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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 204 and 216

CIS No. 2555-14; DHS Docket No. USCIS-2016-0006

RIN 1615-AC07

EB-5 Immigrant Investor Program Modernization

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) proposes to amend its regulations governing the employment-based, fifth preference (EB-5) immigrant investor classification and associated regional centers to reflect statutory changes and modernize the EB-5 program. In general, under the EB-5 program, individuals are eligible to apply for lawful permanent residence in the United States if they make the necessary investment in a commercial enterprise in the United States and create or, in certain circumstances, preserve 10 permanent full-time jobs for qualified U.S. workers. This proposed rule would change the EB-5 program regulations to reflect statutory changes and codify existing policies. It would also change certain aspects of the EB-5 program in need of reform.

DATES: Written comments must be received on or before April 11, 2017.

ADDRESSES: You may submit comments, identified by DHS Docket No.

USCIS-2016-0006, by any one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments.
- Mail: You may submit comments directly to U.S. Citizenship and Immigration Services (USCIS) by mail by sending correspondence to Samantha Deshommes, Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS-2016-0006 in your correspondence. This mailing address may be used for paper or CD-ROM submissions.
- Hand Delivery/Courier: You may submit comments directly to USCIS through hand delivery to Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529; Telephone 202-272-8377. To ensure proper handling, please reference DHS Docket No. USCIS-2016-0006 in your correspondence.

FOR FURTHER INFORMATION CONTACT: Lori MacKenzie, Division Chief, Operations Policy and Performance, Immigrant Investor Program Office, U.S. Citizenship and Immigration Services, Department of Homeland Security, 131 M Street, NE, 3rd Floor, Washington, DC 20529; Telephone 202-357-9214.

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List of Acronyms and Abbreviations Used:

CFR	Code of Federal Regulations
CPI	Consumer Price Index
CPI-U	Consumer Price Index for all Urban Consumers
DHS	Department of Homeland Security
DOL	Department of Labor
DOS	Department of State
EB-5	Employment-Based Fifth Preference
GDP	Gross Domestic Product
HSA	Homeland Security Act
IEFA	Immigration Examinations Fee Account
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IRFA	Initial Regulatory Flexibility Analysis
JCE	Job-Creating Entity
MSA	Metropolitan Statistical Area
NCE	New Commercial Enterprise
NOID	Notice of Intent to Deny
NOIT	Notice of Intent to Terminate
PRA	Paperwork Reduction Act
RFE	Request for Evidence
TEA	Targeted Employment Area
USC	United States Code
USCIS	United States Citizenship and Immigration Services
UR	Unemployment Rates
VPC	Volume Projections Committee

I. Public Participation

DHS invites comments, data, and information from all interested parties,

including regional centers, investors, advocacy groups, nongovernmental organizations, community-based organizations, and legal representatives who specialize in immigration law on any and all aspects of the proposed amendments. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to DHS will reference a specific portion of the proposed amendments; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

In addition to its general call for comments, DHS is specifically seeking comments on the following proposals:

- A. Priority date retention for EB-5 petitioners;
- B. Increases to the minimum investment amount for targeted employment areas (TEAs) and non-TEAs;
- C. Revisions to the TEA designation process, including the elimination of state designation of high unemployment areas as a method of TEA designation;
- D. Revisions to the filing and interview process for removal of conditions on lawful permanent residence.

DHS also invites comments on the economic analysis supporting this rule and the proposed form revisions.

Instructions: All submissions must include the DHS Docket No. USCIS-2016-0006 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to

consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

II. Executive Summary

A. Purpose of the Regulatory Action

DHS proposes to update its regulations governing EB-5 immigrant investors and regional centers to reflect statutory changes and codify existing policies. DHS also proposes changes to areas of the EB-5 program in need of reform.

B. Summary of Major Provisions

DHS proposes the following major revisions to the EB-5 program regulations.

1) Priority Date Retention

DHS proposes to authorize certain EB-5 petitioners to retain the priority date¹ of an approved EB-5 immigrant petition for use in connection with any subsequent EB-5 immigrant petition.² Petitioners with approved immigrant petitions might need to file new petitions due to circumstances beyond their control (for instance, DHS might have

¹ An EB-5 immigrant petition's priority date is normally the date on which the petition was properly filed. In general, when demand exceeds supply for a particular visa category, an earlier priority date is more advantageous than a later one.

² The priority date retention proposal, like other proposals described in this Executive Summary, is subject to important conditions and limitations described in more detail elsewhere in this proposed rule.

terminated a regional center associated with the original petition), or might choose to do so for other reasons (for instance, a petitioner may seek to materially change aspects of his or her qualifying investment). DHS is proposing to generally allow EB-5 petitioners to retain the priority dates of previously approved petitions so as to avoid further delays on immigrant visa processing associated with the loss of priority dates. DHS believes that priority date retention may become increasingly important due to the strong possibility that the EB-5 visa category will remain oversubscribed for the foreseeable future.

2) Increases to the Investment Amounts

DHS is proposing to increase the minimum investment amounts for all new EB-5 petitioners. The increase would ensure that program requirements reflect the present-day dollar value of the investment amounts established by Congress in 1990. Specifically, DHS proposes to initially increase the standard minimum investment amount, which also applies to high employment areas, from \$1 million to \$1.8 million. This change would represent an adjustment for inflation from 1990 to 2015 as measured by the unadjusted Consumer Price Index for All Urban Consumers (CPI-U),³ an economic indicator that tracks the prices of goods and services in the United States. For those investors seeking to invest in a new commercial enterprise that will be principally doing business in a targeted employment area (TEA), DHS proposes to increase the minimum investment amount from \$500,000 to \$1.35 million, which is 75 percent of the proposed standard minimum investment amount. In addition, DHS is proposing to make regular CPI-U-based adjustments in the standard minimum investment amount, and conforming

³ See Bureau of Labor Statistics, CPI-U Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>.

adjustments to the TEA minimum investment amount, every 5 years, beginning 5 years from the effective date of these regulations.

3) TEA Designations

DHS proposes to reform the TEA designation process to ensure consistency in TEA adjudications and ensure that designations more closely adhere to Congressional intent. First, DHS proposes to allow any city or town with high unemployment⁴ and a population of 20,000 or more to qualify as a TEA. Currently, TEA designations are not available at the city or town level, unless a state designates the city or town as a TEA and provides evidence of such designation to a prospective EB-5 investor for submission with the Form I-526. See 8 CFR 204.6(i). Second, DHS proposes to eliminate the ability of a state to designate certain geographic and political subdivisions as high-unemployment areas; instead, DHS would make such designations directly, using standards described in more detail elsewhere in this proposed rule. DHS believes these changes would help address inconsistencies between and within states in designating high unemployment areas, and better ensure that the reduced investment threshold is reserved for areas experiencing significantly high levels of unemployment.

4) Removal of Conditions

DHS proposes to revise the regulations to clarify that derivative family members must file their own petitions to remove conditions on their permanent residence when they are not included in a petition to remove conditions filed by the principal investor. In addition, DHS is proposing to improve the adjudication process for removing conditions

⁴ An area has “high unemployment” if it has an average unemployment rate of at least 150 percent of the national average rate.

by providing flexibility in interview locations and to update the regulation to conform to the current process for issuing permanent resident cards.

5) Miscellaneous Changes

Lastly, DHS proposes to update the regulations to reflect miscellaneous statutory changes made since the regulation was first published in 1991, as well as to clarify definitions of key terms for the program. By aligning DHS regulations with statutory changes and defining key terms, this proposed rule will provide greater certainty regarding the eligibility criteria for investors and their family members.

C. Legal Authority

The Secretary of Homeland Security's authority for the proposed regulatory amendments is found in various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., as well as the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Public Law 102-395, 106 Stat. 1828; the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758; and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, including establishing such regulations as the Secretary deems necessary to carry out his authority; section 101(b)(1)(F) of the HSA, 6 U.S.C. 111(b)(1)(F), which establishes that a primary mission of DHS is to ensure that the economic security of the United States is not diminished by the Department's efforts, activities, and programs; and section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the

Secretary and authorizes the Secretary to issue regulations.

The aforementioned authorities for the proposed regulatory amendments include:

- Section 203(b)(5) of the INA, 8 U.S.C. 1153(b)(5), which makes visas available to immigrants investing in new commercial enterprises in the United States that will benefit the U.S. economy and create full-time employment for not fewer than 10 U.S. workers.
- Section 204(a)(1)(H) of the INA, 8 U.S.C. 1154(a)(1)(H), which requires individuals to file petitions with DHS when seeking classification under section 203(b)(5);
- Section 216A of the INA, 8 U.S.C. 1186b, which places conditions on permanent residence obtained under section 203(b)(5) and authorizes the Secretary to remove such conditions for immigrant investors who have met the applicable investment requirements, sustained such investment, and otherwise conformed to the requirements of sections 203(b)(5) and 216A.
- Section 610 of Public Law 102-395, 8 U.S.C. 1153 note, as amended, which created the Immigrant Investor Pilot Program (the “Regional Center Program”), authorizing the designation of regional centers for the promotion of economic growth, and which authorizes the Secretary to set aside visas authorized under section 203(b)(5) of the INA for individuals who invest in regional centers.

D. Costs and Benefits

This rule proposes changes to certain aspects of the EB-5 program that are in need of reform, and would also update the regulations to reflect statutory changes and codify existing policies. There are three major provisions proposed with several minor

provisions and some miscellaneous technical changes. DHS has analyzed these provisions carefully and has determined that due to data limitations and the complexity of EB-5 investment structures, which typically involve multiple layers of investment, finance, development, and legal business entities, it is difficult to quantify and monetize the costs and benefits of the proposed provisions, with the exception of total estimated costs of approximately \$91,000⁵ annually for dependents who would file the Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (Form I-829) separately from principal investors, and familiarization costs to review the rule, estimated at \$501,154 annually.

However, DHS does provide qualitative discussions on the potential costs and benefits of these proposed provisions. One of the main proposed provisions increases the standard minimum investment amount to \$1.8 million and the minimum investment amount for TEAs to \$1.35 million in order to account for inflation since the inception of the program. DHS has no way to assess the potential reduction in investments either in terms of past activity or forecasted activity, and cannot therefore estimate any impacts concerning job creation, losses or other downstream economic impacts driven by the proposed investment amount increases. DHS provides a full qualitative analysis and discussion on the increase in investment amounts in the executive orders 12866 and 13563 section of this proposed rule. DHS believes these provisions would increase the integrity, effectiveness, and economic impact of the program positively, stimulating investment in areas where it is needed most and generating jobs.

The costs and benefits summary of the proposed provisions is provided in Table

⁵ The cost estimate is rounded from \$90,762.

1, below. In addition, DHS has prepared an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act (RFA) to discuss any potential impacts to small entities. As discussed further in the IRFA, DHS cannot estimate the exact impact to small entities. DHS, however, does expect some impact to regional centers and non-regional center projects, although it does not anticipate that this impact will be substantial or significant.

Table 1: Summary of Changes and Impact of the Proposed Provisions		
Current Policy	Proposed Change	Impact
Current DHS regulations do not permit investors to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition.	DHS proposes to allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition for which the petitioner qualifies.	<p>Benefits:</p> <ul style="list-style-type: none"> • Makes visa allocation more predictable for investors with less possibility for large fluctuations in visa availability dates due to regional center termination. • Provides greater certainty and stability regarding the timing of eligibility for investors pursuing permanent residence in the U.S. and thus lessens the burden of unexpected changes in the underlying investment. • Provides more flexibility to investors to contribute into more viable investments, potentially reducing fraud and improving potential for job creation. <p>Costs:</p> <ul style="list-style-type: none"> • Not identified.
<p>The standard minimum investment amount has been \$1 million since 1990 and has not kept pace with inflation.</p> <p>Further, the statute authorizes a reduction in the minimum investment amount when such investment is made in a TEA by up to 50 percent of the standard minimum</p>	DHS proposes to account for inflation in the investment amount since the inception of the program. DHS proposes to raise the minimum investment amount to \$1.8 million. DHS also proposes to include a mechanism to automatically adjust the minimum investment amount based on the unadjusted CPI-	<p>Benefits:</p> <ul style="list-style-type: none"> • Increases in investment amounts are necessary to keep pace with inflation and real value of investments; • Raising the investment amounts increases the amount invested by each investor and potentially increases the total amount invested under this

<p>investment amount. Since 1991, DHS regulations have set the TEA investment threshold at 50 percent of the minimum investment amount.</p> <p>Similarly, DHS has not proposed to increase the minimum investment amount for investments made in a high employment area beyond the standard amount.</p>	<p>U every 5 years.</p> <p>DHS proposes to decrease the reduction for TEA investment thresholds, and set the TEA minimum investment at 75 percent of the standard amount. Assuming the standard investment amount is \$1.8 million, investment in a TEA would initially increase to \$1.35 million.</p> <p>DHS is not proposing to change the equivalency between the standard minimum investment amount and those made in high employment areas. As such, DHS proposes that the minimum investment amounts in high employment areas would be \$1.8 million, and follow the same mechanism for future inflationary adjustments.</p>	<p>program.</p> <ul style="list-style-type: none"> For regional centers, the higher investment amounts per investor would mean that fewer investors would have to be recruited to pool the requisite amount of capital for the project, so that searching and matching of investors to projects could be less costly. <p>Costs:</p> <ul style="list-style-type: none"> Some investors may be unable or unwilling to invest at the higher proposed levels of investment. There may be fewer jobs created if fewer investors invest at the proposed higher investment amounts. For regional centers, the higher amounts could reduce the number of investors in the global pool and result in fewer investors and thus make search and matching of investors to projects more costly. Potential reduced numbers of EB-5 investors could prevent projects from moving forward due to lack of requisite capital. An increase in the investment amount could make foreign investor visa programs offered by other countries more attractive.
<p>A TEA is defined by statute as a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate). Currently, investors demonstrate that their investments are in a high unemployment area in</p>	<p>DHS proposes to eliminate state designation of high unemployment areas. DHS also proposes to amend the manner in which investors can demonstrate that their investments are in a high unemployment area.</p>	<p>Benefits:</p> <ul style="list-style-type: none"> Rules out TEA configurations that rely on a large number of census tracts indirectly linked to the actual project tract by numerous degrees of separation. Potential to better stimulate

