 2013 in the Senate on January 30, 2013 to create a sixth category of employment-based visas for sponsored entrepreneurs.<sup>151</sup> The proposed bill seeks to steer some of the unused visas from the EB-5 program to three categories of immigrant entrepreneurs.<sup>152</sup>

The first category is for immigrant entrepreneurs who obtain sponsorship from a U.S. qualified super angel investor<sup>153</sup> or a U.S. qualified venture capitalist.<sup>154</sup> The qualified investor must make an investment of at least \$100,000 on behalf of the immigrant entrepreneur. Once the visa is issued, the immigrant entrepreneur's commercial enterprise has two years to create at least five jobs and either raise \$500,000 in capital investment from a U.S. commercial entity, or generate at least \$500,000 in revenue.<sup>155</sup>

The second category applies to immigrant entrepreneurs who hold an unexpired H-1B visa<sup>156</sup> or have completed a graduate level degree from a U.S. university in a STEM-related field. The immigrant entrepreneur must also demonstrate an annual income of at least 250% of the federal poverty level or possession of twice that equivalent amount in assets.<sup>157</sup> A qualified super angel investor or qualified government entity must also sponsor the immigrant entrepreneur by investing at least \$20,000 on the entrepreneur's behalf.<sup>158</sup>

The third category is reserved for immigrant entrepreneurs who have a controlling interest in a foreign company that has

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<sup>151</sup> StartUp Visa Act of 2013, S. 189, 113th Cong. (as introduced in Senate, Jan. 30, 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s189is/pdf/BILLS-113s189is.pdf>. This visa was originally introduced in 2010 as the StartUp Visa Act of 2010 by Senator John Kerry (D-MA). StartUp Visa Act of 2010, S. 3029, 111th Cong. (as introduced in Senate, Feb. 24, 2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s3029is/pdf/BILLS-111s3029is.pdf>.

<sup>152</sup> S. 189.

<sup>153</sup> A qualified super angel investor must be a U.S. citizen and an accredited investor, as defined in 17 C.F.R. § 230.501(a), who has made at least two equity investments of at least \$50,000 in each of the previous three years. *Id.*

<sup>154</sup> A qualified venture capitalist is defined as a U.S.-based venture capital company, as defined in 29 C.F.R. § 2510.3-101(d), that is comprised of partners, a majority of whom are U.S. citizens. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> H-1B is a temporary, non-immigrant status work visa that allows foreign workers to perform work for U.S. companies in the United States in specialized occupations (defined as requiring "theoretical and practical application of a body of specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty"). 8 U.S.C. § 1101(a)(15)(H) (2012); 8 U.S.C. § 1184(i).

<sup>157</sup> S. 189.

<sup>158</sup> *Id.*

generated at least \$100,000 in revenue from sales in the United States during the last twelve months. After the visa is issued, the foreign company's commercial activities must create at least three new U.S. full-time jobs, raise at least \$100,000 in capital investment in furtherance of a commercial entity based in the United States, or generate at least \$100,000 in revenue.<sup>159</sup>

In order to promote entrepreneurship in the United States, the StartUp Visa proposal lowers the amount of capital investment required to \$100,000 as well as the number of jobs an immigrant entrepreneur must create under the program. The program also further attracts immigrant entrepreneurs with graduate level education in a STEM-related field by lowering the investment amount to \$20,000 and eliminating the job creation requirement. However, this proposal depends heavily on the entrepreneur's ability to obtain investment from a qualified investor in the United States.<sup>160</sup> Such a requirement may create an additional hurdle for immigrant entrepreneurs, as most small businesses are financed through owner savings, loans from family and friends, and commercial lenders.<sup>161</sup> Another difficulty is that the proposal still requires that immigrant entrepreneurs meet all the program requirements in two years.<sup>162</sup> Depending on a business's break-even analysis, a small business may take years to generate a profit.<sup>163</sup>

#### B. Striking the Balance

If the United States wants to attract more immigrant entrepreneurs, it should design an immigration policy with requirements that foster entrepreneurship and encourage long-term physical and human capital investments into the United States. This Comment proposes that Congress should amend the current EB-5 program into an immigrant investor's program, create a separate category for immigrant entrepreneurs, and create distinct requirements to accurately reflect how each targeted immigrant group actually does business.

