

THE EB-5 TROJAN HORSE

**HOW AN AMERICAN PAY-FOR-CITIZENSHIP
IMMIGRATION PROGRAM POSES A NATIONAL
SECURITY THREAT**

COMMUNIST CHINA: A CASE STUDY

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Introduction to the EB-5 Program

The Immigration Act of 1990 was created by Congress to stimulate the U.S. economy through job creation and capital investment by foreign investors (“EB-5 Investor program”).¹ The program was intended as an aid program to energize rural and economically distressed urban areas. The EB-5 Investor Program permits a foreign national to obtain U.S. permanent residency (“green card”) by investing in a new commercial enterprise. The spouse and unmarried children under the age of 21 years of age of the foreign investor may also obtain permanent residency under derivative status. The United States Citizenship and Immigration Service (“USCIS”), a component of the United States Department of Homeland Security (“DHS”), oversees the EB-5 Investor Program. EB-5 investors may be eligible for an EB-5 immigrant visa if they have invested – or are actively in the process of investing - the required amount of capital into one of the following for-profit business-types:

- A new commercial enterprise (created after 11/29/1990);
- An enterprise which will expand to 140% of pre-investment net worth or number of employees; or,
- A troubled business in which jobs will be preserved.

Since over 95% of these investments are in a new commercial enterprise, this paper will only examine this model in its overview of the program. The EB-5 Investment Program requires a minimum investment amount of \$1,000,000. However, the minimum investment amount may be reduced to \$500,000 if the new commercial enterprise is located within a *targeted employment area* (“TEA”). An area is defined as a TEA if it has an unemployment rate of at least 150% of the national average, or if it is located within a rural area. A rural area for EB-5 purposes is defined as an area outside a metropolitan statistical area (“MSA”) with a population of less than 20,000.²

The second key component of the EB-5 Investor Program requires that the investment creates full-time employment for not fewer than ten (10) U.S. citizens and/or permanent residents that are at least 35 hours a week at or above the minimum wage level. However, in 1992, the *EB-5 Immigrant Investor Pilot Program* was enacted by Congress in an attempt to popularize the program via increased investment participation. Just as the title of this new law inferred, it was passed as a “Pilot” or temporary tactic.³ Under this new approach, indirect jobs could be credited as part of the 10 required jobs if the potential immigrant invested through a USCIS approved *EB-5 Regional Center*.⁴

An EB-5 Regional Center is not merely a defined geographic area but rather is a government-approved business entity that coordinates foreign investment within its USCIS approved geographic area.⁵ EB-5 requirements for an investor under the Regional Center Program are essentially the same as in the basic EB-5 investor program, except that the Regional Center Program provides for investments that allow for a less restrictive job creation requirement based upon the inclusion of “indirect” and “induced” jobs in addition to ordinary “direct” jobs.

¹ 8 C.F.R. § 204.6

² Shae Armstrong, *EB-5 Capital for Commercial Real Estate Development*, Volume XXXIV, Number 2, Fall 2013, The Fee Simple, The Newsletter of the Virginia State Bar Real Property Section (2013).

³ Shae Armstrong, *Short Term EB-5 Regional Center Program Extension Would Defy Logic*, *The Hill Congress Blog* Web. 30 Sept. 2015 available at <http://thehill.com/blogs/congress-blog/economy-budget/255316-short-term-eb-5-regional-center-program-extension-would>.

⁴ *Id.*

⁵ Shae Armstrong, *Practice Makes Perfect – Regional Center 101*, EB-5 INVESTORS MAGAZINE, Spring 2015.

Direct jobs are actual identifiable jobs for qualified employees within the new project which the investor has invested his or her capital. Indirect jobs are indirect impacts occurring within the same industry that supplies the inputs of production for the new project. Induced jobs are those created through impacts when employees within the new project spend their salaries in the local economy by purchasing consumer goods, services, real estate, etc.

The number of indirect and induced jobs created through an EB-5 investor's capital investment is calculated in a detailed economic analysis. This analysis is evaluated by USCIS at upon application for a Regional Center and upon reviewing an actual investor's petition for conditional residency status. A Regional Center is able to increase the total investment offering available per project by increasing the job creation figures. (Direct Jobs + Indirect Jobs + Induced Jobs) Of course, non-regional center direct investment may only account for direct jobs limiting the amount of EB-5 capital that can be applied to the project.

The immigration process for an EB-5 foreign investor informally commences upon a foreign investor depositing the relevant funds in the designated account of a Regional Center or direct investment project. Subsequent to the deposit of investment funds, the immigration attorney for the petitioning immigrant investor submits *Form I-526, Immigrant Petition by Alien Entrepreneur*, seeking conditional permanent residency status approval from USCIS.⁶ Conditional permanent status permits the immigrant investor and qualified family members to reside in the United States during the 2-year pendency of his petition. Processing times for I-526 petitions may range from 12 to 18 months. Upon the approval of the I-526 Petition, the petitioner proceeds in one of two directions. If the investor is presently in the United States per nonimmigrant status, the investor must adjust his/her status via *Form I-485, Application to Register Permanent Residence or to Adjust Status*⁷, submitted to USCIS. However, if the investor resides outside the United States, the investor must submit *Form DS-230*⁸, *Application for Immigrant Visa and Alien Registration*, to the Department of State for consular processing. Consular processing is a more intrusive manner of gaining entry to the U.S. subsequent to *Form I-526* approval as it requires an in-person interview at a designated U.S. consulate or embassy in the investor's country of origin. Until 2014, neither the overall visa quota, nor a per country quota was ever met for any country relating to this category. However, on August 23, 2014, the U.S. Department of State announced that EB-5 visas for Chinese nationals would not be available for the remainder of the 2014 fiscal year. Hence, similar to other visa categories the backlog and consequential delay for Chinese EB-5 investors commenced.

Upon *Form I-526* approval and lawful entry into the United States, the investor is granted two-years of conditional permanent resident status. Moreover, 90 days immediately prior to the two-year anniversary of obtaining conditional residency status, the investor submits *Form I-829, Petition by Entrepreneur to Remove Conditions*⁹, to USCIS requesting that the conditions on the investor's conditional residency be removed resulting in permanent residency status. If the investor has satisfied the EB-5 requirements discussed in this section, then the conditions will be removed. After five years of maintaining U.S. permanent residency status, an investor may be eligible to petition for U.S. citizenship.

⁶ Department of Homeland Security. U.S. Citizenship and Immigration Service. *Form I-526, Immigrant Petition by Alien Entrepreneur*. Washington: Government Printing Office, 2016

⁷ Department of Homeland Security. U.S. Citizenship and Immigration Service. *Form I-485, Application to Register Permanent Residence or to Adjust Status*. Washington: Government Printing Office, 2016.

⁸ Department of Homeland Security. U.S. Citizenship and Immigration Service. *DS-230, Application for Immigrant Visa and Alien Registration*. Washington: Government Printing Office, 2016.

⁹ Department of Homeland Security. U.S. Citizenship and Immigration Service. *I-829, Petition by Entrepreneur to Remove Conditions*. Washington: Government Printing Office, 2016.