<p>two ways:</p> <p>1) providing evidence that the Metropolitan Statistical Area (MSA), the specific county within the MSA, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business, has experienced an average unemployment rate of at least 150 percent of the national average rate or</p> <p>2) submitting a letter from an authorized body of the government of the state in which the new commercial enterprise is located, which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area.</p>	<p>1) In addition to MSAs, specific counties within MSAs, and counties in which a city or town with a population of 20,000 or more is located, DHS proposes to add cities and towns with a population of 20,000 or more to the types of areas that can be designated as a high unemployment area.</p> <p>2) DHS is proposing that a TEA may consist of a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business if the weighted average of the unemployment rate for the tract or tracts is at least 150 percent of the national average.</p> <p>3) DHS is also proposing that a TEA may consist of an area comprised of the census tract(s) in which the new commercial enterprise is principally doing business, including any and all adjacent tracts, if the weighted average of the unemployment rate for all included tracts is at least 150 percent of the national average.</p>	<p>job growth in areas where unemployment rates are the highest.</p> <p>Costs:</p> <ul style="list-style-type: none"> The proposed TEA provision could cause some projects and investments to not qualify. DHS presents the potential number of projects and investments that could be affected in Table 5.
<p>Current technical issues:</p> <ul style="list-style-type: none"> The current regulation does not clearly define the process by which derivatives may file a Form I-829 petition when they are not included on the principal's petition. Interviews for Form I-829 petitions are generally scheduled at the location of the new commercial enterprise. The current regulations 	<p>DHS is proposing the following technical changes:</p> <ul style="list-style-type: none"> Clarify the filing process for derivatives who are filing a Form I-829 petition separately from the immigrant investor. Provide flexibility in determining the interview location related to the Form I-829 petition. Amend the regulation by which the immigrant investor obtains the new 	<p>Conditions of Filing:</p> <p>Benefits</p> <ul style="list-style-type: none"> Adds clarity and eliminates confusion for the process of derivatives who file separately from the principal immigrant investor. <p>Costs</p> <ul style="list-style-type: none"> Total cost to applicants filing separately would be \$90,762 annually. <p>Conditions of Interview:</p>

<p>require an immigrant investor and his or her derivatives to report to a district office for processing of their permanent resident cards.</p>	<p>permanent resident card after the approval of his or her Form I-829 petition because DHS captures biometric data at the time the immigrant investor and derivatives appear at an ASC for fingerprinting.</p>	<p>Benefits</p> <ul style="list-style-type: none"> • Interviews may be scheduled at the USCIS office having jurisdiction over either the immigrant investor’s commercial enterprise, the immigrant investor’s residence, or the location where the Form I-829 petition is being adjudicated, thus making the interview program more effective and reducing burdens on the immigrant investor. • Some applicants may have cost savings from lower travel costs. <p>Costs</p> <ul style="list-style-type: none"> • Not estimated. <p>Investors obtaining a permanent resident card:</p> <p>Benefits:</p> <ul style="list-style-type: none"> • Cost and time savings for applicants for biometrics data. <p>Costs:</p> <ul style="list-style-type: none"> • Not estimated.
<p>Current miscellaneous items:</p> <ul style="list-style-type: none"> • 8 CFR 204.6(j)(2)(iii) refers to the former U.S. Customs Service. • Public Law 107-273 eliminated the requirement that alien entrepreneurs establish a new commercial enterprise from both INA § 203(b)(5) and INA § 216A. • 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii) reference “management” ; • Current regulation at 8 CFR 204.6(j)(5) has the 	<p>DHS is proposing the following miscellaneous changes:</p> <ul style="list-style-type: none"> • DHS is updating references at 8 CFR 204.6(j)(2)(iii) from U.S. Customs Service to U.S. Customs and Border Protection. • Removing references to requirements that alien entrepreneurs establish a new commercial enterprise in 8 CFR 204.6 and 216.6. • Removing references to “management” at 8 CFR 204.6(j)(5) and 8 CFR 	<p>These provisions are technical changes and will have no impact on investors or the government. Therefore, the benefits and costs for these changes were not estimated.</p>

<p>phrase “as opposed to maintain a purely passive role in regard to the investment”;</p> <ul style="list-style-type: none"> Public Law 107-273 allows limited partnerships to serve as new commercial enterprises; Current regulation references the former Associate Commissioner for Examinations. 8 CFR 204.6(k) requires USCIS to specify in its Form I-526 decision whether the new commercial enterprise is principally doing business in a targeted employment area. Sections 204.6 and 216.6 use the term “entrepreneur” and “deportation.” These sections also refer to Forms I-526 and I-829. 	<p>204.6(j)(5)(iii);</p> <ul style="list-style-type: none"> Removing the phrase “as opposed to maintain a purely passive role in regard to the investment” from 8 CFR 204.6(j)(5); Clarifies that any type of entity can serve as a new commercial enterprise; Replacing the reference to the former Associate Commission for Examinations with a reference to the USCIS AAO. Amending 8 CFR 204.6(k) to specify how USCIS will issue a decision. Revising sections 204.6 and 216.6 to use the term “investor” instead of “entrepreneur” and to use the term “removal” instead of “deportation.” 	
<p>Miscellaneous Cost:</p> <ul style="list-style-type: none"> Familiarization cost of the rule. 	<p>Applicants would need to read and review the rule to become familiar with the proposed provisions.</p>	<p>Familiarization costs to read and review the rule are estimated at \$501,154 annually.</p>

III. **Background**

A. **The EB-5 Program**

As part of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, Congress established the EB-5 immigrant visa classification to incentivize employment creation in the United States. Under the EB-5 program, lawful permanent resident (LPR) status is available to foreign nationals who invest at least \$1 million in a new commercial enterprise (NCE) that will create at least 10 full-time jobs in the United States. See INA section 203(b)(5), 8 U.S.C. 1153(b)(5). A foreign national may also invest \$1 million if

the investment is in a high employment area or \$500,000 if the investment is in a TEA, defined to include certain rural areas and areas of high unemployment. Id.; 8 CFR 204.6(f). The INA allots 9,940 immigrant visas each fiscal year for foreign nationals seeking to enter the United States under the EB-5 classification.⁶ See INA section 201(d), 8 U.S.C. 1151(d); INA section 203(b)(5), 8 U.S.C. 1153(b)(5). Not less than 3,000 of these visas must be reserved for foreign nationals investing in TEAs. See INA section 203(b)(5)(B), 8 U.S.C. 1153(b)(5)(B).

B. The Regional Center Program

Enacted in 1992, section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Public Law 102-395, 106 Stat. 1828, established a pilot program that requires the allocation of a limited number of EB-5 immigrant visas to individuals who invest through DHS-designated regional centers.⁷ The Regional Center Program was initially designed as a pilot program set to expire after 5 years, but Congress has continued to extend the program to the present day.⁸ The Regional Center Program was last extended in December 2016.⁹

Under the Regional Center Program, foreign nationals base their EB-5 petitions on investments in new commercial enterprises located within “regional centers.” DHS

⁶ An immigrant investor, his or her spouse, and children (if any) will each use a separate visa number.

⁷ Current law requires that DHS annually set aside 3,000 EB-5 immigrant visas for regional center investors. Section 116 of Public Law 105-119, 111 Stat. 2440 (Nov. 26, 1997). If this full annual allocation is not used, remaining visas may be allocated to foreign nationals who do not invest in regional centers.

⁸ See Section 116 of Public Law 105-119, 111 Stat. 2440, 2467 (Nov. 26, 1997); Section 1 of Public Law 112-176, 126 Stat. 1325, 1325 (Sept. 28, 2012); Section 575 of Public Law 114-113, 129 Stat. 2242, 2526 (Dec. 18, 2015).

⁹ See Public Law 114-254 (Dec. 10, 2016).

regulations define a regional center as an economic unit, public or private, that promotes economic growth, regional productivity, job creation, and increased domestic capital investment. See 8 CFR 204.6(e). While all EB-5 petitioners go through the same petition process, those petitioners participating in the Regional Center Program may meet statutory job creation requirements based on economic projections of either direct or indirect job creation, rather than only on jobs directly created by the new commercial enterprise. See 8 CFR 204.6(m)(3). In addition, Congress authorized the Secretary to give priority to EB-5 petitions filed through the Regional Center Program. See section 601(d) of Public Law 102-395, 106 Stat. 1828, as amended by Public Law 112-176, Sec. 1, 126 Stat. 1326 (Sept. 28, 2012).

Requests for regional center designation must be filed with USCIS on the Application for Regional Center Under the Immigrant Investor Program (Form I-924). See 8 CFR 204.6(m)(3)-(4). Once designated, regional centers must provide USCIS with updated information to demonstrate continued eligibility for the designation by submitting an Annual Certification of Regional Center (Form I-924A) on an annual basis or as otherwise requested by USCIS. See 8 CFR 204.6(m)(6)(i)(B). USCIS may seek to terminate a regional center's participation in the program if the regional center no longer qualifies for the designation, the regional center fails to submit the required information or pay the associated fee, or USCIS determines that the regional center is no longer promoting economic growth. See 8 CFR 204.6(m)(6)(i). As of November 1, 2016, there were 864 designated regional centers.¹⁰

¹⁰ USCIS, Immigrant Investor Regional Centers, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

C. EB-5 Immigrant Visa Process

A foreign national seeking LPR status under the EB-5 immigrant visa classification must go through a multi-step process. The individual must first file an Immigrant Petition by Alien Entrepreneur (Form I-526, or “EB-5 petition”) with USCIS. The petition must be supported by evidence that the foreign national’s lawfully obtained investment capital is invested (i.e., placed at risk), or is actively in the process of being invested, in a new commercial enterprise in the United States that will create full-time positions for not fewer than 10 qualifying employees. See 8 CFR 204.6(j).

If USCIS approves the EB-5 petition, the petitioner must take additional steps to obtain LPR status. In general, the petitioner may either apply for an immigrant visa through a Department of State consular post abroad¹¹ or, if the petitioner is already in the United States and is otherwise eligible to adjust status, the petitioner may seek adjustment of status by filing an Application to Register Permanent Residence or Adjust Status (Form I-485) with USCIS.¹² Congress has imposed limits on the availability of such immigrant visas, including by capping the annual number of visas available in the EB-5 category and by separately limiting the percentage of immigrant visas that may be issued on an annual basis to individuals born in any one country.¹³

To request an immigrant visa while abroad, an EB-5 petitioner must apply at a U.S. consular post. See INA sections 203(e) and (g), 221 and 222, 8 U.S.C. 1153(e) and (g), 1201 and 1202; see also 22 CFR part 42, subparts F and G. The petitioner must

¹¹ See INA sections 203, 221 and 222; 8 U.S.C. 1153, 1201, and 1202.

¹² See INA section 245, 8 U.S.C. 1255.

¹³ See INA sections 201, 202 and 203; 8 U.S.C. 1151, 1152 and 1153.

generally wait to receive a visa application packet from the DOS National Visa Center to commence the visa application process. After receiving this packet, the petitioner must collect required information and file the immigrant visa application with DOS. As noted above, the wait for a visa depends on the demand for immigrant visas in the EB-5 category and the petitioner's country of birth.¹⁴ Generally, DOS authorizes the issuance of a visa and schedules the petitioner for an immigrant visa interview for the month in which the priority date will be current. If the petitioner's immigrant visa application is ultimately approved, he or she is issued an immigrant visa and, on the date of admission to the United States, obtains LPR status on a conditional basis. See INA sections 211, 216A, and 221; 8 U.S.C. 1181, 1186b, and 1201.

Alternatively, an EB-5 petitioner who is in the United States in lawful nonimmigrant status generally may seek LPR status by filing with USCIS an Application to Register Permanent Residence or Adjust Status (Form I-485, or "application for adjustment of status"). See INA section 245, 8 U.S.C. 1255; 8 CFR part 245. Before filing such an application, however, the EB-5 petitioner must wait until an immigrant visa is "immediately available." See INA section 245(a), 8 U.S.C. 1255(a); 8 CFR 245.2(a)(2)(i)(A). Generally, an immigrant visa is considered "immediately available" if the petitioner's priority date under the EB-5 category is earlier than the relevant date

¹⁴ When demand for a visa exceeds the number of visas available for that category and country, the demand for that particular preference category and country of birth is deemed oversubscribed. The Department of State (DOS) publishes a Visa Bulletin that determines when a visa may be authorized for issuance. See U.S. Dep't of State, Bureau of Consular Aff., Visa Bulletin, available at <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>. Specifically, an individual cannot be issued an immigrant visa unless the individual's "priority date," i.e., the date USCIS received the properly filed Form I-526, is earlier than the "final action date" indicated in the "date for filing application" chart in the current Visa Bulletin for the relevant category and country of birth. See 8 CFR 204.6(d) (defining the "priority date" for EB-5 petitioners).

indicated in the monthly DOS Visa Bulletin.¹⁵ See 8 CFR 245.1(g)(1).

Whether obtained pursuant to issuance of an immigrant visa or adjustment of status, LPR status based on an EB-5 petition is granted on a conditional basis. See INA section 216A(a)(1), 8 U.S.C. 1186b(a)(1). Within the 90-day period preceding the second anniversary of the date the immigrant investor obtains conditional permanent resident status, the immigrant investor is required to file with USCIS a Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (Form I-829). See INA section 216A(c) and (d), 8 U.S.C. 1186b(c) and (d); 8 CFR 216.6(a)(1). Failure to timely file Form I-829 results in automatic termination of the immigrant investor's conditional permanent resident status and the initiation of removal proceedings. See INA section 216A(c), 8 U.S.C. 1186b(c); 8 CFR 216.6(a)(5). In support of the petition to remove conditions, the investor must show, among other things, that he or she established the commercial enterprise, that he or she invested or was actively involved in the process of investing the requisite capital, that he or she sustained those actions for the period of residence in the United States, and that job creation requirements were met or will be met within a reasonable time. See 8 CFR 216.6(a)(4). If approved, the conditions on the investor's permanent residence are removed as of the second anniversary of the date the investor obtained conditional permanent resident status. See 8 CFR 216.6(d)(1).

¹⁵ More specifically, an individual generally may file an application for adjustment of status with USCIS only if his or her priority date is earlier than the cut-off date for the relevant category and country of birth in the "final action dates" chart in the relevant Visa Bulletin. However, when USCIS determines that there are more immigrant visas available for the fiscal year than there are known applicants for such visas, USCIS will state on its website that, during that month, applicants may instead use the "dates for filing visa applications" chart in the Visa Bulletin for purposes of determining whether they may file applications for adjustment of status with USCIS. DOS, moreover, may not issue a visa and USCIS may not grant adjustment of status unless the individual's priority date is earlier than the corresponding cut-off date in the "final action date" chart listed in the Visa Bulletin.

IV. The Proposed Rule

DHS has not comprehensively revised the EB-5 program regulations since they were published in 1993, see 58 FR 44606 (1993), but has issued policy guidance to conform agency practice to intervening changes in the governing statutes. In addition to proposing changes to portions of the EB-5 program that are in need of reform, this proposed rule would codify and clarify certain policies. For example, the current regulation requires that the interview for the petition to remove conditions take place at the USCIS office located in the same location as the new commercial enterprise, although there is no requirement that the EB-5 immigrant petitioner reside in that vicinity. See 8 CFR 216.6(b)(2). In some instances, DHS has been allowing the interview to take place at a variety of different locations, including the USCIS office closest to the immigrant petitioner's residence, as DHS recognizes the burden of conducting an interview in a location that is a considerable distance from an immigrant petitioner's residence. DHS is proposing conforming revisions to the regulations in order to reflect this practice. See proposed 8 CFR 216.6(b)(2).