For the immigrant investor visa category, Congress should first consider amending the requirements to reflect the type of

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> SBA OFFICE OF ADVOCACY, *supra* note 140, at 3; WADHWA ET AL., *supra* note 43, at 11.

<sup>162</sup> S. 189.

<sup>163</sup> Bethany K. Laurence, *Will My New Business Ever Make Money?*, FORBES (Jan. 16, 2007, 12:00 PM), [http://www.forbes.com/2007/01/16/smallbusiness-break-even-business-plan-ent-fin-cx\\_bl\\_0116nolo.html](http://www.forbes.com/2007/01/16/smallbusiness-break-even-business-plan-ent-fin-cx_bl_0116nolo.html).



investors Congress wishes to attract. Second, Congress should consider increasing the investment amount required to attract high-net-worth individuals and simply eradicating the job creation and management requirements, as these requirements cannot be accurately measured. Third, Congress should increase the investment amount as demand for U.S. citizenship increases.<sup>164</sup>

For the immigrant entrepreneur category, distinct requirements should be made to reflect the type of entrepreneurs Congress wishes to attract and to better meet the needs of the entrepreneurs. Congress should design the program based on characteristics possessed by successful entrepreneurs, such as access to funds, education level, industry knowledge, and intent to maintain a business in the United States.<sup>165</sup> Since entrepreneurs are concerned with creating a sustainable business that will grow and generate profit in the long run, program requirements should be realistically obtainable to create an environment that fosters the development of a successful business.

This Comment proposes that an immigrant entrepreneur should have up to five years of conditional residency status to establish and actively engage in a new commercial enterprise to create a minimum of three full-time jobs. The immigrant entrepreneur should be required to invest at least \$100,000, obtained either from personal savings or through investors, into the new commercial enterprise. The entrepreneur should also have access to at least \$400,000 in additional maintenance funds to demonstrate his or her ability to endure the period before the business becomes profitable. Additionally, the entrepreneur should be required to have at least two years of business operations experience or a graduate level degree from a U.S. university in a STEM-related field.

This proposed program would minimize the initial risk for an entrepreneur; if the business fails, the entrepreneur can redirect the business instead of committing \$500,000 into one business model. The extra time gives the entrepreneur a more realistic

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<sup>164</sup> Robert Frank, *Wealthy Chinese Flee China, Taking Fortunes with Them*, NBC NEWS (Jan. 17, 2014, 12:53 PM), <http://www.nbcnews.com/business/economy/wealthy-chinese-flee-china-taking-fortunes-them-n11756>; Jeremy Page, *Plan B for China's Wealthy: Moving to the U.S., Europe*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/news/articles/SB10001424052970203806504577181461401318988>.

<sup>165</sup> Countries like the United Kingdom, Australia, and Canada consider immigrant entrepreneurs' backgrounds, including: language proficiency; lack of criminal record; age; availability of maintenance funds; intent to directly engage in business activity; job creation; past business experiences; and annual business revenue. See ICF INT'L, *supra* note 25, at 54–70.

time frame to build and grow a business. The lower job creation requirement is more obtainable because this allows the entrepreneur to add employees as he or she expands, instead of rushing to create ten full-time jobs right away and overloading on overhead costs. An entrepreneur visa program with more realistic goals will allow the immigrant entrepreneur to focus on the sustainability of the business. Furthermore, the business experience requirement or education requirement will allow for better prediction of the entrepreneur's success in his or her chosen industry.<sup>166</sup> Together, these requirements more accurately reflect how entrepreneurs develop their businesses and create an environment to cultivate successful businesses in the long run.

#### CONCLUSION

If the EB-5 program can be separated into two distinct programs, one for immigrant entrepreneurs and one for immigrant investors, the programs can have distinct requirements better designed to specifically target investors and entrepreneurs. Since the EB-5 program is already gaining popularity and is successful in attracting immigrant investors, revamping the program can better attract immigrant entrepreneurs, like Kyung Kim, who have real desires to maintain a business in the United States. While investors make one-time monetary investments into the economy, entrepreneurs make both physical and human capital investments. Thus, entrepreneurs are better for stimulating the economy in the long run because successful businesses can continuously provide goods and services to induce consumer spending, and because growth of such businesses will also steadily create jobs for U.S. citizens. The United States cannot afford to have an immigration policy that ignores a labor asset as valuable to its economy as immigrant entrepreneurs.

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<sup>166</sup> See *supra* Part I.B.