The investor must satisfy the following requirements in order to qualify for EB-5 immigration:

1. The Investment must be in a *New Commercial Enterprise Requirement* (created after 11/29/1990);
2. Minimum Investment Amount Requirement - The Investor is required to demonstrate that he/she has personally invested \$1 million dollars into the new commercial enterprise, except (as previously discussed) the minimum investment is lowered to \$500,000 if the investment is located in a “targeted employment area.”
3. Evidence of Investment Requirement - The Investor is required to demonstrate that he has invested the full amount of his capital into the *new commercial enterprise*;
4. Creation of not fewer than ten (10) EB-5 qualifying jobs – The U.S. Citizenship and Immigration Service (USCIS) requires that each EB-5 investment must result in the creation of no fewer than 10 full-time jobs for qualified U.S. workers at the minimum wage level at 35 hours per week;
5. Capital Available to Employment Creating Activity Requirement - USCIS has emphasized the requirement that all of the Petitioner’s capital must be available to the job creating entity.
6. Capital “at Risk” and “for Profit” Requirement - The Petitioner is required to demonstrate that the full amount of his capital into the new commercial enterprise is “at risk.”
7. Lawful Source of Funds - The Act requires that the Petitioner demonstrate that the investment funds have been gained from lawful sources.
8. Active Management Requirement - To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment. However, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the *new commercial enterprise*.¹⁰

In summary, by satisfying these terms, would-be immigrants are able to buy their way into the United States, first as legal residents, and then, in short order, as citizens. It should be self-evident that this arrangement offers such access not only to well-intentioned and wealthy individuals yearning to become valuable parts of the fabric of America, but to some who may have hostile intentions, as well.

The following pages provide a case study of the latter, illuminating how the Chinese government and a number of its citizens have – thanks to the EB-5 Program – put themselves in a position to do potentially considerable material harm to our country and people.

Exploitation by the Chinese Government: Unrestricted Warfare

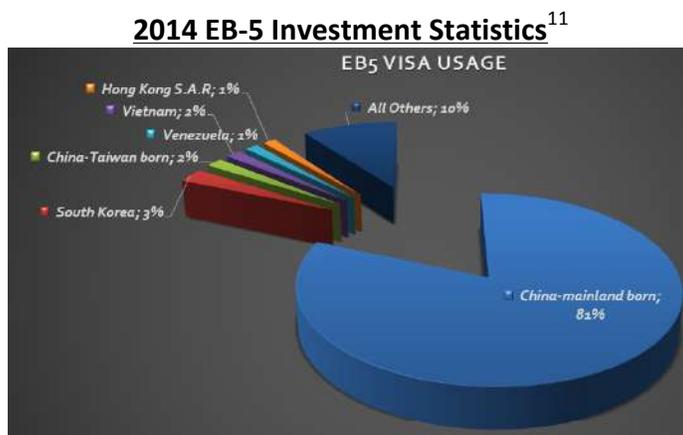
The EB-5 Immigrant Investment Program is a multi-faceted creature. Its scope spans a wide array of industries and government portfolios, including foreign direct investment, private equity, real estate development, U.S. securities laws, and immigration.

¹⁰ See 8 C.F.R. § 204.6, *supra* note 1.

We are a country of immigrants. As Franklin D. Roosevelt proclaimed, “Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists.” The wealth of talents that immigrants contribute to our society and culture have helped make America the greatest nation in history. And, that would surely be true of the EB-5 immigrants who invest in this country with the purest of intentions.

I have traveled all over the world, and specifically, I have been blessed with the opportunity to visit over 15 cities in China. My favorite aspect of China are the people. In discussing my China trips with friends and family, I always point out that that the Chinese are the most hospitable and friendliest people in the world. The one assertion that almost all EB-5 stakeholders agree on is that most of the 90% of EB-5 immigrants that hail from China invest with the best intentions insofar as they desire for their children to have access to all the opportunities available in the United States.

That said, as with any other government-sponsored dealings with China, it is necessary to analyze the geopolitical and military goals of the Chinese government in order to conclude whether the EB-5 program is being treated by both domestic and foreign interests in accordance to the purpose of the program, i.e., the economic revitalization of underserved communities.



In my article published by the *Center for Immigration Studies*, I encouraged the American public and government to ask: “Why does the People's Republic of China quietly warrant the exporting of over \$3 billion a year into U.S. markets while taking with it China's most wealthy and competent citizens who seek to immigrate to the United States?”¹²

Keep in mind that the PRC bans its citizens from transferring more than \$50,000 USD abroad a year. This section of the paper will explain the reason for the PRC's seemingly contradictory policy position when it comes to the EB-5 program.

In 1999, two air force colonels of the People's Liberation Army (“PLA”), Qiao Liang and Wang Xiangsui, wrote a culturally defining book on military strategy titled *Unrestricted Warfare*.¹³ The colonels outlined an asymmetric Chinese strategy to counter U.S. power. The book asserts that

¹¹Department of Homeland Security. United States Citizenship and Immigration Service. Available at www.USCIS.gov.

¹²Shae Armstrong, *The PRC's Perversion of an American Immigration Program*, The Center for Immigration Studies, June 14, 2016, available at <http://cis.org/cis/prcs-perversion-american-immigration-program>.

¹³See generally COL. QIAO LIANG AND COL. WANG XIANGSUI (introduction by Al Santoli), *UNRESTRICTED WARFARE: CHINA'S MASTER PLAN TO DESTROY AMERICA* (Pan American Publishing Co. 2002).

American military weakness can be found in its excessive reliance on technological advancements. The authors propose a new concept of warfare that “does not require relying on the springboard of new technology; it just demands lucid and incisive thinking.”¹⁴ The Chinese colonels observe that such thinking “is not a strong point of the Americans, who are slaves to technology in their thinking.”¹⁵

The Colonels assert that “There is nothing in the world today that cannot become a weapon.”¹⁶ The writers establish their point through the illustration of a “young lad” moving out with orders and asking the location of the battlefield, and his commander’s answer is “everywhere.”¹⁷ They add:

We already know that war will not again be displayed in its original form. To a very great extent, war is no longer even war but rather coming to grips on the Internet, and matching the mass media, assault and defense in forward exchange transactions, along with other things which we had never viewed as war, now all possibly causing us to drop our eyeglasses.¹⁸

Unrestricted Warfare, therefore, envisions a war strategy against the United States that has no bounds, to include the use of the following offensive techniques:

1. Financial Warfare
2. Smuggling Warfare
3. Cultural Warfare
4. Drug Warfare
5. Media and Fabrication Warfare
6. Technological Warfare
7. Resources Warfare
8. Psychological Warfare
9. Network Warfare
10. International Law Warfare
11. Environmental Warfare
12. Economic Aid Warfare

It is not hard to find evidence that the PRC has adopted this boundless, and borderless, strategy including such well-documented events as Chinese cyber-attacks on the United States and China’s continual currency manipulation.

In June, 2015, award-winning national security journalist Bill Gertz, reported in the *Washington Times*:

Retired Chinese Col. Liu Mingfu, one of Beijing’s most significant military supremacists, this week confirmed that China is using information warfare against its enemies.

¹⁴ *Id.* at 15.

¹⁵ *Id.*

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 32.

¹⁸ *Id.* At 119

Col. Liu spoke Monday night at the Georgetown home of Michael Pillsbury, a longtime consultant to the Pentagon on China, in promoting the English-language version of the colonel's 2010 book, "The China Dream." The book calls for China to replace the United States as global hegemon. The book's ideas were adopted by Beijing's communist rulers and have become the main "thought" of current party boss and President Xi Jinping.

Asked about the contradiction between official claims that China seeks peace and the covert use of the so-called three warfares — psychological, media and legal information operations — against enemies, Col. Liu said: "I don't deny it...."

Col. Liu in his book urged China to build up its military power to swiftly replace the United States as the world's global power. He wrote that the U.S.-Chinese rivalry is a "competition to be the leading country, a conflict over who rises and falls to dominate the world."