A. Priority Date Retention

DHS proposes to allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 immigrant petition for which the petitioner qualifies. See proposed 8 CFR 204.6(d). This provision would not apply where DHS revoked the original petition's approval based on fraud, willful misrepresentation of a material fact, or a determination that DHS approved the petition based on a material error. Id. Similarly, priority date retention would not be available once the investor uses the priority date to obtain conditional LPR status based upon the

approved petition (e.g., when such an investor fails to remove the conditional basis of that status and thus loses his or her LPR status). Should DHS seek to revoke the approval of an immigrant petition, DHS would provide notice of the revocation detailing the reasons for revocation.¹⁶ If the revocation is not based on fraud, a willful misrepresentation of a material fact, or material DHS error, the investor would be able to utilize the priority date of that petition should he or she seek to file another immigrant petition under the EB-5 program. See proposed 8 CFR 204.6(d). An investor seeking to use a retained priority date should provide a copy of the original immigrant petition's approval notice indicating the earlier priority date when filing the new EB-5 immigrant petition. Under this proposal, denied petitions would not establish a priority date, and a priority date would not be transferable to another investor. See proposed 8 CFR 204.6(d).

The current regulation does not permit investors to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition. See 8 CFR 204.6(d). DHS has generally allowed beneficiaries in the employment-based first, second, and third preference categories to retain the priority date of their previously approved immigrant petitions unless DHS revokes petition approval. See 8 CFR 204.5(e). DHS recently issued a final rule that will expand the ability of beneficiaries in these preference categories to retain their priority dates even when their petitions have been revoked, so long as the approval was not revoked based on fraud, willful misrepresentation of a material fact, material error, or the revocation or invalidation of

¹⁶ See 8 CFR 205.2.

the labor certification associated with the petition.¹⁷ See 8 CFR 204.5(e)(2). DHS's proposal in this regulation to allow priority date retention for those in the EB-5 category would bring the EB-5 priority date retention policy into harmony with those other employment-based preference categories. See proposed 8 CFR 204.6(d).

DHS is proposing to allow priority date retention in order to: (1) address situations in which petitioners may become ineligible through circumstances beyond their control (e.g., the termination of a regional center) as they wait for their EB-5 visa priority date to become current; and (2) provide investors with greater flexibility to deal with changes to business conditions. For example, investors involved with an underperforming or failing investment project would be able to move their investment funds to a new, more promising investment project without losing their place in the visa queue.

Providing EB-5 investors with the opportunity to retain their priority dates is increasingly important as the demand for EB-5 visas outpaces the statutorily limited supply of such visas, which lengthens wait times for visa numbers. Since the severe economic recession between 2007 and 2009,¹⁸ the EB-5 program has experienced a dramatic increase in participation. Prior to 2008, the EB-5 program received an average of fewer than 600 EB-5 immigrant petitions per year. In the following years, the EB-5 program has received an average of over 5,500 petitions per year. And between FY 2014

¹⁷ See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398, 82485 (Nov. 18, 2016).

¹⁸ The Nat'l Bureau of Econ. Research, U.S. Business Cycle Expansions and Contractions, available at <http://www.nber.org/cycles.html>.

and FY 2015 alone, the program received over 25,000 petitions.¹⁹ As a result, demand for EB-5 visas by investors has now outpaced the annual supply, resulting in visa backlogs for certain petitioners and their family members. Individuals affected by those backlogs frequently wait for one year or more before they can obtain conditional permanent residence.

The EB-5 program began to experience oversubscription (i.e., demand that outpaced the supply in visa numbers) for the first time during FY 2014. At that time, DOS announced that EB-5 visas were no longer available for the remainder of the fiscal year for individuals born in China.²⁰ Since then, the program has continued to experience annual demand from individuals born in China that has outpaced the supply in visas, resulting in increasingly long backlogs every year for those individuals.²¹ This trend is anticipated to continue and likely worsen for the foreseeable future, especially considering that individuals born in China currently file about 80 percent of the EB-5 immigrant visas granted on an annual basis.²² Indeed, given the 20,000 EB-5 petitions currently pending with USCIS, DHS estimates that there are currently 16,000 EB-5 petitions pending for individuals born in China.²³

¹⁹ Statistics provided by USCIS Immigrant Investor Program Office.

²⁰ DOS issued a statement in August 2014 indicating the EB-5 preference category was unavailable for Chinese nationals through the end of FY2014. See Nataliya Rymer, U.S. Department of State Announces EB-5 Visas for China Unavailable Until October 1, 2014, Nat'l L. Rev., Aug. 23, 2014, <http://www.natlawreview.com/article/us-department-state-announces-eb-5-visas-china-unavailable-until-october-1-2014>.

²¹ While the demand has exceeded supply for investors from China, the demand has not exceeded supply for investors from any other countries as of December 2016.

²² Dep't of State, Visa Statistics, Report of the Visa Office, available at <https://travel.state.gov/content/visas/en/law-and-policy/statistics.html>

²³ USCIS, Number of I-526 Immigrant Petitions by Alien Entrepreneurs by Fiscal Year, Quarter, and Case Status 2008-2016, (May 25, 2016) available at

Although Congress sets visa numbers, DHS recognizes that having to wait for a visa can create difficulties for individuals seeking to invest in the United States. There are also consequences for investors who invest through a regional center that is subsequently terminated through no fault of the investor. When a regional center is terminated, EB-5 immigrant petitions filed through that regional center are generally also denied or revoked depending on the procedural status of the petition. The filers of such petitions may have met all requirements to participate in the EB-5 program, but absent priority date retention they will lose their place in the immigrant visa queue. Currently, an investor in this situation who wants to continue with the EB-5 immigrant visa process must start the process all over again by investing in a new commercial enterprise and going to the end of the EB-5 visa queue. Allowing priority date retention would allow such an investor to retain his or her place in the queue, thereby alleviating the harsh consequences of regional center terminations and other material changes that occur unexpectedly and through no fault of the investor.

Finally, priority date retention would also benefit other investors with approved EB-5 immigrant petitions who, while waiting for their priority dates to become current, learn that they have invested in severely delayed projects that are likely not to succeed. Under current regulations, such investors cannot reinvest their investment funds without losing their place in the immigrant visa queue. Under the proposed rule, such investors would be able to reinvest in new projects while retaining their previously established priority dates. By allowing priority date retention, DHS is thus eliminating an external

https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr2.pdf.

incentive that currently distorts market forces and increases financial risk for investors.

DHS welcomes public comment on the proposal to allow investors in certain circumstances to retain their priority dates. DHS also welcomes comment on the proposed standards that may be considered when determining whether or not to allow for priority date retention, including alternative suggestions to those standards.

B. Increasing the Minimum Investment Amount.

In 1990, Congress set the minimum investment amount for the program at \$1 million and authorized the Attorney General (now the Secretary of Homeland Security) to increase the minimum investment amount, in consultation with the Secretaries of State and Labor. INA section 203(b)(5)(C)(i), 8 U.S.C. 1153(b)(5)(C)(i). Neither the former INS nor DHS has exercised its authority to increase the minimum investment amount. As a result, over the past 25 years inflation has eroded the present-day value of the minimum investment required to participate in the EB-5 program.²⁴ After consulting with the Departments of State and Labor, DHS proposes to account for inflation by increasing the minimum investment amount consistent with increases in the CPI-U during the intervening period, for a new minimum investment amount of \$1.8 million.²⁵

²⁴ DHS also notes that prior to the passage of IMMACT, the former INS provided a written response to Senator Simon regarding the “creation of a subcategory for immigrant investors” and stated that the “minimum investment amount would be set in terms of the value of the dollar at the time of enactment and would be adjusted periodically based on some criteria such as the Consumer Price Index.” A Bill to Amend the Immigration and Nationality Act to Effect Changes in the Numerical Limitation and Preference System for the Admission of Immigrants: Hearing on S. 1611 Before the S. Subcomm. on Immigr. & Refugee Aff. of the S. Comm. on the Judiciary, 100th Cong. 90 (1987) (statement of Mark W. Everson, Deputy Comm’r of the Immigr. and Naturalization Serv.).

²⁵ DHS may conduct further consultations following receipt of public comment and prior to issuing a final rule. The \$1.8 million figure is rounded down to the nearest hundred thousand from approximately \$1,813,443, based on an inflation factor of 1.813443 between 1990 and 2015. The actual increase in prices is obtained as $((CPI-U_{2015}/CPI-U_{1990})-1)$. Using a base period of

As discussed below, DHS also proposes to include a mechanism for future adjustments every 5 years, based on the CPI-U.

DHS believes that it is appropriate to adjust the minimum investment amount upward based on inflation, without regard for the amount of capital that would likely be required to fulfill the statutory requirement to create 10 jobs. As a preliminary matter, DHS notes that Congress did not provide for adjustments in the investment threshold to be related in any way to the EB-5 job creation requirements. Indeed, based on the controlling statutory authorities, Congress itself does not appear to have tied the statutory investment thresholds to the job creation requirement. For example, when Congress first created the EB-5 category, Congress established a single job creation standard (i.e., the direct creation of at least 10 jobs) but authorized three different levels of qualifying investments:

- 1) The standard minimum investment amount of \$1 million;
- 2) The reduced minimum investment amount of no less than 50 percent of the standard for investments in targeted employment areas; and
- 3) A higher minimum investment amount of up to three times the standard amount for investments in high employment areas.

As noted, Congress originally provided for up to three different qualifying investment amounts but did not vary the job creation requirements to correspond to the level of investment. Congress also did not tie investment levels to job creation criteria when it

1982-84, the CPI-U increased from 130.7 in 1990 to 237.017 in 2015, for an actual increase in price of approximately 81.34 percent. DHS rounded the figure down for ease of agency administration and the convenience of all stakeholders. The CPI-U data is publicly available at <http://www.bls.gov/data/#prices>.

established the regional center program. For regional center investments, Congress used the same three investment levels as the original program but varied the job creation requirement by including both direct and indirect job creation. Based on the plain language of INA section 203(b)(5)(C)(i) and the regional center legislation, Congress does not appear to have intended to tie the minimum investment amounts to the number of jobs to be created.

DHS considered a number of different measures upon which to base the proposed adjustment and future adjustments. Among these, DHS is proposing to rely on the Consumer Price Index (CPI), which “is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.”²⁶ According to the Bureau of Labor Statistics at the Department of Labor (DOL), the CPI is—

the most widely used measure of inflation. . . . It provides information about price changes in the Nation’s economy to government, business, labor, and private citizens and is used by them as a guide to making economic decisions. . . . The CPI and its components are used to adjust other economic series for price changes and to translate these series into inflation-free dollars.²⁷

The specific CPI index that DHS proposes to rely on is the unadjusted All Items CPI-U.

The CPI-U is the “broadest and most comprehensive CPI,” and using unadjusted data is

²⁶ Bureau of Labor Statistics, Consumer Price Index: Frequently Asked Questions, available at <http://www.bls.gov/cpi/cpifaq.htm>; Bureau of Labor Statistics, Consumer Price Index: Addendum to Frequently Asked Questions, available at http://www.bls.gov/cpi/cpiadd.htm#2_1.

²⁷ Id.

more appropriate for this purpose, because seasonally adjusted CPI data is subject to revision for up to five years after their original release, making such data difficult to use for escalation purposes.²⁸

DHS also considered other indices used by the Bureau of Labor Statistics to measure different aspects of inflation.²⁹ One of these is the Producer Price Indexes, which “measure changes in the selling prices received by domestic producers of goods and services.”³⁰ Although the Producer Price Indexes could also provide an appropriate measure for adjusting the standard minimum investment amount, DHS believes the CPI-U is a better measure because it is more widely relied upon.³¹ The BLS also produces a number of other business cost statistics that measure labor costs or the costs of goods and services,³² but DHS chose not to propose these as measures as they are more narrowly focused on different and discrete aspects of economic activity.

Because the EB-5 program is focused on investment, DHS also considered adjusting the standard minimum investment amount based on changes in the overall value of a specific stock index, such as the Dow Jones Industrial Average or the Standard and Poor’s 500 Stock Index. But these indexes are based on trades in the secondary market

²⁸ See id.

²⁹ Bureau of Labor Statistics, Overview of BLS Statistics on Inflation and Prices, available at <http://www.bls.gov/bls/inflation.htm>.

³⁰ Bureau of Labor Statistics, Producer Price Indexes: Frequently Asked Questions, available at <http://www.bls.gov/ppi/ppifaq.htm>.

³¹ Bureau of Labor Statistics, Consumer Price Index: Addendum to Frequently Asked Questions, available at <http://www.bls.gov/cpi/cpiadd.htm>. For additional comparison of CPI and PPI, see Bureau of Labor Statistics, Comparing the Producer Price Index for Personal Consumption with the U.S. All Items CPI for All Urban Consumers, available at <https://www.bls.gov/cpi/cpiadd.htm>.

³² Bureau of Labor Statistics, Overview of BLS Statistics on Business Costs, available at <http://www.bls.gov/bls/business.htm>.

that are tied to the value of existing companies strictly for investment purposes. By comparison, investment in the EB-5 program is related to job creation, which in turn results from an adequately capitalized enterprise (as determined by the costs of goods or services required to do business). DHS believes the CPI-U is a more appropriate indicator of the costs of goods and services necessary for an EB-5 enterprise to be adequately capitalized for the purpose of job creation.

DHS believes that increasing the standard minimum investment amount to account for inflation since creation of the EB-5 program would both modernize the program and ensure a level of capital investment in the United States that more closely adheres to congressional intent. DHS also believes that this change will benefit the U.S. economy by increasing the amount of foreign investment in the United States. This conclusion is supported by the fact that the EB-5 program has recently suffered from oversubscription at current investment levels; that investors' economic resources have likely increased since the program's creation by at least the rate of inflation; and that even with the proposed increases, the EB-5 program would remain extremely competitive with other countries' investor visa programs, which typically require higher investment thresholds.³³

³³ The United Kingdom's Tier 1 Investor visa requires a minimum investment of £2,000,000 (approximately \$2.5 million USD), and offers permanent residence to those who have invested at least £5 million (approximately \$6.3 million USD). [Tier 1 \(Investor\) Visa](https://www.gov.uk/tier-1-investor/overview), Gov.UK, <https://www.gov.uk/tier-1-investor/overview>. Australia's Significant and Premium Investment Visa Programs require AU \$5 million (approximately \$3.7 million USD) and AU \$15 million (approximately \$11.2 million USD), respectively; its "investor stream" visa program requires an AU \$1.5 million (approximately \$1.1 million USD) investment and a host of other requirements. [Business Innovation and Investment Visa](https://www.border.gov.au/Trav/Visa-1/188-), Australian Government, <https://www.border.gov.au/Trav/Visa-1/188->. Canada's Immigrant Investor Venture Capital Pilot Program requires a minimum investment of CDN \$2 million (approximately \$1.5 million USD) and a net worth of CDN \$10 million (approximately \$7.6 million USD) or more. [Immigrant](https://www.cic.gc.ca/immigration-and-refugee/immigration-and-refugee/immigrant-investor-venture-capital-pilot-program.aspx)

In addition to raising the standard minimum investment amount effective as of the date specified in the final rule, DHS proposes that the minimum investment amount be adjusted every 5 years based on the CPI-U. See proposed 8 CFR 204.6(f)(1). DHS proposes that each such future adjustment will be in effect for a 5-year period beginning on October 1 of the year of the adjustment. Id. DHS believes it is important to include a periodic inflation-adjustment mechanism in the regulations to avoid a recurrence of the current situation, where the minimum investment amount remains unchanged for a lengthy period and is eroded by inflation. DHS also proposes to adjust the investment threshold every 5 years, rather than on an annual basis, as a way of balancing the need to counteract inflation with the need to provide predictability and reliability to stakeholders. Such predictability is especially helpful for investors and project developers who need to prepare for the infusion of pooled EB-5 capital into new commercial enterprises. DHS estimates that more than 96 percent of all EB-5 immigrant petitions filed are based on pooled investments involving more than one EB-5 investor in the same new commercial enterprise. In addition, a 5-year adjustment period would be straightforward for the agency to administer in adjudicating multiple petitions based on investments in the same new commercial enterprise and business plan, filed over a period of several years.