"To save itself, to save the world, China must prepare to become the [world's] helmsman," he states.¹⁹

In response to the article, economic warfare expert Kevin Freeman points out that many in Chinese leadership view war with America to be inevitable.²⁰ In an essay in the 2016 collection of essays entitled *Warning Order: China Prepares for Conflict and Why We Must Do the Same*,²¹ Mr. Freeman refers to Michael Pillsbury's epiphany about China discussed in the latter's book, *The Hundred-Year Marathon*. In it Mr. Pillsbury admits that, as a key influencer of China policy within the U.S. government for the last 40 years, he got it all wrong.²² Dr. Pillsbury notes that he was taught to view China "as a helpless victim of western imperialists," and hence, that "assistance should be provided almost unquestionably."²³ He confesses, "[l]ooking back, it was painful that I was so gullible."²⁴ However, he now considers that view to be "the most systematic, significant and dangerous intelligence failure in American history."²⁵ He claims this came "as a result of intentional deception and misdirection" on the part of the Chinese."²⁶

Dr. Pillsbury concludes: "There can be no doubt that the Total War Strategy is being implemented. Its goal is to use all means whatsoever - to force the enemy to serve one's own interests . . . The ultimate goal is to displace the United States as the world's sole superpower."²⁷

Unfortunately, the EB-5 program lends itself to China's application of at least **5 of its 12 Unrestricted Warfare** lines of attack against the United States:

¹⁹ Bill Gertz, "Chinese Colonel on Information Warfare," *Washington Times*, June 3, 2015, available at <http://globeconomicwarfare.com/2015/06/this-is-unrestricted-warfare-whether-we-admit-it-or-not>.

²⁰ KEVIN FREEMAN, *WARNING ORDER: CHINA PREPARES FOR CONFLICT AND WHY WE MUST DO THE SAME*, 57-58 (Center for Security Policy Press 2016).

²¹ *Id.* at 57.

²² *Id.* at 57-58

²³ *Id.* at 58

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Financial Warfare

Bizarrely contrary to the PRC's strict policy governing the offshore capital flows, the PRC appears to turn a blind eye to American EB-5 project stakeholders soliciting investors on Chinese soil. Each weekend, from Shenyang to Shenzhen, wealthy Chinese nationals pack hotel meeting rooms and convention halls eager to learn about EB-5 immigration and related projects pitched by American real estate developers and their Chinese broker cohorts.²⁸

This seeming anomaly is all the more baffling since the PRC does closely oversee the EB-5 program through regulations of EB-5 investment brokers in China.²⁹ These brokers (also known as "agents" or "migration agents") are the gatekeepers of the entire EB-5 industry.³⁰ Although Chinese investors may communicate with U.S. regional centers and projects directly, the majority of potential immigrant investors depend on middleman brokers, due to cultural and linguistic hurdles.³¹

In many cases, the EB-5 brokerage firms steer investors to certain American projects.³² Thus, these brokers in China may influence investment outcomes in the United States for projects seeking to obtain this form of cheap capital.³³ The PRC's Exit Entry Bureau regulates Chinese migration agent companies, and these agents are obligated to place a substantial bond of approximately \$300,000 USD with the Chinese government.³⁴

The placement commissions paid to agents in China by U.S. regional centers and immigrant investors for raising EB-5 private equity are dumbfounding when considering that the actual investor usually does not gross more than a 1 percent return per year.³⁵ The largest agents in China earn up to \$60k up-front for each investor placed and, in many cases, an additional carried interest of between 2-to-4 percent is earned by the agents on each \$500k USD investment placed for up to five years.³⁶

Thus, it is not uncommon for agents to earn 30 percent or more commissions over five years on each immigrant investment.³⁷ Projects often offer agents equity positions in the deals, as well.³⁸ Keep in mind that traditional private equity placement rates in the United States float around 3 percent.³⁹

For their part, American developers welcome relationships with Chinese state-run EB-5 agents and Chinese developers because these groups bring to the relationship buckets of cheap capital to fund their projects. The profit margins are fat enough for U.S. projects that American Regional Centers and developers are willing to over-compensate their Chinese affiliates, with no questions asked.

Hence, the EB-5 Program allows the PRC to position its state-owned developers in joint venture relationships with U.S. developers. In turn, these PRC developers have a front row seat in

²⁸ See generally, *supra* note 47.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

learning first-hand about, and sharing in some of the best U.S. real estate companies' plays in this country.

My conclusion is that the PRC allows U.S. companies to solicit EB-5 investments in China because China state-run and state-regulated companies are essentially the largest beneficiaries of this U.S. immigration program. The PRC uses the EB-5 program to further its geopolitical and economic objectives in America.

As is made clear in *Unrestricted Warfare*, those objectives are inimical to U.S. national and economic security. Yet, we are allowing the Chinese government through its state run enterprises and via the EB-5 program to acquire significant equity positions in the most valuable U.S. real estate and developments in states like California, Texas, New York, and Florida.

In turn, we have witnessed Chinese developers and Chinese EB-5 agents establishing U.S. subsidiaries and physical offices *in the United States*.⁴⁰ Recently, one of the largest EB-5 agents in China moved their director to a major U.S. city. Incredibly, despite being a PRC- regulated agent, she works directly with a city-owned Regional Center.

In short, the PRC's uses the EB-5 program to further its geopolitical goals as the EB-5 program offers the PRC an opportunity to diversify its portfolio in the United States via real estate investment.

Kevin Freeman reported in his best-selling book, *Secret Weapon: How Economic Terrorism Brought Down the U.S. Stock Market and Why It can Happen Again*: "In April 2011, the Treasury Department reported that China was dramatically reducing its holdings of U.S. debt....By September [2011], China was signaling it wanted to invest in foreign holdings in companies and physical assets rather than treasuries."⁴¹

Year	I-526s Approved	Amount Invested
2005	179	\$ 89,500,000.00
2006	336	\$ 168,000,000.00
2007	473	\$ 236,500,000.00
2008	640	\$ 320,000,000.00
2009	1,262	\$ 631,000,000.00
2010	1,369	\$ 684,500,000.00
2011	1,563	\$ 781,500,000.00
2012	3,677	\$ 1,838,500,000.00
2013	3,699	\$ 1,849,500,000.00
2014	5,115	\$ 2,557,500,000.00
10 Years	18,313	\$ 9,156,500,000.00

EB-5 annual statistics – reflecting investments that are 90% Chinese – reveal that EB-5 immigrant investments have increased significantly in the years between 2009 and 2014.⁴² EB-5 consumption doubled in 2009, and in 2012, the EB-5 industry witnessed its largest annual increase in investment petitions of 135%.⁴³

The 2009 increase may be easily explained by real estate developers seeking alternative financing due to the

credit freeze caused by the 2008 market crash. However, the historic immigrant investment petition increase in 2012 (which involved investments made in 2011) may have been a product of the PRC's new strategy in this same period to invest in U.S. physical assets while commencing its divestment of U.S. debt instruments. This equates to your mortgagor simply moving into your house and taking control of your household.

⁴⁰ See Summer Zhen, *Beijing developer targets Chinese immigrants with US Homes that come with 'green cards'*, SOUTH CHINA MORNING, June 14, 2016, available at <http://www.scmp.com/property/hong-kong-china/article/1974543/beijing-developer-targets-chinese-immigrants-us-homes-come>.

⁴¹ KEVIN FREEMAN, *SECRET WEAPON* 203 (Regnery Publishing, Inc. 2012).

⁴² See, *supra* note 46.

⁴³ *Id.*

New York City's Atlantic Yards is one of the largest EB-5 financed projects to date. The *Wall Street Journal* reported on Oct. 10, 2013:

[T]he Chinese state-owned property developer Greenland Holdings Group of China agreed to buy a majority stake [estimate \$3.5 billion USD investment]⁴⁴ in a 15-tower apartment project in Brooklyn, NY, that would rank as the largest commercial development in the U.S. ever to get a major backing directly from a Chinese company. Terms of the tentative deal call for Greenland to buy a 70% stake from Forest City Ratner Cos . . .⁴⁵

Further, Norman Oder wrote in an article published on the PBS Newshour blog:

[T]he two most recent rounds of EB-5 funding for Atlantic Yards, since renamed Pacific Park Brooklyn, were launched on behalf not just of initial developer Forest City Ratner, but its new 70 percent partner in a joint venture, is the Greenland Group . . . Greenland is owned and controlled by the government of Shanghai. The resulting scenario sounds like something out of the satirical publication *The Onion*, "a Chinese government profits by marketing U.S. green cards to Chinese immigrant investors."⁴⁶

Additionally, PRC-owned Shanghai Greenland Group ("Greenland") developer announced that it is investing \$1 billion in a downtown Los Angeles project. Greenland will acquire its interest in the project from the California State Teacher's Retirement System. The Chairman of the Group, stated, "We are extending the China market abroad, and we prioritize our investment to countries [that] Chinese immigrants, students, and tourists like the most."⁴⁷

The pattern of Chinese ownership of American EB-5 projects is continuing. Wailian Overseas Consulting Group, one the leading EB-5 placement agents in China announced the development of its Renzo Piano-designed residential buildings in New York City.⁴⁸ The project is financed by a \$320 million construction loan from the Bank of China and a \$135 million equity investment from a U.S. subsidiary of a Chinese investment firm.⁴⁹ Chinese EB-5 agents are now deferring to Chinese state-run banks to source debt on U.S. EB-5 projects.

Tom DeWeese with the *American Policy Center* reported on April 25, 2014 that China is "fast becoming the largest land owner in America." He warns against PRC-directed commercial activities in the U.S., noting that "43% of all corporate profits in China are produced by companies that the Chinese government controls outright."⁵⁰ Mr. DeWeese cited a \$6 billion Chinese EB-5 project in Sullivan County, New York in the Catskill Mountains called China City covering 2,000 acres.⁵¹ Although the China City project was ultimately halted, it is a prime illustration of the PRC's manipulation of the EB-5 program. China City was to include a Chinese-themed gambling and

⁴⁴ *China Global Investment Tracker*, The American Enterprise Institute and the Heritage Foundation, Web, July, 2016.

⁴⁵ Eliot Brown, *Chinese Builder Greenland Charges Into Brooklyn*, THE WALL STREET JOURNAL, Oct. 10, 2013.

⁴⁶ Norman Oder, *Should Congress Rein in the EB-5 Program*, PBS NEWS HOUR.

⁴⁷ Bonnie Cao, *China's Greenland Buys Stake In Los Angeles Project*, BLOMBERG NEWS, July 26 2013, available at <http://www.bloomberg.com/news/articles/2013-07-26/china-s-greenland-enters-u-s-in-1-billion-los-angeles-project>.

⁴⁸ Wailian Overseas Consulting Group. (2016) *Wailian Overseas Consulting Group Holds 6th Annual Invest in America Summit* [Press Release]. Retrieved from http://finance.yahoo.com/news/wailian-overseas-consulting-group-holds-180000216.html;_ylt=A86.J7xS4oVXWmQAGpQPxQt;_ylu=X3oDMTByb2lvbXVubGNvbG8DZ3ExBHBvcwMxBHZAaWQDBHNIYwNzcg--.

⁴⁹ *Id.*

⁵⁰ Tom DeWeese, *Is the U.S. Being Colonized by Red China*, American Policy Center, May 25, 2014, available at <http://newswithviews.com/DeWeese/tom248.htm>.

⁵¹ *Id.*

entertainment complex, hotels, China-related businesses, a high school, a college and 1,000 residences.⁵²

DeWeese observed: "According to the developers' plan, every province of China will have an office there and the city will be full of symbols of Chinese culture....At a recent public meeting, a local citizen asked the China City spokesman if Americans will be allowed to live there. The vague answer was, 'Well, you can visit our amusement park and stay in our hotels.'⁵³

An outspoken opponent of the EB-5 program, David North of the Center for Immigration Studies, wrote that the China City project, "has generated adverse reactions because of... a charge from within the Chinese[-American] community that China City is a stalking horse for the Chinese communist government in Beijing."⁵⁴

The motives behind the PRC's involvement in the EB-5 program may be exposed when we look at similar Chinese tactics from recent history. In the 1990s, China's involvement with the Panama Canal produced serious concern for the American private and public sectors. In 1999, during a Senate Armed Services Committee, Marine Corps General Charles E. Wilhelm testified that China does not hesitate to use its commercial, state-run businesses to support its political and military objectives.⁵⁵

Journalist Bill Gertz, in his book *The China Threat: How the Peoples Republic Targets America*, recalls a prophetic insight of Constantine Menges, a senior National Security Council specialist during the Reagan administration.⁵⁶ Dr. Menges labeled the new Chinese communist strategy of using commercial activities and alliances to further the PRC's supremacist geopolitical goals as "checkbook subversion."⁵⁷

Resources Warfare

A particular impetus behind the Chinese government's growing interest in U.S. real estate and development operations may have been identified by G. William Domhoff, a sociology professor at the University of California Santa Cruz. He suggests that from 1776 to the present those who have income producing land and businesses have the predominant power in the United States.⁵⁸

George Washington was one of the biggest landowners of his day; presidents in the late 19th century were close to the railroad interests; for the Bush family, it was oil and other natural resources, agribusiness, and finance. In this day and age, this means that banks, corporations, agribusinesses, and big real estate developers, working separately on most policy issues, but in combination on important general issues -- such as taxes, opposition to labor unions, and trade agreements with other countries -- set the rules within which policy battles are waged.⁵⁹

A country's most valued resource and its sovereign identity has always been the control of its own land. The PRC is covertly using the EB-5 program to snatch up large tracts of American real

⁵² *Id.*

⁵³ *Id.*

⁵⁴ David North, China City, Center for Immigration Studies, Dec. 2013, available at <http://cis.org/china-city-perfect-storm-eb-5-proposal-new-york>.

⁵⁵ BILL GERTZ, *THE CHINA THREAT* 84 (Regnery Publishing, Inc. 2000).

⁵⁶ *Id.* at 94.

⁵⁷ *Id.*

⁵⁸ G. William Domhoff, *Who Rules America*, available at http://www2.ucsc.edu/whorulesamerica/power/class_domination.html.

⁵⁹ *Id.*

estate at a heavy discount. To do so, the PRC is not only ignoring the exporting of billions of dollars and many of its wealthiest citizens to the United States; it is closely regulating the practice.

Make no mistake: The PRC's well-documented priority continues to be economic growth through global dominance. China has established a Twenty-First century pattern of seizing global resources in the form of land and raw materials.⁶⁰ The PRC understands that the EB-5 program allows for China and its state-run companies to develop and acquire some of the most expensive and even iconic pieces of U.S. real estate at a bargain price, all the while profiting the Chinese government's closely regulated EB-5 brokerage companies.

Technological Warfare

Technological warfare involves gaining control of or having an advantage in vital technologies.