Finally, DHS proposes that each investor will be required to contribute the minimum investment amount that is designated at the time the initial petition is filed. See

Investor Venture Capital Pilot Program, Government of Canada, <http://www.cic.gc.ca/english/immigrate/business/iivc/eligibility.asp>. New Zealand's Investor 1 Resident Visa requires a NZ \$10 million (approximately \$7.2 million USD) investment, and its Investor 2 Resident Visa requires a NZ \$2.5 million (approximately \$1.8 million USD) investment. Investor Visas, New Zealand Now, <https://www.newzealandnow.govt.nz/move-to-nz/new-zealand-visa/visas-to-invest/investor-visa>. Currency exchange calculations are as of December 2016.

proposed 8 CFR 204.6(f)(1). EB-5 investors may qualify for the program based either on having made their investment prior to petition filing or by being in the process of investing at the time of filing. However, all EB-5 investors must demonstrate a present commitment of the full minimum amount of required investment at the time the petition is filed. DHS believes that tying the required minimum investment amount to the amount designated at the time of filing provides clarity for stakeholders and simplifies the adjudication process for the agency.

DHS seeks public comment on all aspects of this proposal, including the proposed increase of the standard minimum investment amount to \$1.8 million, the proposed 5-year inflation-adjustment periods, the proposed use of the CPI-U as the basis for the initial increase and the periodic adjustments, the proposal to round future adjustments down to the nearest 100,000, and the proposed requirement that the minimum investment amount be set at the time of filing the EB-5 immigrant petition. DHS recognizes that under this proposal, the required minimum investment amount would increase significantly, in relative and absolute terms, to account for a quarter century of inflation. DHS is seeking comment on whether it should increase the standard minimum investment amount as proposed under this rule, or whether a different methodology or different investment amount would be more appropriate. DHS also seeks comment on whether it should implement any such increase incrementally or by another method that reduces impacts on stakeholders. DHS notes, however, that incremental increases may result in a lack of clarity for stakeholders and may pose operational burdens on adjudicators.

C. Increasing the Minimum Investment Amount for High Employment Areas

Congress also provided DHS with the authority to set the qualifying investment amount for high employment areas to an amount greater than—but not three times greater than—the standard minimum investment amount. See INA section 203(b)(5)(C)(iii), 8 U.S.C. 1153(b)(5)(C)(iii). At the outset of the program, the former INS did not wish to increase the investment for these areas beyond \$1 million. See 56 FR 60897, 60903. Because the standard minimum investment amount has applied to such areas since the program’s inception, DHS has not tracked which projects have been set in high employment areas. DHS thus does not have sufficient information at this time to determine whether to increase the investment threshold for such areas. DHS recently adjusted its forms to capture this information, which, once collected and analyzed, may help the Department determine whether to adjust the minimum investment amount for high employment areas. For now, however, DHS is not proposing an increase beyond the standard minimum investment amount, and therefore proposes applying the standard investment threshold in high employment areas. See proposed 8 CFR 204.6(f)(3). DHS also proposes that the minimum investment amount for high employment areas be adjusted consistent with adjustments to the standard investment threshold—i.e., every five years based on increases in the CPI-U and rounded down to the nearest 100,000.

DHS seeks public comment on all aspects of this proposal, including the continuing application of the standard investment threshold to high employment areas, which would increase the threshold to \$1.8 million, the proposed 5-year inflation-adjustment periods, the proposed use of the CPI-U as the basis for the periodic adjustments, and the proposal to round future adjustments down to the nearest 100,000.

D. Increasing the Minimum Investment Amount for TEAs

In 1990, Congress set the minimum investment amount for the program at \$1 million and authorized DHS to set a different amount for investments made in TEAs (i.e., rural areas and areas of high unemployment). See INA section 203(b)(5)(C)(ii), 8 U.S.C. 1153(b)(5)(C)(ii). Specifically, Congress authorized DHS to reduce the minimum investment amount in a TEA by up to 50 percent of the standard minimum investment amount. Id. The former INS subsequently issued regulations in 1991 setting the TEA investment threshold at 50 percent of the minimum investment amount, or \$500,000.³⁴ See 8 CFR 204.6(f)(2).

In establishing two tiers of investment, and setting aside 3,000 visas for those investing in rural areas and areas subject to high unemployment, Congress sought to incentivize investment in such areas.³⁵ But although some in Congress expected that most investors would invest at the higher amount,³⁶ experience shows that such investments have become relatively rare. An agency analysis of petitions filed in 2015 indicates that approximately 97 percent of all investments by EB-5 petitioners are made

³⁴ In the final rule published in 1991, the former INS noted that 82 commenters called for the maximum percentage reduction because they believed that “lowering the investment capital requirement would promote the purpose of the Act to stimulate investment in rural and high unemployment areas.” 56 FR 60897 (Nov. 29, 1991). “They further felt that viable businesses could be maintained with the lower investment amount.” Id.

³⁵ See 135 Cong. Rec. S7858-02 (July 13, 1989) (statement of Sen. Boschwitz) (stating that the amendment’s purpose was to “attract significant investments to rural America.”); 136 Cong. Rec. S17106-01 (Oct. 26, 1990) (statement of Sen. Simon) (“We are mindful of the need to target investments to rural America and areas with particularly high unemployment – areas that can use the job creation the most . . . America’s urban core and rural areas have special job creation needs.”).

³⁶ See 136 Cong. Rec. S17106-01 (Oct. 26, 1990) (statement of Sen. Simon) (“The general rule and the vast majority of the investor immigrants will fit in this category-is that the investor must invest \$1 million and create 10 U.S. jobs.”).

in TEAs and thus at the reduced amount of \$500,000. In other words, while Congress expressed concern about investments in TEAs and thus set aside approximately 30 percent of visas at a reduced investment amount for such purpose, investments in TEAs have effectively become the settled norm. As investments in TEAs have dominated the program in recent years, the de facto standard threshold has become \$500,000, thus undermining congressional aims to also encourage investments at the standard minimum investment amount of \$1 million.

Accordingly, DHS has determined that the large differential between the standard and reduced investment amounts has failed to strike the balance that Congress appears to have intended by creating a multi-leveled investment framework in the EB-5 program. Moreover, based on its 25-year history implementing the program, DHS believes that the differential—and the sizable monetary incentive it presents—has the potential of distorting general market forces and the business decisions that follow from such forces to an unintended degree. To strike a better balance between investments at the standard and reduced thresholds, and to reduce the degree to which the differential between the thresholds affects investment decisions, DHS is proposing to reduce the difference between the two investment thresholds. Specifically, DHS is proposing to set the minimum amount for investments in TEAs at 75 percent of the standard amount (i.e., change the percentage reduction for investments in TEAs from 50 percent of the standard amount to 25 percent of the standard amount). See proposed 8 CFR 204.6(f)(2). Because DHS has proposed to set the standard investment amount at \$1.8 million, the effect of this change is to set the TEA investment amount at \$1.35 million (i.e., 75% of \$1.8 million).

DHS considered changing the percentage reduction for TEA investments to various degrees but settled on a 25 percent reduction for several reasons. First, DHS believes that reducing the TEA investment discount by half will significantly reduce the potential for unintended distortions in investment decisions. Second, DHS notes that a 25 percent reduction represents a midway point between the two extremes allowed by Congress—applying the maximum 50 percent reduction and applying no reduction at all. Because DHS is seeking to reduce the investment imbalance caused by the 50 percent differential on the one hand, while continuing to effectuate the congressional intent of incentivizing investments in rural and high unemployment areas on the other, DHS believes that proposing the midway point between the two possible extremes for public comment is appropriate. Third, DHS determined that due to other proposed changes to the standard minimum investment amount in this rulemaking, the impact of a 25 percent reduction for TEA investments would initially be softened by the fact that the difference between the standard amount and the TEA investment amount, in terms of dollars, would remain roughly the same (changing from \$500,000 to \$450,000). Thus, at least for the first 5 years after the change proposed in this section, investors who choose to invest in TEAs will be able to invest at approximately the same savings in terms of real dollars as they do under the current regulations.

Finally, in addition to proposing to raise the minimum investment amount for TEAs, DHS proposes to adjust this amount every five years consistent with other parts of this proposed rule. See proposed 8 CFR 204.6(f)(2). Specifically, DHS proposes to keep the investment threshold for TEAs at 75 percent of the standard investment threshold. Id. As with the standard investment threshold, adjustments to the TEA investment threshold

would be in effect for a 5-year period beginning on October 1 of the year of the adjustment. Id.

DHS welcomes public comment on all aspects of this proposal, including the proposed minimum investment amount for TEAs as well as the proposal for adjusting the amount every five years. DHS also welcomes comment on the specific percentage reduction for TEA investments relative to the standard investment threshold, including alternative suggestions on the percentage to be considered.

E. TEA Designation Process.

As discussed in the previous section, Congress created the two-tier investment system in order to incentivize investments in targeted employment areas, defined in the statute as “a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” 8 U.S.C. 1153(b)(5)(B)(ii). In subsequent regulations published in 1991, the former INS allowed investors to demonstrate that their investment was in a high unemployment area in one of two ways: 1) by providing evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of at least 150 percent of the national average rate; or 2) by submitting a letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. 8 CFR 204.6(j)(6)(ii). When the INS

promulgated this provision, it permitted states to designate smaller TEAs—areas within an MSA or within a city or town with a population of 20,000 or more—because the agency believed that due to the nature of the data involved, states should have an opportunity to participate in TEA determinations.³⁷

Reliance on states' TEA designations has resulted in the application of inconsistent rules by different states. Some of these rules understandably may be motivated primarily by the desire to promote economic development in the relevant state, rather than by the desire to fulfill congressional intent with respect to the EB-5 program.³⁸ As mentioned previously, at least 97 percent of all EB-5 petitions filed in 2015 involved investments at the lower investment threshold for projects in TEAs. In addition, the deference to state determinations provided by current regulations has resulted in the acceptance of some TEAs that consist of areas of relative economic prosperity linked to areas with lower employment, and some TEAs that have been

³⁷ 56 FR 60897 (Oct. 26, 1990) (“With respect to geographic and political subdivisions of this size, however, the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government.”).

³⁸ Is the Investor Visa Program an Underperforming Asset?: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 62 (2016) (statement of Matt Gordon, Chief Exec. Officer, E3 Inv. Group) (“Generally, States quickly learned to be as permissive as possible in an attempt to attract ever greater amounts of EB-5 capital.”); see also The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse: Hearing Before the S. Comm. on the Judiciary, 114th Cong. 12 (2016) (statement of Gary Friedland, Scholar-in-Residence, N.Y. Univ., Stern School of Bus.) (“USCIS’ continued delegation to the states of the TEA authority without guidelines results in the application of inconsistent rules by the various states. More important, each state has the obvious self-interest to promote economic development within its own borders. Delegation presents an opportunity for the states to establish lenient rules to enable project locations to qualify as a TEA. Compounding the problem, often the state agency that is charged with making the TEA determination is the same agency that promotes local economic development. As a consequence, virtually every EB-5 project location qualifies as a TEA.”).

criticized as “gerrymandered.”³⁹

For these reasons, DHS proposes to eliminate state designation of high unemployment areas. This change would help ensure consistency across TEA designations. DHS would itself determine which areas qualify as TEAs, by applying standards proposed in this rule to the evidence presented by investors and regional centers. DHS alternatively considered continuing to allow states to make TEA designations while providing a clearer basis for DHS to scrutinize and overturn such designations. DHS, however, currently prefers to avoid such an approach because of the administrative burden it presents. DHS believes it would be more difficult to evaluate the individualized determinations of the various states than to implement and administer a nationwide standard on its own.

The proposed new standards for designating TEAs are as follows. First, the term “targeted employment area” would be defined, consistent with statutory authority, to mean an area which, at the time of investment, is a rural area or is designated as an area which has experienced unemployment of at least 150 percent of the national average rate. See proposed 8 CFR 204.6(e). DHS is also proposing to amend the definition of a “rural area” to mean any area other than an area within a metropolitan statistical area (as designated by the Office of Management and Budget (OMB)) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States. See proposed 8 CFR 204.6(e). This definition clarifies, consistent with statute, that qualification as a rural area is based on

³⁹ See, e.g., Eliot Brown, Swanky New York Condo Project Exploits Aid Program, Wall St. Journal, Oct. 13, 2015, <http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781>.

data from the most recent decennial census of the United States.

DHS is also proposing new guidelines for the designation of a TEA. As in the current system, investors may continue to provide evidence that the new commercial enterprise is principally doing business in (1) an MSA, (2) a specific county within an MSA, or (3) a county with a city or town with a population of 20,000 or more, that has experienced an average unemployment rate of at least 150 percent of the national average rate. See proposed 8 CFR 204.6(j)(6)(ii)(A). To this list, DHS proposes to add cities and towns with a population of 20,000 or more. Id. Because cities and towns fall between counties and MSAs on the one hand, and geographic or political subdivisions within counties and MSAs on the other, DHS believes it is appropriate to include them as an area that could independently qualify as a TEA if the average unemployment rate for the city or town is at least 150 percent of the national average.

In addition to including cities and towns, DHS proposes new rules for determining when a geographic or political subdivision could qualify as a TEA—determinations that states currently make on a case-by-case basis. DHS proposes that a TEA may consist of a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business⁴⁰ (the “project tract(s)”) if the

⁴⁰ According to USCIS policy in effect at the time of issuance of this proposed rulemaking:

A new commercial enterprise is principally doing business in the location where it regularly, systematically, and continuously provides goods or services that support job creation. If the new commercial enterprise provides such goods or services in more than one location, it will be principally doing business in the location most significantly related to the job creation.

Factors considered in determining where a new commercial enterprise is principally doing business include, but are not limited to, the location of:

- Any jobs directly created by the new commercial enterprise;
- Any expenditure of capital related to the creation of jobs;

weighted average of the unemployment rate⁴¹ for the tract or tracts is at least 150 percent above the national average. See proposed 8 CFR 204.6(i). Moreover, if the project tract(s) do not independently qualify under this analysis, a TEA may also be designated if the project tract(s) and any or all additional tracts that are directly adjacent to the project tract(s) comprise an area in which the weighted average of the unemployment rate for all of the included tracts is at least 150 percent of the national average. Id. DHS proposes that petitioners submit a description of the boundaries of the geographic or political subdivision and the unemployment statistics in the area for which designation is sought as set forth in proposed 8 CFR 204.6(i), and the method or methods by which the unemployment statistics were obtained. See proposed 8 CFR 204.6(j)(6)(ii)(B).