In a 2014 *Washington Free Beacon* article, Bill Gertz reported that the Obama Administration was under pressure for years from American companies "victimized by Chinese hacking –ranging from Google to Lockheed Martin – to take more action against Chinese military cyber- attacks."⁶¹ The report further cites former National Security Agency Director Gen. Keith Alexander who surmised that "theft of American corporate secrets in recent years resulted in the largest loss of valuable economic and other data in history and [l]osses have been estimated to be worth tens to hundreds of billions of dollars in lost information to competitors such as China."⁶²

Unrestricted Warfare glorifies computer hackers, stating that, "Their powers of destroying the present world are shocking...[their activities] have the great force of a forest fire."⁶³ Its PLA authors note that is especially a threat to the United States due to its large computer network, and the authors state that hackers can do great damage to the United States due America's acute reliance on vulnerable computers and networks.⁶⁴

The largest EB-5 projects are many times situated in potentially strategic locations in dense cities such as Manhattan and Washington, D.C. These projects consist of multi-family apartments, retail areas, hotels, sports arenas, and infrastructure projects ripe for unlawful activities and covert information-gathering. As the developer of massive EB-5 projects, Chinese companies are privy to the architectural plans, construction specifications, and the site's communication infrastructure, such as phone and internet networks. Such data can be of incalculable value for those planning and executing hostile Chinese operations in the United States. For example, American private and public sector workers carrying sensitive data – whether concerning matters of national security and/or proprietary information involving technology developments, business transactions and other exploitable developments – would be easy targets.⁶⁵ The bottom line is that Chinese government ownership of U.S. real estate creates obvious vulnerabilities.

⁶⁰ See generally, Tim Webb and Nick Mathiason, *China buys its future from Africa*, THE GUARDIAN, Feb. 9, 2008, available at <https://www.theguardian.com/business/2008/feb/10/mining.china>

⁶¹ Bill Gertz, *Indictment of Military Hackers Reveals New Details of Cyber Attack Methods*, THE WASHINGTON FREE BEACON, May 21, 2014

⁶² *Id.*

⁶³ See, *supra* at note 48.

⁶⁴ *Id.*

⁶⁵ Shae Armstrong, *Political Dealing on Behalf of Manhattan Developers Puts U.S. Security at Risk*, THE HILL, Dec. 17, 2014, available at <http://thehill.com/blogs/congress-blog/homeland-security/263612-political-dealing-on-behalf-of-manhattan-developers>.

Cultural Warfare

The preface of *Unrestricted Warfare* describes Cultural Warfare as a means to influence “the cultural biases of a targeted country by imposing your own cultural viewpoint.”⁶⁶ Previously, I indicated that the director of USCIS estimates that for the current year the EB-5 category is oversubscribed by approximately 20,000 investors. Thus, if the visa category annual allotment is 10,000 visas then there approximately 60,000 individuals in the queue this year, assuming that the average family size from China is three people. Further, assuming that at least 90% of these individuals are from the People’s Republic of China, then about 54,000 wealthy Chinese will be eligible this year for accelerated immigration to the United States.

It is a safe bet that the wealthiest in China are disproportionately and inextricably linked to China’s communist party. Hence, out of these 54,000 individuals, a significant number may be classified as communist party sympathizers, if not actual members.

If so, the PRC could be utilizing the EB-5 program to move large numbers of its valuable human assets to the U.S. via EB-5 expedited immigration. Such individuals could be expected to tap into and exploit anti-establishment and Leftist sentiments so evident at the moment among younger generations of Americans.

Chinese nationals with ties to the Communist Party back home or their nation’s intelligence services who given permanent resident status and fast-tracked for U.S. citizenship thanks to the EB-5 program could be brilliantly positioned to propagandize, recruit and otherwise subvert our culture and people in various ways (perhaps including starting their own businesses and employing Americans, engaging in the media and political affairs and other forms of community involvement). This would simply be a form of strategic Chinese colonization and could be quite insidious.

Psychological Warfare

The majority of American legislators and the American public probably perceive the EB-5 program’s popularity as an extension of American global superiority. We identify this capital and immigration flight from China to this country as proof of the attractiveness of our nation and culture, the loss to the PRC of many of their wealthy citizens and their assets as our unalloyed gain.

With respect to many, if not most, of the Chinese EB-5 immigrants, this view is warranted. However, China surely perceives this program as an exploitable American weakness and an irresistible opportunity to be exploited to the PRC’s advantage, and our detriment. The U.S. eagerness to stimulate its domestic economy by allowing mass migration, as long as it is accompanied by foreign direct investment, has opened a window for the PRC to carry out various means of unrestricted warfare on the U.S.

Specifically, China may seek to use its EB-5-facilitated or -enabled penetration of and operations in the United States to undermine American confidence in our nation’s exceptionalism and ability to resist the PRC’s rise at our expense.

In summary, under the guise of a U.S. Immigration program, the PRC is: converting a portion of its U.S. debt to U.S. physical asset holdings; establishing a strategic and commercial presence in the United States from which to conduct unrestricted warfare against this country; and insinuating unknown numbers of its agents and sympathizers as permanent residents and ultimately as citizens.

⁶⁶ See, *supra* note 48 at xii.

What's Next

The EB-5 regional center program is set to expire on September 30, 2016. Political and private sector bickering over the extent and nature of reforms makes the future of EB-5 unknown. To date, the focus of this bickering has revolved almost entirely around non-national security matters (as discussed in Appendix A). There has been little debate about the national security and sovereignty implications of the EB-5 program.

In 2013, Sen. Charles “Chuck” Grassley (R-Iowa), the chairman of the Senate Judiciary Committee, was the first of very few to have identified to date the serious national security risks associated with EB-5 program. The Senator wrote a letter to the Immigration and Customs Enforcement expressing grave concerns about the program.⁶⁷ Grassley was especially alarmed about an internal USCIS memorandum that outlined how the EB-5 program “may be abused by Iranian operatives to infiltrate the United States.”⁶⁸ What is true of the Iranians is even more the case with respect to the Chinese.

It is high time the American people and their representatives come to grips with the inadvisability of the present EB-5 investor visa program and reduce the real danger that, as presently configured, it is not simply failing to do what it was supposed to, but it is having an array of untoward and very problematic consequences for our country.

Recommendations

EB-5 provides affordable capital for complicated financing structures. U.S. real estate developers and Regional Centers are not to blame for the program’s manipulation by the PRC.

In light of the abundant evidence that the present EB-5 program is being manipulated and otherwise, on-net, harmful, Congress should allow the program to expire on September 30, 2016 or considerably reform the Program in order to eliminate national security risks plaguing what amounts to a pay-for-citizenship initiative.

A thorough and independent national security assessment is needed with respect to the use being made by China of the EB-5 program in ways that could be extremely detrimental to the common defense. In the meantime, several steps appear to be in order:

- Legislators should restrict U.S. projects and Regional Centers from being owned by third-party foreign entities – and most especially Chinese state-owned enterprises – or U.S. subsidiaries thereof, not including the individual immigrant investors.
- The total commission that a project and Regional Center can pay to foreign brokers for each immigrant investor placed should be capped at a lower rate more in line with traditional private equity placement rates.
- Counter-intelligence measures must be put into place to minimize the chances of having the EB-5 program used successfully by Communist China to wage unrestricted warfare in and against this country.

There are, in addition, numerous non-national security concerns affecting the EB-5 program including gerrymandering practices, social injustice, minimal job creation and economic impacts, and prevalent illegal conduct within the industry. Please refer to the Appendix for an analysis of these concerns.

⁶⁷ Chuck Grassley, *Internal Memo Outlines National Security Concerns with EB-5 Immigration Program*, United States Senator for Iowa, Dec. 12, 2013, available at <http://www.grassley.senate.gov/news/news-releases/internal-memo-outlines-national-security-concerns-eb-5-immigration-program>

⁶⁸ See generally, *id.*

About The Author

Shae Armstrong is the principal of the Law Office of Shae Armstrong, PLLC, an EB-5 consulting and private practice law firm he founded in Dallas, Texas. He has experience representing investors, regional centers, and other EB-5 investment vehicles.

Mr. Armstrong is the co-founding member of the More American Jobs Alliance, or MAJA. MAJA's constitutional principle is to maximize the social impact and societal value for America from the jobs created by virtue of the EB-5 Immigrant Investor Program. MAJA advocates a re-focusing of the EB-5 program on the creation of actual jobs for American workers and in particular the creation of jobs in true economically distressed and rural areas. MAJA also believes that enhanced investor integrity and national security measures are needed for the long-term health and viability of the program.

Mr. Armstrong has also helped establish the EB-5 Rural Alliance which promotes EB-5 investment in rural America. The EB-5 Rural Alliance consists of USCIS-approved Regional Centers and other EB-5 stakeholders from states including: Texas, Kentucky, Michigan, North Dakota, Kansas, Minnesota, Georgia, Alabama, Colorado, Florida, and Tennessee.

Shae Armstrong is a native Texan and resident of Dallas. He earned his undergraduate degree in accounting and management from Tulane University's Freeman School of Business. He earned his law degree in 2005 from the University of Tulsa, College of Law. During his matriculation at Tulsa, he was a member of the University's Comparative and International Law Journal.

Mr. Armstrong is a 10-year attorney licensed by the Supreme Court of Texas, and he is also licensed by the U.S. Court of International Trade. He began his career as corporate in-house counsel for an import-export company involving U.S.-China trade. He is a frequent speaker on the subject of the EB-5 Program to state and county bar associations, student organizations, universities, and trade groups. His analyses of the EB-5 Program have been published in respected trade publications, academic journals, and national newspapers. He has presented the EB-5 program in over 15 Chinese cities.

Appendix

Domestic Concerns

The Regional Center program is set to expire on September 30, 2016. Numerous trade groups with conflicting opinions on the future of the program have been aggressively lobbying Congress seeking an extension to the program with a laundry list of proposed reforms to remedy abuses and inherent problems related to: blatant gerrymandering; social injustice; lack of geographic diversity; exaggerated economic impacts; hocus-pocus “job creation”; and widespread fraud. Let us examine each in turn.

Gerrymandering

EB-5 gerrymandering is a depreciatory term for census tract aggregation.⁶⁹ Projects and their EB-5 advisors will parochially add more and more census tracts to a proposed TEA until the overall area achieves at least an average unemployment rate of at least 150% of the national average, despite these projects actually being in a single census tract with very low unemployment rates. Over the last couple of years, I have been afforded the opportunity to work on projects that allowed me to witness the exponential economic impacts resulting from EB-5 capital infusion in underserved markets. These economic impacts included actual long-term job creation and community revitalization.

At least 80% of EB-5 money is going to projects that wouldn't qualify as being in TEA without “some form of gerrymandering,” estimates Michael Gibson, managing director of USAdivisors.org, which evaluates projects for foreign investors.⁷⁰ Akin to the notation deemed by Supreme Court Justice Stewart when objectifying the presence of pornography, gerrymandered projects are easily identifiable as *you know it when you see it*.⁷¹ The project that sits in a census tract with a very low unemployment rate is obviously gerrymandered when the deal proposes an irregularly shaped TEA designation that reaches out to grab census tracts from economically and socially distressed neighborhoods, and even in some cases, jumping over bodies of water to achieve the required unemployment rate.⁷²

Recently, policies have been proposed in the hopes of curtailing these gerrymandering tactics. States control the TEA designations submitted to USCIS. California has been the only state to concretely define high unemployment TEAs by setting the maximum number of census tract compilation for a single TEA designation to 12. Other groups assert, moreover, that the high unemployment TEA definition should be tied to commuter traffic patterns relating to the project. This proposal suggests that the TEA should be expanded to encompass the geographic area within which the workers commute to the project site. Even though this may be consistent with the job creation purpose of the EB-5 Program, “it does not reflect the economic condition of the location where the immigrants' capital investment is made, i.e., the project tract.”⁷³ Thus, the communities

⁶⁹ See generally, Kenric Ward, *Upscale Dallas project cashes in on EB-5 visa program*, *Watchdog.org*, Sept. 24, 2015, available at <http://watchdog.org/239446/dallas-eb5-immigration>.

⁷⁰ Eliot Brown, *How a U.S. Visa for Cash Plan Funds Luxury Apartment Buildings*, *THE WALL STREET JOURNAL*, Sept. 9, 2014, available at <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>.

⁷¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁷² U.S. Senate. Committee on the Judiciary. *The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse. Hearings. April 13, 2016*. 114th Cong. 2nd sess. Washington: GPO, 2016. Print. (Written Testimony of Shae Armstrong).

⁷³ Jeanne Calderon and Gary Friedland. *What TEA Projects Might Look Like under EB-5 2.0: Alternatives Illustrated with Maps and Data*. (Last revised February 6, 2016) New York University Stern Center for Real Estate Finance Research. Available at:

in which these workers originate do not receive permanent and direct economic impacts of EB-5 capital in the form of actual bricks and mortar development.

The most sincere and reasonable approach to preventing gerrymandering is defined by Senate Bill S. 1501 which limits census tracts to the actual project site census tract and any tracts directly contiguous thereto.⁷⁴ This proposal ensures that EB-5 capital for projects qualifying as a high unemployment TEA will be injected into economically distressed communities. As indicated by NYU Professor Jeanne Calderon and Scholar-in-Residence Gary Friedland, the various TEA clarification versions negotiated last December would have had the effect of reducing the number of projects that qualified for the reduced investment rate.⁷⁵ However, changing the rules simply to allow non-economically distressed areas to qualify as TEAs would subvert the policy goals and reduce the potential positive social impact from the EB-5 program.⁷⁶

Matt Gordon, President of E3 Cargo, stated the following during his testimony to the House Judiciary Committee:

TEA policy has been a failure, because it is not only *possible*, but relatively easy, to get any location in America designated as a TEA. Absent a few notable exceptions, including, for example, our urban-based E3 Cargo, CP Homes, which is developing an assisted living facility for senior citizens in Athens, Texas, a rural community of 13,000 people, and the rural-based LIGTT Regional Center that is developing a critical piece of national infrastructure, the vast majority of all TEA qualified projects are not located in distressed urban areas or rural communities. Despite the policy goal of wanting to help distressed urban and rural communities who desperately need the additional investment capital, virtually all EB-5 capital goes to prosperous wealthy areas. Increasingly, the market is becoming dominated by mega-projects located in the most affluent areas, such as the Hudson Yards project in Manhattan, NY. The root of the issue is the States' ability to define the geographical contours of a TEA, with USCIS only able to verify the unemployment calculations, but not challenge the overall bounds. Generally, States quickly learned to be as permissive as possible in an attempt to attract ever greater amounts of EB-5 capital.⁷⁷

Supporting Mr. Gordon's testimony, NYU Professor Jean Calderon pointed out in her written testimony for this same House Judiciary hearing that the percentage of EB-5 projects qualifying as TEAs has "skyrocketed" to where almost 98% of EB-5 projects qualify as a TEA.⁷⁸

Further, Senator Leahy's statement from the Senate Judiciary Committee Meeting on February 2nd, 2016, succinctly clarified this issue:

I am particularly troubled by the opposition to reform of the Targeted Employment Areas. Their abuse undermines a core objective of the EB-5 Regional Center Program—to spur growth and create jobs in underserved areas where investment

<http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

⁷⁴ See S.1501 available at <https://www.congress.gov/bill/114th-congress/senate-bill/1501/text>

⁷⁵ *What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data*, Working Draft, latest revision dated January 25, 2016, is available at: http://www.stern.nyu.edu/sites/default/files/assets/documents/What-TEA-Projects-Might-Look-Like-under-EB5-2.0-Alternatives-with-Maps-and-Data_0.pdf.