The figure below illustrates how to apply the proposed limitations.⁴² The areas on the map outlined with a thin solid line represent census tracts. The tract outlined in a solid bold line near the center, just south of the waterway, represents the project tract in which the new commercial enterprise (represented by the pointer) is principally doing

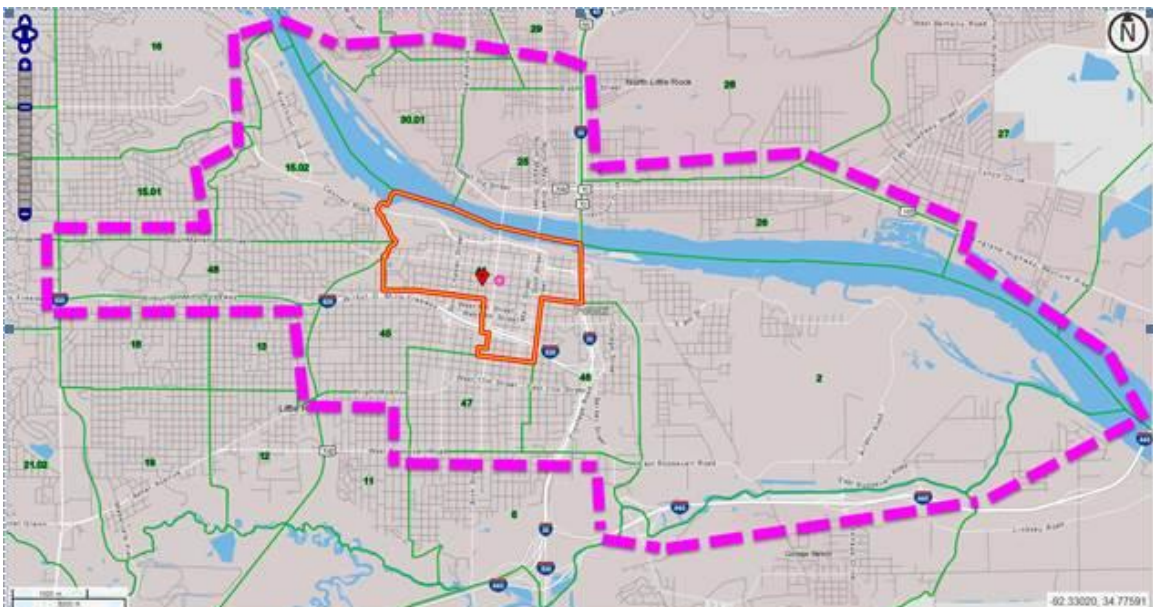
-
- The new commercial enterprise's day-to-day operation; and
 - The new commercial enterprise's assets used in the creation of jobs.

USCIS Policy Manual, 6 USCIS-PM G (Nov. 30, 2016).

⁴¹ In order to determine if a project qualifies for TEA designation USCIS would first determine the weighted unemployment rate for each census tract in the TEA area. To determine the weighted unemployment rate of a census tract, USCIS would divide the labor force (civilians ages 16 and older who are employed or employed, plus active duty military) of each census tract by the labor force of the entire TEA area. USCIS would then multiply this figure by the unemployment rate of that specific census tract. The resulting figure is the weighted unemployment rate for each individual census tract. The total weighted unemployment rate is the sum of the weighted unemployment rates for each census tract in the TEA area. If the total weighted unemployment rate is 150% above the national unemployment rate then the project would qualify for TEA designation.

⁴² For ease of reference, a color-coded version of this figure is available in the docket for this rulemaking.

business. The broader area outlined in a dashed bold line contains all of the tracts that are adjacent to the project tract. Under the proposed limits, the tract outlined in a solid bold line may independently qualify as a TEA. If it does not, an area consisting of that tract and any or all of the additional tracts outlined in the dashed bold line could qualify as a TEA. Qualification is determined by looking to the weighted average unemployment rate of the entire area proposed.



The proposed new TEA designation rules would rely on the census tract as the building block for the geographic or political subdivision for multiple reasons. First, census tracts offer uniformity. Although census tracts vary in size, they are generally drawn to define a residential population of between 1,200 and 8,000 people, with an optimum size of 4,000 people per census tract according to the U.S. Census Bureau.⁴³ No census tract can extend beyond county lines, meaning the largest census tract would,

⁴³ U.S. Census Bureau, Census Tracts, available at <https://www.census.gov/geo/reference/webatlas/tracts.html>.

at most, cover a single county.⁴⁴ Second, data at the census tract level is more readily publicly available, and is updated annually based on data collected through the Census Bureau’s “American Community Survey” (ACS).⁴⁵ Third, census tract numbering is generally stable and would only change at the time of the next available census (generally every 10 years). Fourth, as local planning agencies can request changes to census tract configurations, the use of census tracts still provides localities with some input into the overall process. However, DHS believes this input is sufficiently limited to avoid concerns regarding political influence on TEA designations, because census tracts typically only change when populations change to the point that a tract is split or two tracts are merged.⁴⁶ DHS also surveyed agencies in several locations to obtain information regarding how they have approached the TEA designation process, namely: the states of Illinois, New York, and California, and the city of Dallas, Texas. Every state or local agency consulted by DHS relied on census tract level unemployment data in the TEA designation process.⁴⁷

In addition to utilizing the census tract as the most appropriate and reliable building block for EB-5 program purposes, DHS believes it is appropriate for a TEA to consist of both the project tract(s) and the census tracts adjacent to the project tracts as

⁴⁴ U.S. Census Bureau, Geographic Terms and Concepts - Census Tract, available at https://www.census.gov/geo/reference/gtc/gtc_ct.html (Note: Tribal census tracts are unique and can cross state and county boundaries).

⁴⁵ U.S. Census Bureau, Am. Cmty. Survey, available at <http://factfinder.census.gov/faces/nav/jsf/pages/programs.xhtml?program=acs>.

⁴⁶ U.S. Census Bureau, Geography: Census Tracts, available at <https://www.census.gov/geo/reference/webatlas/tracts.html>.

⁴⁷ We note that only one state, California, set parameters on the use of census tracts, limiting the tracts to 12 contiguous tracts encompassing the investment project location.

such an area—including the tracts immediately surrounding the project tract(s)—is likely to experience the employment-creation impact of the investment. DHS considered extending the cluster to census tracts beyond those directly adjacent to the project tract(s), but determined that doing so in some cases would include areas that are too far from the site of the proposed project.⁴⁸

DHS considered other options presented by stakeholders⁴⁹ and during

⁴⁸ See Stuart S. Rosenthal and William C. Strange, Evidence on the Nature and Sources of Agglomeration Economies, Aug. 24, 2003, available at <http://siteresources.worldbank.org/INTLED/Resources/339650-1105473440091/WillAndStuart.pdf> (“More recently still, Rosenthal and Strange (2003) provide a micro-level analysis of the geographic scope of agglomeration economies. The environment of an establishment is measured by constructing rings around the centroid of the establishment’s zip code. Rings of 1 mile, 5 miles, 10 miles, and 15 miles are included. For each of the six industries studied . . . new arrivals are more likely to be attracted to zip codes as employment in the own industry within one mile increases. Employment in the own industry just five miles away, however, has a much smaller effect, as does employment further out in the ten and fifteen mile rings.”); see also John C. Ham, Charles Swenson, Ayşe İmrohoroğlu, and Heonjae Song, Government Programs Can Improve Local Labor Markets: Evidence from State Enterprise Zones, Federal Empowerment Zones and Federal Enterprise Communities, 95 J. Pub. Econ. 779, 779-97 (2011) (“Federal and state governments spend well over a billion dollars a year on programs that encourage employment development in disadvantaged labor markets through the use of subsidies and tax credits. . . We find that all three programs have positive, statistically significant, impacts on local labor markets in terms of the unemployment rate, the poverty rate, the fraction with wage and salary income, and employment.”).

⁴⁹ On April 25, 2016, DHS held an EB-5 Listening Session, in which it solicited and received feedback from stakeholders on several issues, including the TEA process. Stakeholders expressed concerns about a lack of consistency in state TEA designations (“I think we all know that every single state in this union has a different way of doing targeted employment areas”), the inefficiency of state TEA designation (“I think that the current process is very inefficient. . . the states are reviewing. . . federal data and the states don’t provide any benefit.”), and the natural incentive for states to approve TEAs (“The other thing is that. . . there’s an incentive to lower the hurdle for their state.”). DHS further solicited feedback on the same issues through its Idea Community website, an online portal available to the general public. See USCIS Idea Community, <https://www.uscis.gov/outreach/uscis-idea-community>; Remarks, EB-5 Immigrant Investor Program Stakeholder Engagement (July 28, 2016), available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_EB5NatStakeholderEng072816_MackenzieRemarks.pdf. DHS received various suggestions for changing the TEA process, including the consideration of commuting patterns and greater scrutiny of the state designation process by DHS.

congressional hearings⁵⁰ to determine the parameters for a TEA. One option DHS considered was limiting the geographic or political subdivision to the project tract(s). This option would be easy to put in practice for both stakeholders and the agency, but was considered too restrictive in that it would exclude immediately adjacent areas that would be impacted by the investment. Another option DHS considered was limiting the geographic or political subdivision to an area containing up to, but no more than, 12 contiguous census tracts, an option currently used by the state of California in its TEA designation process.⁵¹ However, DHS is not confident that this option is necessarily appropriate for nationwide application, as the limitation to 12 census tracts may be justifiable for reasons specific to California but may not be apt on a national scale.

DHS also considered options based on a “commuter pattern” analysis, which focuses on defining a TEA as encompassing the area in which workers may live and be commuting from, rather than just where the investment is made and where the new commercial enterprise is principally doing business. The “commuter pattern” proposal was deemed too operationally burdensome to implement as it posed challenges in establishing standards to determine the relevant commuting area that would fairly account for variances across the country.⁵² In addition, DHS could not identify a

⁵⁰ See The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse: Hearing Before the S. Comm. on the Judiciary, 114th Cong. (2016) (statement of Gary Friedland, Scholar-in-Residence, N.Y. Univ., Stern School of Bus.).

⁵¹ See Cal. Governor’s Office of Bus. and Econ. Dev., EB-5 Investor Visa Program, available at <http://business.ca.gov/International/EB5Program.aspx>.

⁵² DHS reviewed a proposed commuter pattern analysis incorporating the data table, Federal Highway Administration, CTPP 2006-2010 Census Tract Flows, available at (http://www.fhwa.dot.gov/planning/census_issues/ctpp/data_products/2006-2010_tract_flows/) (last updated Mar. 25, 2014). DHS found the required steps to properly manipulate the Census Transportation Planning Product (CTPP) database might prove overly burdensome for petitioners with insufficient economic and statistical analysis backgrounds. Further, upon contacting the

commuting-pattern standard that would appropriately limit the geographic scope of a TEA designation consistent with the statute and the policy goals of this proposed regulation.

DHS believes the proposed guidelines limiting TEAs to MSAs, counties, cities, or project tracts (including any and all adjacent tracts) would remove the possibility of gerrymandering and better ensure that the reduced investment threshold is reserved for areas experiencing significantly higher levels of unemployment. DHS seeks public comment on all aspects of this proposal, including on the feasibility and appropriateness of each of the potential alternatives to the census tract model discussed above, as well as any other alternatives that commenters wish to propose. With respect to all such alternatives, DHS would particularly benefit from comments that set forth a clear and easily administrable methodology.

F. Technical Changes.

DHS is also proposing a number of other technical changes. These changes would variously: (1) clarify the filing process for derivatives who are filing the Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (Form I-829) separately from the immigrant investor; (2) enhance flexibility in determining the interview location related to the Form I-829 adjudication; and (3) update the regulation to conform to the current process for issuing permanent resident cards after the removal of

agency responsible to manage the CTPP data table, DHS was informed that the 2006-2010 CTPP data is unlikely to be updated prior to FY2018 to incorporate proposed changes to the data table. U.S. Census is currently reviewing the CTPP proposed changes. As an alternate methodology for TEA commuter pattern analysis, DHS reviewed data from the U.S. Census tool, On the Map, <http://onthemap.ces.census.gov/>, which is tied to the U.S. Census Bureau's American Community Survey. Although the interface appeared to be more user-friendly overall, using this data would be operationally burdensome, potentially requiring hours of review to obtain the appropriate unemployment rates for the commuting area.

conditions on status. DHS is also proposing miscellaneous other changes. The proposed changes are described in more detail below.

1) Separate Filings for Derivatives.

The proposed rule would clarify the process by which an immigrant investor's spouse and children file separate Form I-829 petitions when they are not included in the Form I-829 filed by the immigrant investor. Generally, an immigrant investor's derivatives should be included in the principal immigrant investor's Form I-829 petition. See 8 CFR 216.6(a)(1). However, there are situations in which derivatives may not be included on the principal immigrant investor's Form I-829 petition, such as when the immigrant investor dies during the conditional residence period, or when the immigrant investor decides not to continue his or her conditional permanent resident status. In such circumstances, if the immigrant investor would have otherwise been eligible to have his or her conditions on status removed, then the derivatives would remain eligible to remove the conditions on their status even if the immigrant investor cannot or will not file a Form I-829 petition.⁵³

The current regulation does not clearly define the process by which derivatives may file a Form I-829 petition when they are not included on the principal's petition, including whether each derivative in such cases should file his or her own separate Form I-829 petition or whether the derivatives should jointly file on the same petition. The proposed regulations specify that where the dependent family members cannot be included in the Form I-829 petition filed by the principal investor because that principal

⁵³ See INA section 204(l), 8 U.S.C. 1154(l) (providing that upon the death of the principal beneficiary, surviving relative petitions and "related applications" must be adjudicated notwithstanding the death of the principal beneficiary).

is deceased, all dependents of the deceased investor may be included on a single Form I-829 petition. See proposed 8 CFR 216.6(a)(1)(ii). DHS also clarifies, however, that consistent with current practice, each derivative must file a separate Form I-829 petition in all other situations in which the investor's spouse and children are not included in the investor's Form I-829 petition. See id.

2) Interviews.

Section 216A(c)(1)(B) of the INA, 8 U.S.C. 1186b(c)(1)(B), generally requires Form I-829 petitioners to be interviewed prior to final adjudication of the petition, although DHS may waive the interview requirement in its discretion, see INA section 216A(d)(3), 8 U.S.C. 1186b(d)(3). The statute also provides that the interview may be held at a location that "is convenient to the parties involved." See INA section 216A(d)(3), 8 U.S.C. 1186b(d)(3). Under current regulations, however, interviews are generally scheduled in the location of the new commercial enterprise, even though there is no statutory or regulatory requirement that the immigrant investor reside in the same location as the new commercial enterprise. Specifically, the current regulation requires the interview to be conducted by an immigration examiner or other officer so designated by the director of the USCIS District Office "that has jurisdiction over the location of the alien entrepreneur's commercial enterprise." 8 CFR 216.6(b)(2).