⁷⁶ *Id.*

⁷⁷ Is the Investor Visa Program an Underperforming Asset: Hearings before the Judiciary Committee of the House of Representatives. 114th Cong. 1 (2016) (Testimony of Matt Gordon).

⁷⁸ *Id.* (Testimony of Jean Calderon) (as cited in DHS Yearbook of Immigration Statistics (FY1992-FY2013); State Department preliminary data (FY2014). Also see Lazaro Zamora and Theresa Cardinal Brown. *EB-5 Program: Successes, Challenges, and Opportunities for States and Localities*. (September 2015). Bipartisan Policy Center.)

capital and jobs are often scarce. I do not suggest that affluent areas should not benefit from EB-5. They should. But they should not qualify as distressed areas. In many cases, these projects would be pursued regardless of EB-5, calling into question whether the EB-5 capital is creating any jobs at all.⁷⁹

Social Injustice

A Federal lawsuit filed by *Urban Equality Now* in the Southern District of Texas in 2015, alleged that the aforementioned gerrymandering abuses in EB-5, deprive ethnic minorities and single mothers in economically distressed neighborhoods of the benefits associated with EB-5 capital infusions.⁸⁰ The law suit cites a \$20 billion project in lower Manhattan's upper-class West Chelsea area, where unemployment is around 5%.⁸¹ However, the project submitted a TEA to the city that was approved, which included a census tract in West Harlem in order to boost the alleged unemployment rates of the area.⁸² The majority of EB-5 projects gerrymander off the backs of our less fortunate citizens in order to have affluent areas deemed as economically distressed. This practice adds insult to injury for underserved communities.⁸³

Lack of Geographic Diversity

The vast majority of EB-5 projects are located in a handful of cities including the most affluent areas of Los Angeles, New York City, Miami, Dallas, and Houston. Large projects in affluent, urban centers are solely using EB-5 capital as a cheaper financing alternative. This was clearly evidenced in a *Wall Street Journal* article titled "Swanky New York Condo Project Exploits Aid Program; Manhattan Developer Capitalizes on Low-cost 'EB-5' Funding Aimed at Ailing areas."⁸⁴ Reporter Eliot Brown ends his article with a confession from the developer: "We had more interest than we expected from lenders. We had no less than four legitimate offers." In most cases, such projects will be developed, with or without EB-5 financing. Thus, these mammoth projects, wholly based on indirect and construction job creation methodologies, will economically benefit the affected community, regardless of their ability to include EB-5 capital in its financing structure.

Locations in rural and economically distressed areas are in many instances economically viable markets for such projects as limited service hotels, call centers, manufacturing and industrial developments, restaurants and other retail, multi-family, health care facilities, energy developments (such as wind farms and oil and gas plays), and agriculture projects.

However, Stephen Mullet, a commercial lending specialist, contends that, with small banks dotting the countryside, the banking industry serves rural America with only a myopic economic approach. Smaller community banks are held back by state and federal statutes that constrain lending limits and growth.⁸⁵ Due to processing requirements within underwriting guidelines larger commercial banks will not engage within the rural market place. So what are we left with? It requires innovative partnerships that bring new capital growth to business and jobs to long-distressed areas, while also considering the health and education needs of the people who live there.

⁷⁹ The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed: Hearings before the Senate Judiciary Committee. 114th Cong. 1 (2016).

⁸⁰ *Urban Equality Now v. DHS*, 378 U.S. 184, 197 (2015).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See generally, Kenric Ward, *Lawsuit Hammers Fed Cash-Visa Gerrymander*, *Watchdog.org*, Nov.12, 2015, available at <http://watchdog.org/246639/eb5-gerrymander-lawsuit>.

⁸⁴ See Eliot Brown, *Swanky New York Condo Project Exploits Aid Program*, *THE WALL STREET JOURNAL*, Oct. 15, 2015, available at <http://www.my-property-report.com/articles/swanky-new-york-condo-project-exploits-aid-program>.

⁸⁵ Mullet, Stephen. *Rural Commercial Lending Challenges*. Lecture, Pacrim U.S. LLC, Dallas, TX, February 22, 2016.

This isn't just about philanthropy; underserved America needs the kind of lending and investing that is both good for business and good for communities.

Chinese immigrant investors consume over 90% of the annual EB-5 visa allocation. With essentially all EB-5 projects in the market qualifying as a TEA without regard for location, smaller, rural projects are unable to effectively compete with the large, more glamorous projects in affluent, urban centers.⁸⁶

This sluicing of EB-5 funds emanating from China away from American communities where it would do the most good reflects the Chinese culture's attraction to Western brands. *The Economist* called it, "China's Addiction to Luxury Goods."⁸⁷ And graduate student Chen Li described the phenomenon in her doctoral white paper for Aix-Marseille University examining Chinese consumer behavior:

The Chinese will adhere more easily to the standards of group than people in individualistic societies. An essential element in Western culture and consumer behavior, the desire to distinguish themselves, is also in China. It assumes a difference as a member of one group over another group, while respecting individual standards of his group.

We therefore believe that the consumption of the product of foreign origin is rather symbolic other than utilitarian to correspond to social status. Imitation is also a behavior used for identification as a member of the group. Moreover, it is obvious that luxury products are well sold in China in recent years. This means that the brand is in the process of buying decision because it meets the needs of good social status than personal needs.⁸⁸

These findings explain the Chinese cultural attraction to the large glitzy project branded by either project location such as a projects in Beverly Hills, California or branded by the product brand itself such as a swanky flagged 5-star hotel.

The aforementioned theory regarding vanity investing has been borne out in my own experiences meeting EB-5 placement agents during my trips across China. Two of the first questions agents ask to project sponsors are: (1) Is your project in a large internationally recognizable city, and (2) How large is your project? These Chinese agents understand that they will earn greater profits and commissions by marketing the largest projects in affluent U.S. urban centers projects while maximizing market efficiencies. For instance, a project with an EB-5 capital raise of \$400 million dollars in a trendy neighborhood of a larger city will attract investors while allowing agents to focus on one deal for a longer time period compared with raising capital for a small restaurant in New Prague, Minnesota. Agents understand that the largest EB-5 deals gives them the opportunity to focus their marketing staff on one set of offering documents, business plans, and marketing materials for many months or years at a time.⁸⁹

These consumer behaviors are true for Americans, as well. For example, if I were unfamiliar with China, but required to make an investment there, would I invest \$500,000 in the city of

⁸⁶ See *Swanky New York Condo Project Exploits Aid Program*, *supra* note 119.

⁸⁷ S.N., *China's Addiction to Luxury Goods*, THE ECONOMIST, April 29, 2014, is available at <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-17>.

⁸⁸ A copy of the White Paper presented to Aix-Marseille University doctoral program entitled, *Brand Culture and Consumption: Chinese Consumers and the Foreign Brands* by Chen Li (as cited in Guo X. (2005), *La sensibilité aux marques et l'engagement à la marque : Une application aux consommateurs chinois*, thèse de doctorat en science de gestion, Université de Nancy2.), available at:

http://cerdi.org/uploads/sfCmsContent/html/253/LI_Chen.pdf.

⁸⁹ See *generally*, *supra* note 107.

Karamay in far western, rural China, or invest in a \$500,000 Waldorf Astoria in Shanghai assuming the actual monetary return amounts each totaled \$5,000. Of course, I would invest in the Shanghai project because I have heard of Shanghai before and would be proud to tell my colleagues of my investment in such a fashionable project. However, once again assuming the return dollars total the exact same, would I invest \$1,000,000 in the Shanghai project or \$500,000 in Karamay. I believe that at this point the western China smaller, rural project would be in consideration, thus, allowing it to compete fairly for my capital.⁹⁰

The purpose of the TEA is to provide a discounted investment amount by those investors who invest in projects that meet the TEA definition. A lower investment threshold for rural and true economically distressed areas allow these communities to competitively market their projects in China and elsewhere.

Exaggerated Economic Impacts & Minimal Job Creation

Recently, the *Dallas Morning News* reported that Dallas Mayor Mike Rawlings is urging Congress to reauthorize and expand the EB-5 program as it “has become a vital source of urban redevelopment funds and mayors are working with private parties to use EB-5 foreign direct investment to finance job creating projects and downtown revitalization.”⁹¹ The article provided a list of 17 Dallas projects utilizing EB-5 capital.⁹² The list amounts to a *Who’s Who* of hotel brands and developers.

The reality is that except for two or three of these projects, traditional financing was probably available to all these deals. In describing similar projects in New York City, Gary Frieland who wrote the NYU paper with fellow professor Jeanne Calderon, contends that such projects could easily have been financed on the private market.⁹³ “It’s a profit enhancement....The original argument was more of a ‘but for’ argument, in which EB-5 was meant to spur projects that wouldn’t otherwise have happened....That focus has been lost.”⁹⁴ Howard Michaels, who heads the Carlton Group, called the program *legalized crack cocaine* for luxury developers.⁹⁵

These developers report to USCIS that each of their luxury projects create thousands of jobs via economic impacts and short term, temporary construction jobs. In fact, these glamour projects that consume the EB-5 quota have limited job creation. For example, a \$100 million condominium in lower Manhattan most likely only creates 5-8 real permanent jobs, counting a handful of leasing agents, maintenance workers, security, and a property manager. As a practical matter, the EB-5 source of these funds shouldn’t be credited with even these minimal job-creation impacts since an estimated 80% of the industry’s projects would built *with or without EB-5*.

In short, it is evident that EB-5 is working well for well-established, urban developers, affluent communities, and Chinese placement agents, but what about American families?

There are only about 3,300 EB-5 investment slots per year when you consider the average immigrant investor’s family size consumes three visas per each investment. This year, Nicholas

⁹⁰ *Id.*

⁹¹ Graham Vyse, *Mayor wants expansion of visa program that puts Dallas on ‘international stage’*, THE DALLAS MORNING NEWS, July 1, 2016, available at <http://www.dallasnews.com/business/headlines/20160701-mayor-wants-expansion-of-visa-program-that-put-dallas-on-international-stage.ece>

⁹² *Id.*

⁹³ See, *supra* note 108.

⁹⁴ *Id.*

⁹⁵ *EB-5 may be “legalized crack cocaine,” but it creates jobs: Shvo advisor*, THE REAL DEAL, April 13, 2016, available at <http://therealdeal.com/2016/04/13/eb-5-may-be-legalized-crack-cocaine-but-it-creates-jobs-shvo-advisor/>

Colucci, Director of USCIS, testified at a House Judiciary Committee Hearing that the EB-5 program is presently oversubscribed by about 20,000 investors.⁹⁶

The question occurs: If EB-5 demand has greatly exceeded the available annual quota, then why shouldn't Congress create legislation that maximizes EB-5 job creation and EB-5 economic impacts by encouraging real direct job creation and incentivizing investment in rural and true, non-gerrymandered, economically distressed areas?

EB-5 Illegalities

Beyond the misallocation of EB-5 visas in ways that diminish the value of this program to the United States, there is the problem of the *abuse* of that program. It is beyond the scope of this white paper to explore fully the magnitude of such abuse – or even just the myriad fraud cases that have been brought against this industry by the Securities and Exchange Commission and the Department of Justice. It is sufficient for the present purpose to observe that, from California to Vermont, recent EB-5 frauds and other illegalities have been exposed involving misallocation of funds and misrepresentation, both on a criminal and civil basis. The deplorable state of present, abusive EB-5 practices is evidenced by the SEC and Financial Regulatory Authority (FINRA) designating EB-5 as an exam priority for 2016.⁹⁷

Illegalities within EB-5 are also found in China. I posited in a June 2016 article published by the Center for Immigration Studies, that secret commissions paid from U.S. projects to Chinese state-run EB-5 agents may violate the Foreign Corrupt Practices Act (FCPA).⁹⁸ FCPA's anti-bribery provisions make it unlawful for a U.S. person to make payments to a foreign official for the purpose of obtaining business.⁹⁹ Under the FCPA, the definition of a foreign official includes principals and employees of government-managed institutions or enterprises.¹⁰⁰ Thus, I concluded that the undisclosed payments by American project principals and sponsoring Regional Centers to their Chinese-government-managed agents should be considered an act of bribery and clear violation of the FCPA.¹⁰¹

Moreover, per EB-5 regulations, immigrant investors must prove to USCIS that their investments funds were derived from lawful sources such as a mortgage on real estate holdings or a savings account. On numerous occasions, USCIS has found that source of funds statements had been fabricated to hide the true, original source of capital. In one particularly egregious example, an applicant that had been flagged under suspicion of profiting from *commercial child pornography* was granted an EB-5 visa.¹⁰² ABC News also reported that other EB-5 investors were flagged for suspicion of narcotics trafficking, fraud, and espionage.¹⁰³

⁹⁶ U.S. Senate. Committee on the Judiciary. *The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse. Hearings. April 13, 2016.* 114th Cong. 2nd sess. Washington: GPO, 2016. Print. (Testimony of Nicholas Colucci).

⁹⁷ William Mack, *SEC and FINRA Name EB-5 as a Priority in 2016*, EB-5 Insights: Greenberg Taurig (Jan. 22, 2016), available at <http://www.eb5insights.com/2016/01/22/sec-and-finra-name-eb-5-as-a-priority-in-2016>.

⁹⁸ Shae Armstrong, *Secret Payments from U.S. Regional Centers to Chinese State Run EB-5 Agents Violate the Foreign Corrupt Practices Act*, Center for Immigration Studies, June 28, 2016, available at <http://cis.org/cis/secret-payments-us-eb-5-regional-centers-chinese-state-run-eb-5-agents-violate-for>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Matthew Mosk and Brian Ross, *DHS Inspector General Focusing on \$500,000 Green Card Program*, ABC News, Feb. 12, 2015, available at <http://abcnews.go.com/International/dhs-inspector-general-focusing-500000-green-card-program/story?id=28928002>.

¹⁰³ *Id.*

Recommendations

Subordinate to the necessary national security recommendations outlined above, if Congress intends to continue the EB-5 Program, Congress must legislate reforms that incentivizes investment in targeted employment areas by establishing a lower price differential for projects in rural and genuinely economically distressed areas (calculated by a single census tract plus contiguous census tracts thereto). Moreover, these reforms should promote the creation of direct jobs by limiting a project's indirect job creation credit. Additionally, Congress should allocate at least 60% of the annual allotment of EB-5 visas to foreign nationals that invest in authentically economically distressed rural and urban areas (i.e., with 30% going to rural and 30% to urban TEAs). Visa petitions related to rural and urban TEA investments must each have their own USCIS managed processing tracks in order to ensure priority processing.