Under this rule, DHS is proposing to give stakeholders greater flexibility in the interview location by clarifying the agency's discretion under the INA to determine the appropriate location for Form I-829 petition interviews. Specifically, the proposed amendment would allow USCIS to schedule an interview at the USCIS office holding jurisdiction over either the immigrant investor's commercial enterprise, the immigrant

investor's residence in the United States, or the location where the Form I-829 petition is adjudicated. See proposed 8 CFR 216.6(b)(2). DHS believes this change will both benefit the agency by making the interview process more effective and benefit immigrant investors by reducing the need to travel long distances to participate in Form I-829 petition interviews.

3) Process for issuing permanent resident cards.

DHS also proposes to amend regulations governing the process by which immigrant investors obtain their new permanent resident cards after the approval of their Form I-829 petitions. After an immigrant investor's Form I-829 petition is approved, the immigrant investor and each included derivative is entitled to a Permanent Resident Card (Form I-551). The provision of this card documents that the conditions on the immigrant investor's LPR status have been removed. Current regulations include an outdated description of the process for obtaining such permanent resident cards. Specifically, the current regulation requires the immigrant investor and his or her derivatives to report to a district office for processing of their permanent resident cards after approval of the Form I-829 petition. 8 CFR 216.6(d)(1). This process is no longer necessary in light of intervening improvements in DHS's biometric data collection program.⁵⁴ DHS now captures the required biometric data during the pendency of the Form I-829 petition, at the time the immigrant investor and his or her derivatives appear at an Application Support Center for fingerprinting, as required for the Form I-829 background and security checks. DHS then mails the permanent resident card directly to the immigrant investor by U.S. Postal Service registered mail after the Form I-829 petition is approved.

⁵⁴ DHS already has authority to collect this information under 8 CFR part 103.

There is therefore no need for each immigrant investor or any derivatives to report to a district office for processing of their permanent resident cards after petition approval.

DHS is thus proposing to remove the mandatory reporting requirement from the regulatory text, and to replace that requirement with the discretionary authority to require an immigrant investor to report to a district office to provide biometric data when needed to complete card production. See proposed 8 CFR 216.6(d)(1). This discretionary authority is intended to address circumstances in which an in-person meeting is necessary, such as when the biometrics captured during the Form I-829 background process may not be suitable for issuing a permanent resident card.

4) Miscellaneous other changes.

DHS is also proposing a number of other technical changes to the EB-5 regulations. First, DHS is proposing to update a reference to the former United States Customs Service, so that it will now refer to U.S. Customs and Border Protection. See proposed 8 CFR 204.6(j)(2)(iii). On March 1, 2003, the Homeland Security Act of 2002 created U.S. Customs and Border Protection, which is now responsible for activities previously handled by the U.S. Customs Service, including the issuance of commercial entry documents. See 6 U.S.C. 211.

Second, DHS is proposing to conform DHS regulations to the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, which eliminated the requirement that immigrant entrepreneurs establish a new commercial enterprise from both section 203(b)(5) and section 216A of the INA. Accordingly, USCIS proposes to remove references to this requirement in 8 CFR 204.6 and 216.6.

Third, DHS is proposing to further conform DHS regulations to Public Law 107-

273 by removing the references to “management” at 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii). Section 203(b)(5)(A) of the INA requires that EB-5 petitioners be seeking “to enter the United States for the purpose of engaging in a new commercial enterprise.” INA section 203(b)(5)(A), 8 U.S.C. 1153(b)(5)(A). To give effect to this provision, existing regulations require investors to be “engaged in the management of the new commercial enterprise,” which can be accomplished in one of two ways: “through the exercise of day-to-day managerial control” or “through policy formulation.” 8 CFR 204.6(j)(5). DHS has determined that the reference to “management” should be removed, as actual management of the new commercial enterprise is not strictly required by section 203(b)(5)(A) of the INA. The statutory text does not use the term, and strictly requiring the exercise of managerial control may be inconsistent with Public Law 107-273, which amended section 203(b)(5) to expressly permit new commercial enterprises to take the form of limited partnerships (as had been previously permitted by existing regulation). Removal of the reference to “management” from 8 CFR 204.6(j)(5) would have no practical effect, as the provision already allows and would continue to allow investors to demonstrate eligibility either through management or through policy formulation. The reference to “management” would also be removed from 8 CFR 204.6(j)(5)(iii) because that provision pertains to evidence that is largely unrelated to management.

Fourth, DHS is proposing to remove the phrase “as opposed to maintaining a purely passive role in regard to the investment” from 8 CFR 204.6(j)(5). DHS deems this phrase unnecessary as both the existing regulations at 8 CFR 204.6(j)(5)(iii) and the proposed version of that subsection specify the circumstances in which investments may

be essentially passive in nature.

Fifth, DHS is proposing to allow investors in any type of entity to demonstrate that they are sufficiently engaged in a new commercial enterprise through policymaking activities by virtue of being an equity holder in the new commercial enterprise with rights, powers and duties normally granted to such equity holders. See proposed 8 CFR 204.6(j)(5)(iii). DHS recognizes that the amendment made by Public Law 107-273 to allow limited partnerships to serve as new commercial enterprises was intended to require flexibility in the administration of the EB-5 program with respect to the use of different entity types. Accordingly, to provide clarity and flexibility for all currently existing entity types, including limited liability companies, as well as to accommodate future entity types without creating an unnecessary distortion in the choice of entities used within the EB-5 program, DHS is proposing to revise the regulations to cover all types of entities and to consider equity holders in any type of entity to be considered sufficiently engaged if they are provided with the rights, duties, and powers normally provided to those types of equity holders. See id.

Sixth, DHS is proposing to amend 8 CFR 204.6(k) to remove the requirement on USCIS to specify in the decision on the EB-5 immigrant petition whether the new commercial enterprise is principally doing business in a TEA. See proposed 8 CFR 204.6(k). This requirement provides no operational benefit to USCIS, as the agency relies on other means to track which approved petitions were based on investments in TEAs. The requirement also provides no benefit to investors; an approved petition based on an investment in a TEA necessarily means that the petitioner has met the burden of satisfying that eligibility requirement, and if a petition is denied due to failure to satisfy

the requirement, the decision and analysis will be explicitly stated in the denial. This revision would also replace a reference to the Associate Commissioner for Examinations with a reference to the Administrative Appeals Office, which is now the appropriate appellate authority in denied cases. See id.

Finally, DHS is proposing revisions to otherwise unaffected portions of section 204.6 and 216.6 to replace the term “entrepreneur” with the term “investor.” This will provide clarity and consistency in the program’s terminology, including by mirroring terminology in USCIS policy. DHS also proposes to remove the “Form I-526” and “Form I-829” references in 8 CFR 204.6(a), and 8 CFR 216.6(a) and (b), respectively. Throughout the proposed regulations, DHS has removed references to specific form names and numbers to ensure the regulations remain relevant and informative, regardless of potential future form name or number changes. Additionally, the proposed revision to 8 CFR 216.6(a)(5) would replace the word “deportation” with “removal” proceedings to conform to terminology used in the INA.

V. Statutory and Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100 million in 1995 adjusted for inflation to 2015 levels

by the Consumer Price Index for All Urban Consumers is \$155 million.

This proposed rule does not include any unfunded Federal mandates. The requirements of Title II of the Act, therefore, do not apply, and DHS has not prepared a statement under the Act.

B. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States companies to compete with foreign-based companies in domestic and export markets. However, as some small businesses may be impacted under this regulation, DHS has prepared an IRFA under the Regulatory Flexibility Act.

C. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB.

1) Summary

This rule proposes changes to certain aspects of the EB-5 program that are in need of reform, and would also update the regulations to reflect statutory changes and codify existing policies. This proposed rule would make three major changes along with other technical and miscellaneous changes to the current regulations. First, DHS proposes to allow EB-5 immigrant petitioners, with limited exception, to use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 immigrant petition for which the petitioner qualifies. Second, DHS proposes to increase the standard minimum investment amount to \$1.8 million to account for inflation since the program's inception, and builds in a mechanism to adjust the investment amount based on the unadjusted CPI-U every 5 years. Similarly, DHS proposes to increase the TEA minimum investment amount to \$1.35 million, or 75 percent of the standard amount, and to periodically adjust the TEA minimum investment amount so that it remains 75 percent of the standard amount. Third, DHS proposes to eliminate state designation of high unemployment areas and proposes new standards for the designation of TEAs.

DHS is also proposing several technical changes. These changes include clarifying the filing process for derivatives who are filing Form I-829 petitions separately from the principal immigrant investor, providing flexibility in determining the location of interviews for Form I-829 petitions, and updating outdated regulations on how an immigrant investor obtains a new permanent resident card after approval of the Form I-829 petition. Additionally, this proposed rule would make miscellaneous changes including updating references to the U.S. Customs and Border Protection, removing references to requirements that foreign entrepreneurs establish a new commercial

enterprise (NCE) in 8 CFR 204.6 and 216.6, removing references to “management” at 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii), removing the phrase “as opposed to maintain a purely passive role in regard to the investment” from 8 CFR 204.6(j)(5), allowing any type of entity to serve as a new commercial enterprise, amending 8 CFR 204.6(k) to specify how USCIS will issue decisions, and revising 8 CFR 204.6 and 216.6 to use the term “investor” instead of “entrepreneur” and “removal” instead of “deportation.”

Several of the provisions are expected to generate costs and benefits, although DHS does not have the necessary data to monetize these costs and benefits, with the exception of total costs of approximately \$91,000⁵⁵ expected for dependents who would file Form I-829 petitions separately from principal investors. The proposed rule would likely result in long term expected benefits in the form of job stimulation due to increased EB-5 investment overall. The Table below is the same as Table 1 found in the “Costs and Benefits” portion of the Executive Summary above and provides a synopsis of each of the provisions in this proposed rule and its estimated impacts. In addition to the impacts outlined in the table, DHS believes that there would be some familiarization costs associated with reading and assessing the proposed rule. Based on several assumptions, DHS estimates these costs to be about \$501,154 annually.

Current Policy	Proposed Change	Impact
Current DHS regulations do not permit investors to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition.	DHS proposes to allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition for which the petitioner qualifies.	Benefits: <ul style="list-style-type: none"> • Makes visa allocation more predictable for investors with less possibility for large fluctuations in visa availability dates due to regional center termination. • Provides greater certainty

⁵⁵ The cost estimate is rounded from \$90,762.

		<p>and stability regarding the timing of eligibility for investors pursuing permanent residence in the U.S. and thus lessens the burden of unexpected changes in the underlying investment.</p> <ul style="list-style-type: none"> • Provides more flexibility to investors to contribute into more viable investments, potentially reducing fraud and improving potential for job creation. <p>Costs:</p> <ul style="list-style-type: none"> • Not estimated.
<p>The standard minimum investment amount has been \$1 million since 1990 and has not kept pace with inflation.</p> <p>Further, the statute authorizes a reduction in the minimum investment amount when such investment is made in a TEA by up to 50 percent of the standard minimum investment amount. Since 1991, DHS regulations have set the TEA investment threshold at 50 percent the minimum investment amount.</p> <p>Similarly, DHS has not proposed to increase the minimum investment amount for investments made in a high employment area beyond the standard amount.</p>	<p>DHS proposes to account for inflation in the investment amount since the inception of the program. DHS proposes to raise the minimum investment amount to \$1.8 million. DHS also proposes to include a mechanism to automatically adjust the minimum investment amount based on the unadjusted CPI-U every 5 years.</p> <p>DHS proposes to decrease the reduction for TEA investment thresholds, and set the TEA minimum investment at 75 percent of the standard amount. Assuming the standard investment amount is \$1.8 million, investment in a TEA would initially increase to \$1.35 million.</p> <p>DHS is not proposing to change the equivalency between the standard minimum investment amount and those made in high employment areas. As such, DHS proposes that the minimum investment amounts in high employment areas would be \$1.8 million, and</p>	<p>Benefits:</p> <ul style="list-style-type: none"> • Increases in investment amounts are necessary to keep pace with inflation and real value of investments; • Raising the investment amounts increases the amount invested by each investor and potentially increases the total amount invested under this program. • For regional centers, the higher investment amounts per investor would mean that fewer investors would have to be recruited to pool the requisite amount of capital for the project, so that searching and matching of investors to projects could be less costly. <p>Costs:</p> <ul style="list-style-type: none"> • Some investors may be unable or unwilling to invest at the higher proposed levels of investment. • There may be fewer jobs created if fewer investors invest at the proposed higher investment amounts. • For regional centers, the

	<p>follow the same mechanism for future inflationary adjustments.</p>	<p>higher amounts could reduce the number of investors in the global pool and result in fewer investors and thus make search and matching of investors to projects more costly.</p> <ul style="list-style-type: none"> • Potential reduced numbers of EB-5 investors could prevent projects from moving forward due to lack of requisite capital. • An increase in the investment amount could make foreign investor visa programs offered by other countries more attractive.
<p>A TEA is defined by statute as a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate). Currently, investors demonstrate that their investments are in a high unemployment area in two ways:</p> <p>1) providing evidence that the MSA, the specific county within the MSA, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business, has experienced an average unemployment rate of at least 150 percent of the national average rate or</p> <p>2) submitting a letter from an authorized body of the government of the state in which the new commercial enterprise is located, which certifies that the geographic or political subdivision of the metropolitan statistical area</p>	<p>DHS proposes to eliminate state designation of high unemployment areas. DHS also proposes to amend the manner in which investors can demonstrate that their investments are in a high unemployment area.</p> <p>1) In addition to MSAs, specific counties within MSAs, and counties in which a city or town with a population of 20,000 or more is located, DHS proposes to add cities and towns with a population of 20,000 or more to the types of areas that can be designated as a high unemployment area.</p> <p>2) DHS is proposing that a TEA may consist of a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business if the weighted average of the unemployment rate for the tract or tracts is at least 150 percent of the national average.</p>	<p>Benefits:</p> <ul style="list-style-type: none"> • Rules out TEA configurations that rely on a large number of census tracts indirectly linked to the actual project tract by numerous degrees of separation. • Potential to better stimulate job growth in areas where unemployment rates are the highest. <p>Costs:</p> <ul style="list-style-type: none"> • The proposed TEA provision could cause some projects and investments to not qualify. DHS presents the potential number of projects and investments that could be affected in Table 5.

<p>or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area.</p>	<p>3) DHS is also proposing that a TEA may consist of an area comprised of the census tract(s) in which the new commercial enterprise is principally doing business, including any and all adjacent tracts, if the weighted average of the unemployment rate for all included tracts is at least 150 percent of the national average.</p>	
<p>Current technical issues:</p> <ul style="list-style-type: none"> • The current regulation does not clearly define the process by which derivatives may file a Form I-829 petition when they are not included on the principal’s petition. • Interviews for Form I-829 petitions are generally scheduled at the location of the new commercial enterprise. • The current regulations require an immigrant investor and his or her derivatives to report to a district office for processing of their permanent resident cards. 	<p>DHS is proposing the following technical changes:</p> <ul style="list-style-type: none"> • Clarify the filing process for derivatives who are filing a Form I-829 petition separately from the immigrant investor. • Provide flexibility in determining the interview location related to the Form I-829 petition. • Amend the regulation by which the immigrant investor obtains the new permanent resident card after the approval of his or her Form I-829 petition because DHS captures biometric data at the time the immigrant investor and derivatives appear at an ASC for fingerprinting. 	<p>Conditions of Filing:</p> <p>Benefits</p> <ul style="list-style-type: none"> • Adds clarity and eliminates confusion for the process of derivatives who file separately from the principal immigrant investor. <p>Costs</p> <ul style="list-style-type: none"> • Total cost to applicants filing separately would be \$90,762 annually. <p>Conditions of Interview:</p> <p>Benefits</p> <ul style="list-style-type: none"> • Interviews may be scheduled at the USCIS office having jurisdiction over either the immigrant investor’s commercial enterprise, the immigrant investor’s residence, or the location where the Form I-829 petition is being adjudicated, thus making the interview program more effective and reducing burdens on the immigrant investor; • Some applicants may have cost savings from lower travel costs. <p>Costs</p> <ul style="list-style-type: none"> • Not estimated. <p>Investors obtaining a permanent resident card:</p>

		<p>Benefits:</p> <ul style="list-style-type: none"> • Cost and time savings for applicants for biometrics data. <p>Costs:</p> <ul style="list-style-type: none"> • Not estimated.
<p>Current miscellaneous items:</p> <ul style="list-style-type: none"> • 8 CFR 204.6(j)(2)(iii) refers to the former U.S. Customs Service. • Public Law 107-273 eliminated the requirement that alien entrepreneurs establish a new commercial enterprise from both INA § 203(b)(5) and INA § 216A. • 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii) reference “management”; • Current regulation at 8 CFR 204.6(j)(5) has the phrase “as opposed to maintain a purely passive role in regard to the investment”; • Public Law 107-273 allows limited partnerships to serve as new commercial enterprises; • Current regulation references the former Associate Commissioner for Examinations. • 8 CFR 204.6(k) requires USCIS to specify in its Form I-526 decision whether the new commercial enterprise is principally doing business in a targeted employment area. • Sections 204.6 and 216.6 use the term “entrepreneur” and 	<p>DHS is proposing the following miscellaneous changes:</p> <ul style="list-style-type: none"> • DHS is updating references at 8 CFR 204.6(j)(2)(iii) from U.S. Customs Service to U.S. Customs and Border Protection. • Removing references to requirements that alien entrepreneurs establish a new commercial enterprise in 8 CFR 204.6 and 216.6. • Removing references to “management” at 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii); • Removing the phrase “as opposed to maintain a purely passive role in regard to the investment” from 8 CFR 204.6(j)(5); • Clarifies that any type of entity can serve as a new commercial enterprise; • Replacing the reference to the former Associate Commission for Examinations with a reference to the USCIS AAO. • Amending 8 CFR 204.6(k) to specify how USCIS will issue a decision. • Revising sections 204.6 and 216.6 to use the term “investor” instead of “entrepreneur” and to use 	<p>These provisions are technical changes and will have no impact on investors or the government. Therefore, the benefits and costs for these changes were not estimated.</p>

“deportation.” These sections also refer to Forms I-526 and I-829.	the term “removal” instead of “deportation.”	
Miscellaneous Cost: <ul style="list-style-type: none"> Familiarization cost of the rule. 	Applicants would need to read and review the rule to become familiar with the proposed provisions.	Familiarization costs to review the rule are estimated at \$501,154 annually.

2) *Background and Purpose of the Proposed Rule*

The preceding sections of the preamble review key historical aspects and goals of the program, and specific justifications for the particular provisions proposed in the rule. This section supplements and provides additional points of analysis that are pertinent to this regulatory impact assessment.

A person wishing to immigrate to the United States under the EB-5 program must file an Immigrant Petition by Alien Entrepreneur (Form I-526). Each individual immigrant investor files a Form I-526 petition containing information about their investment.⁵⁶ The investment must be made into either an NCE within a designated regional center in accordance with the Regional Center Program or a standalone NCE outside of the Regional Center Program (“non-regional center” investment). The NCE may create jobs directly (required for non-regional center investments), or serve as a source of funding for separate job creating entities (JCEs) (allowable for regional center investments).

With respect to regional center investors, once a regional center has been designated, affiliated investors can submit Form I-526 petitions in the concurrent year

⁵⁶ To be eligible at the time of the Form I-526 petition’s filing, investors must demonstrate either that they have already invested their funds into the NCE or that they are actively in the process of investing. Some investors choose to demonstrate commitment of funds by placing their capital contribution in an escrow account in a U.S. financial intermediary, to be released irrevocably to the NCE upon a certain trigger date or event, such as approval of the Form I-526 petition.

and in future years, provided the regional center maintains its designation. Each year, the stock of approved regional centers represents the previous year's approved total, plus new regional centers approved during the current year, minus a relatively small number of regional centers that are terminated in the concurrent year.⁵⁷

DHS analysis of Form I-526 filing data for FY 2013-2015 indicates that on average, 10,547 Form I-526 petitions were filed annually. Regional centers accounted for 9,623 such petitions annually, or 91 percent of all submitted Form I-526 petitions, while non-regional centers accounted for an average of 924 Form I-526 petitions annually, or 9 percent.

EB-5 filings grew rapidly starting in 2008, when the U.S. financial crisis reduced available U.S.-based commercial lending funds and alternative funding sources, such as the EB-5 program, were sought. Based on the type of projects that Form I-526 petitions describe, it appears that EB-5 capital has been used as a source of financing for a variety of projects, including a large number of commercial real estate development projects to develop hotels, assisted living facilities, and office buildings.

In general, DHS databases do not track the total number of investment projects associated with each individual EB-5 investment, but rather track the NCE associated with each individual investment. Any given NCE could fund multiple projects. DHS analysis of filing data reveals that for FY 2013-2015, on average per year, 1,246 unique NCEs were referenced in the Form I-526 petitions submitted. On average, 726 of these

⁵⁷ Between May 2008 and May 2016, 51 regional centers have been terminated, averaging about 6 per year. USCIS, Immigrant Investor Regional Centers, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

NCEs (58 percent of the overall number of unique NCEs) were found in petitions associated with regional centers. And on average, 520 of these NCEs, or 42 percent of the overall number of NCEs, were found in non-regional center-associated petitions. This suggests that on average, unique NCEs are more common in non-regional center filings, as 91 percent of filings are associated with regional centers.⁵⁸

DHS obtained and analyzed a random sample of Form I-526 petitions that were submitted in FY 2016. The files in the sample were pending adjudicative review at the EB-5 program office in May 2016.⁵⁹ As the results obtained from analysis of this random sample are utilized in forthcoming sections of this regulatory analysis, it will be referred to as the “2016 NCE sample” for brevity. A key takeaway from the review of the sample is that a majority of all NCEs (80 percent) blended program capital with other sources. For regional center NCEs sourced with blended capital, the EB-5 portion comprised 40 percent of the total capital outlay, while for non-regional center NCEs sourced with blended capital, the EB-5 portion comprised 50 percent of the total capital outlay.

3) Baseline Program Forecasts

DHS produced a baseline forecast of the total number of Form I-526 receipts,

⁵⁸ EB-5 program office NCE data records indicate that the disparity in the regional center share of investments compared to NCEs—91 percent compared to 58 percent, respectively—exists because regional center projects include 15 investors on average, while non-regional center investments include only 2 investors on average.

⁵⁹ The figures for yearly volumes of Form I-526 filings are publicly available under DHS performance data: USCIS, Number of I-526 Immigrant Petitions by Alien Entrepreneurs by Fiscal Year, Quarter, and Case Status 2008-2016, [available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr3.pdf). The NCE data were obtained from file tracking data supplied by the EB-5 program office. Because the NCE file submissions contain detailed business plan and investor information, the NCE data are not captured in formal DHS databases that are provided publicly, but rather in internal program office and adjudication records.

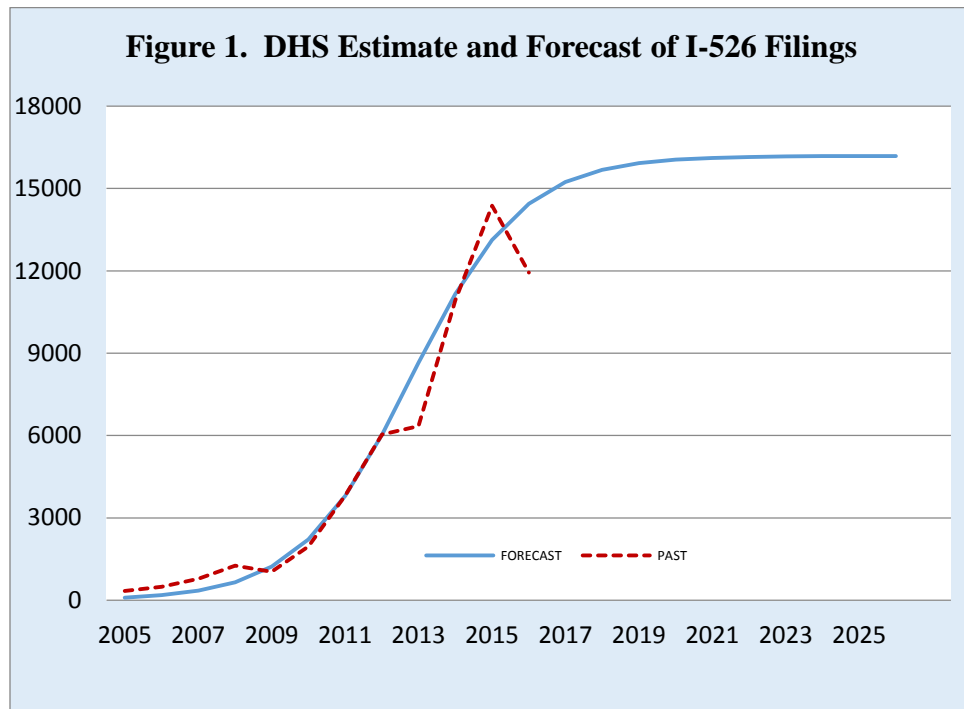
beginning in the first year the rule would take effect and extending for 10 years for the period FY 2017-2026.⁶⁰ This Form I-526 forecast includes the historical trend of Form I-526 receipts from FY 2005 to FY 2015, the filing projections from the USCIS Volume Projections Committee (VPC), and input from the EB-5 program office. The VPC projects that the high rate of growth in EB-5 investment filings, which averaged 39 percent annually since FY 2008, will slow to about 3.3 percent over the next 3 years and will subsequently level off.⁶¹ The program grew exponentially starting in 2008 with the economic downturn. At that time, commercial lending was extremely difficult to obtain. Over time as the U.S. economy has improved, commercial lending is now more viable, resulting in fewer overall petitions. In addition, over the past two fiscal years, USCIS has experienced significant spikes in filings in anticipation of Congress either allowing the regional center program to sunset or implementing new legislative reforms that would make it difficult for some regional centers to immediately comply. These spikes have occurred around the program's anticipated sunset (September 2015, December 2015, and September 2016). USCIS believes that the filings will level off once the program is extended for longer than one year at a time. DHS used this information to inform a forecasting model based on a logistic function that captures the past increase in receipts from a low baseline, the exponential growth that the program experienced from FY 2008-2015, the anticipated growth rate for the next 3 years, and then the projected levelling off

⁶⁰ DHS did not attempt a similar forecast for Form I-924 receipts, because DHS does not have a sound basis for predicting how the proposed rule would affect such receipts.

⁶¹ The VPC estimates that the final total number of Form I-526 filings for FY 2016 will be about 12,000. While this projection is below the FY 2015 total filings, the VPC expects growth to increase again in FY 2017 by 3.3 percent. FY 2015 was an anomaly for Form I-526 petitions and experienced an influx of petitions that DHS does not expect in the future.

of future growth. The technical details are provided in the accompanying footnote, and as can be seen in the graph, the DHS estimation technique closely fits past filings and captures the expected trends alluded to above.⁶²

Figure 1 graphs the volume of past Form I-526 filings from 2005 to 2015, compared with DHS’s estimation of the filings for that period, and the forecasts thereafter.



The forecast values are listed in Table 3, below:

⁶² DHS utilized a logistic function of the format, $(C/(\lambda + \beta e^{-\rho t}))$ where input t is the time year code (starting with zero), e is the base of the natural logarithm, and $C, \lambda, \beta,$ and ρ are parameters such that C/λ asymptotically approaches the maximum level of the predicted variable, the Form I-526 receipts. The parameters β and ρ jointly impact the inflection and elongation of the sigmoidal curve. Because the data includes non-sample information, DHS did not attempt an estimation procedure focused on minimizing the sum of squared errors (such as least squares regression) or other fitting technique, and instead utilized a direct trial-and-error approach for calibration. For the final forecast run, the specific calibration was $C=17,000, \lambda=1.05, \beta=180,$ and $\rho=.66$. The maximum expected level of receipts (equal to $17,000/1.05$ which is approximately 16,200) was determined via input from EB-5 program management.

Table 3. DHS forecasts for investor Form I-526 receipts and NCEs		
FY	Investors	NCEs
2017	15,241	1,314
2018	15,685	1,353
2019	15,925	1,373
2020	16,052	1,384
2021	16,119	1,390
2022	16,153	1,393
2023	16,171	1,395
2024	16,181	1,395
2025	16,185	1,396
2026	16,188	1,396
10-year total	159,900	13,789
Annual Average	15,990	1,379

The last column of Table 3 provides estimates of the total number of NCEs. An assumption of the NCE forecasts is that there is no change in the relationship between the number of NCEs and the number of Form I-526 filings over time.⁶³ The impact of the proposed provisions on the forecasts will be described in the relevant sections of this analysis.

⁶³ In other words, the assumption is that the current number of investors per NCE holds in the future. For the NCE projections, the 2016 value is set at the 2013-2015 average of 1,246. For each year thereafter, the figure is based on the growth rate of predicted Form I-526 receipts.

4) *Economic Impacts of the Major Rule Provisions*

a. Retention of Priority Date.

This rule proposes to generally allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 immigrant petition for which the petitioner qualifies. Provided that petitioners have not yet obtained lawful permanent residence pursuant to their approved petition and that such petition has not been revoked on certain grounds, petitioners would be able to retain their priority date and therefore retain their place in the visa queue. DHS is proposing to allow priority date retention to: (1) address situations in which petitioners may become ineligible through circumstances beyond their control (e.g., the termination of a regional center) as they wait for their EB-5 visa priority date to become current; and (2) provide investors with greater flexibility to deal with changes to business conditions. For example, investors involved with an underperforming or failing investment project would be able to move their investment funds to a new, more promising investment project without losing their place in the visa queue.

There would be an operational benefit to the investor cohort because priority date retention would make visa allocation more predictable with less possibility for massive fluctuations due to regional center termination that could, in the case of some large regional centers, negatively affect investors who are in the line at a given time. This change would provide greater certainty and stability for investors in their pursuit of permanent residence in the United States, helping lessen the burden of situations unforeseen by the investor related to their investment. In addition, by allowing priority date retention, investors obtain more ability to move their investment funds out of

potentially risky projects, thereby potentially reducing fraud and improving the potential for job creation in the United States. DHS cannot quantify or monetize the net benefits of the priority date retention provision or assess how many past or future investors might be impacted. DHS welcomes public comment on the costs and benefits of the priority date retention provision.

b. Investment amount increase

DHS proposes to raise the standard minimum investment amount from the current \$1 million to \$1.8 million to account for the rate of inflation since the program's inception in 1990. DHS also proposes to raise the reduced investment amount, for TEA projects, to \$1.35 million, which is 75 percent of the general investment amount.⁶⁴ DHS further proposes to adjust the minimum investment amounts every 5 years so that the standard minimum investment amount keeps pace with the rate of inflation and the TEA minimum investment amount remains 75 percent of the standard minimum investment amount. These increases are necessary because the investment amounts have not kept pace with inflation, thereby eroding the real value of the investments.

Because the proposed discounted amount for investments in TEAs is higher than the current minimum amount for investments in non-TEAs, DHS believes it is reasonable to assume that some investors may be unable or unwilling to invest at either of the higher proposed levels of investment. However, DHS has no way to assess the potential reduction in investments either in terms of past activity or forecasted activity, and cannot

⁶⁴ The adjustment to the standard minimum investment amount is based on the CPI-U, which, as compared to a base date of 1982-1984, was 130.7 in 1990 and 237.017 in 2015. The actual increase in prices for the period was approximately 81.34 percent, obtained as $((CPI-U_{2015}/CPI-U_{1990})-1)$. The \$1.8 million proposed investment amount is rounded. See generally Bureau of Labor Statistics, Inflation & Prices, available at <http://www.bls.gov/data/#prices>.

therefore estimate any impacts concerning job creation, losses or other downstream economic impacts driven by the proposed investment amount increases. DHS evaluates the source of investor funds for legitimacy but not for information on investor income, wealth, or investment preferences. DHS cannot therefore estimate how many past investors would have been unable or unwilling to have invested at the proposed amounts, and hence cannot make extrapolations to potential future investors and projects. DHS requests public input on the impact of the newly proposed amount on potential investors' willingness to participate in the program. DHS also welcomes any input, including identification of relevant data sources, that might provide insight on the number of total jobs that these potential investors may create.⁶⁵

In addition to the effect on investors, it is reasonable to assume that the proposed changes to the investment amounts would also affect regional centers. If the higher amounts reduce the number of investors in the global pool, competition for fewer investors may make it more costly for regional centers to identify and match with investors. The net effect on regional centers would depend on the elasticities associated with these activities and is not something DHS can forecast with accuracy. DHS requests information from the public on how the proposed changes may impact regional center costs.

DHS also believes that for both regional center and non-regional center investments, the projects and the businesses involved could be impacted. A reduced

⁶⁵ DHS has arranged with the Department of Commerce to assess the EB-5 program to determine the number of jobs created, but the report has not yet been released. Remarks, EB-5 Immigrant Investor Program Stakeholder Engagement (July 28, 2016), available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_EB5NatStakeholderEng072816_ColucciRemarks.pdf.

number of EB-5 investors could preclude some projects from going forward due to outright lack of requisite capital. Other projects would likely see an increase in the share of non-EB-5 capital, such as capital sourced to domestic or other foreign sources. As alluded to above in Section Two of the analysis, analysis of the 2016 NCE sample reveals the 80 percent of NCEs involving EB-5 capital blend this type of capital with other sources of capital. DHS believes that the costs of capital and return to capital could be different depending on the source of the capital. As a result, a change in the composition of capital could change the overall profitability for one or more of the parties involved; however, if the project on the whole promises net profitability, it is likely to proceed. The specific impact on each party for each project would vary on a case by case basis, and would be dependent on, among other things, the particular financial structures and agreements between the regional center, investors, NCE, and project developer. It would also be determined by local and regional investment supply and demand, lending conditions, and general business and economic factors. DHS welcomes any comments the public may provide on how the proposed rules may impact regional center and non-regional center investments, projects and businesses.

DHS also considers that an increase in the investment amount could make other countries' foreign investor visa programs more attractive and therefore there could be some substitution into such programs. The decision to invest in another country's program would depend in part on the investment and country-specific risk preferences of each investor. While DHS has no means of ascertaining such preferences, it is possible that some substitution into non-U.S. investor visa programs could occur as a result of the higher required investment amounts. However, according to DHS research, substitution

into another countries' immigrant investor program would likely be more costly for investors than investing in the EB-5 program even with increases in the EB-5 investment amounts. As stated earlier in this preamble, the United Kingdom's immigrant investor programs range in minimum investment amounts of approximately \$2.5 million to \$6.3 million, Australia's immigrant investor programs range in minimum investments amounts from approximately \$1.1 million to \$11.2 million, Canada's immigrant investor programs range from approximately \$1.5 million and require a net worth of \$7.6 million, and New Zealand's immigrant investor programs range from minimum investment amounts of approximately \$1.8 million to \$7.2 million. All of these values are approximations, in U.S. dollars, and are not an exhaustive list. DHS notes that most of these minimum investment amounts are considerably higher than the proposed increased investment amounts in the EB-5 program. DHS requests comments from the public regarding foreign investor visa programs from other countries and how they may compare to the U.S. EB-5 program, and the likelihood that investors will shift their investments to other countries' programs as a result of the changes proposed here.

There are numerous ancillary services and activities linked to both regional center and direct investments, such as, but not limited to, business consulting and advising, finance, legal services, and immigration services. However, DHS is not certain how these services would be affected by the proposed rule. Similarly, DHS does not have information on how the revenues collected from these types of activities contribute to the overall revenue of the regional centers or direct investments. DHS requests information from the public on the several layers of business and financial activities that focus on matching foreign investor funds to development projects, and on the potential effects of

this proposed rule on such activities.

In summary, DHS believes that the proposed increase in the minimum investment amount would bring the nominal investment amounts in line with real values and increase the investment amounts in areas where it is needed most. However, DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. DHS does not have the data or information necessary to attempt to estimate such mitigating effects. It is reasonable to conclude that the higher investment amounts could deter some investors from EB-5 activity and therefore negatively impact regional center revenue in some cases, although the magnitudes and net effects of these impacts cannot be estimated. However, it is also possible that the higher investment amounts could attract additional capital overall and stimulate projects to get off the ground that otherwise might not. Due to the complexity of EB-5 financial arrangements and unpredictability of market conditions, DHS cannot forecast with confidence how many projects could be affected by the increased investment amounts through a change in the number of individuals investing through the EB-5 program. However, it is possible that some projects could be forgone and that others would proceed with a higher composition of non-EB-5 capital, with resultant changes in profitability and rates of return to the parties involved. An overall decrease in investments and projects would potentially reduce some job creation and result in other downstream effects.

c. Periodic Adjustments to the Investment Amounts

In addition to initially raising the investment thresholds to account for inflation, DHS proposes to adjust the standard investment threshold every 5 years to account for

future inflation, and to adjust the reduced investment threshold for TEAs to keep pace with the standard amount. DHS projected the effects of this methodology using a relatively low, recent, inflation index (1.4 percent) and a more moderate inflation index (3.2 percent). DHS made two separate projections based on two different indexes because DHS cannot predict with certainty what the future inflation index will be. The 1.4 percent estimate is based on the average rate of inflation for the period 2009-2015, which economists generally consider to be relatively low compared to earlier periods. The 3.2 percent estimate used for the higher-end projection is based on the 3.2 percent inflation rate in 2011, which was the highest annual inflation rate observed from the 2009 to 2015 period. DHS believes it is appropriate to characterize the 3.2 percent rate as a “moderate” inflation baseline, because although it is higher than the average annual rate since 2008, it is not considered by economists to be high as compared to other historical periods.⁶⁶

Table 4 lists the general minimum investment amounts and reduced investment amounts after 5 and 10 years if the amounts are raised initially as proposed in this rule. The figures are in millions of U.S. dollars and are rounded to the nearest fifty-thousandth.

⁶⁶ Allan Meltzer, A Slow Recovery with Low Inflation, Hoover Inst., Econ. Working Paper No. 13,110 (2013), available at http://www.hoover.org/sites/default/files/13110_-_meltzer_-_a_slow_recovery_with_low_inflation.pdf; see also Michael T. Kiley, Low Inflation in the United States: A Summary of Recent Research, FEDS Notes, Board of Governors of the Federal Reserve System (Nov. 23, 2015), available at <http://www.federalreserve.gov/econresdata/notes/feds-notes/2015/low-inflation-in-the-united-states-a-summary-of-recent-research-20151123.html>; Mary C. Daly and Bart Hobijn, Downward Nominal Wage Rigidities Bend the Phillips Curve, Fed. Reserve Bank S.F., Working Paper No. 2013-08 (2014), available at <http://www.frbsf.org/economic-research/files/wp2013-08.pdf>.

Table 4. Projected Investment Amounts at 5-Year Revisions (figures are in millions of \$)			
Proposed Provision: Initial Increase	Revision	Projected Investment Amount	Projected Investment Amount
		Based on Average Inflation Scenario, 1.4 percent	Based on Moderate Inflation Scenario, 3.2 percent
Standard Investment Amount = \$1.8 Million in 2017	5 year	1.90	2.04
	10 Year	2.04	2.40
Minimum Investment Amount = \$1.35 Million in 2017	5 year	1.43	1.53
	10 Year	1.53	1.80

DHS attempted to assess the costs of these proposed changes. As described above, the potential cost of the higher amounts may result in a reduction in the number of investors and projects and a lower share of EB-5 capital for some projects, which could result in capital losses, fewer jobs created, and other reductions in economic activity. DHS is not able to predict how many investors and projects will be impacted, nor can we predict the impact to the capital available for projects. DHS requests any data sources the public may provide, as well as comments on anticipated outcomes.

d. Targeted Employment Areas

Under the current regulations, a state may designate an area in which the enterprise is principally doing business as a high-unemployment TEA if that area is a geographic or political subdivision of a metropolitan statistical area (MSA) or of a city or town with a population of 20,000 or more. DHS generally defers to the state determination of the appropriate boundaries of a geographic or political subdivision that constitutes the TEA, but there is currently no limit to the number of census tracts that a state can aggregate as part of a high-unemployment TEA designation. TEA

configurations that DHS has evaluated from state designations have included the census tract or tracts where the NCE is principally doing business (“project tract(s)”), one or more directly adjacent tracts, and others that are further removed, resulting in configurations resembling a chain-shape or other contorted shape. This proposed rule would remove states from the TEA designation process; instead, investors would be required to provide sufficient evidence to DHS in order to qualify for the reduced investment threshold. DHS would generally limit the number of census tracts that could be combined for this purpose.⁶⁷ Specifically, DHS is proposing that a TEA may also consist of an area comprised of the census tract(s) in which the new commercial enterprise is principally doing business, including any and all adjacent tracts, if the weighted average of the unemployment rate for all included tracts is at least 150 percent of the national average.

In order to assess the potential impact of this aspect of the proposed rule, DHS performed further analysis on the 2016 NCE sample. First, DHS determined, based on the sample, that 99 percent of regional center investments and 64 percent of non-regional

⁶⁷ According to USCIS policy in effect at the time of issuance of this proposed rulemaking:

A new commercial enterprise is principally doing business in the location where it regularly, systematically, and continuously provides goods or services that support job creation. If the new commercial enterprise provides such goods or services in more than one location, it will be principally doing business in the location most significantly related to the job creation.

Factors considered in determining where a new commercial enterprise is principally doing business include, but are not limited to, the location of:

- Any jobs directly created by the new commercial enterprise;
- Any expenditure of capital related to the creation of jobs;
- The new commercial enterprise’s day-to-day operation; and
- The new commercial enterprise’s assets used in the creation of jobs.

USCIS Policy Manual, 6 USCIS-PM G (Nov. 30, 2016).

center investments are made into TEAs. Because the 2016 sample significantly over-represents non-regional center investments and over-represents non-regional center NCEs by a smaller, but still noticeable, margin, DHS also determined the percentage of investments overall that were applied to TEAs. DHS found that 97 percent of investments and 85 percent of NCEs were applied to TEAs.⁶⁸ About 10 percent of investments that were made into TEAs were made into rural TEAs. This 10% was the same for regional center and non-regional center investments.

DHS then parsed the TEA filings comprising the 2016 NCE sample into specific cohorts. The first cohort is the number of non-rural high-unemployment TEA filings that did not rely on state designations to qualify. The TEAs in this cohort did not require state designations because the project was located in a specific geographical unit that met the unemployment threshold.⁶⁹ They would be unaffected by the changes proposed in this rule. The next two cohorts are the filings that relied on one or two census tracts, respectively. These too would be unaffected by this rule. The fourth cohort is the filings

⁶⁸ DHS used a weighted average calculation to determine these percentages because the 2016 NCE sample over-represents non-regional center investments—non-regional center investments accounted for exactly half the 2016 NCE sample but less than a tenth (9 percent) of submitted investments. This bias is not a feature of the sampling methodology but rather an inherent feature of the population, because non-regional center investments comprise 42 percent of NCEs. The 2016 NCE sample over-represents non-regional center NCEs as well, but not by as much as investments. The sample share of non-regional center NCEs is 50 percent, while the true share in the NCE population is 42 percent. Hence, the overrepresentation is about 8 percentage points but DHS feels this is significant enough that the NCE aggregate shares should be weighted as well. The weighted average for TEA investments is the sum of the regional center share of investments (.91) multiplied by the TEA share found in the sample (.99), and the non-regional share of investments (.09) multiplied by the TEA share in the sample (.64). The resulting weighting equation is $.91+.06=.97$. The weighted average for TEA NCEs is the sum of the regional center share of NCEs (.58) multiplied by the TEA share found in the sample (.99), and the non-regional share of NCEs (.42) multiplied by the TEA share in the sample (.64). The resulting weighting equation is $.58+.27=.85$.

⁶⁹ For the TEA geographies that met the high unemployment threshold in the sample analyzed, 90 percent utilized MSAs and the remaining 10 percent utilized counties.

that relied on three or more census tracts. The proposed rule would potentially affect some of the designations in this cohort. Because of this, DHS attempted to subject these tracts to further analysis, as described further below.

DHS determined the relative size of each cohort by determining the total number of filings per cohort, and then weighting these percentages to reflect the appropriate regional center and non-regional center proportions, first for investments, and then for NCEs. The relative size of each cohort, as a share of the total number of investments in TEAs and the total number of NCEs in TEAs, are listed in Table 5 below. Note that the amounts are based on the average of filings for FY 2013-2015; potential changes in future filing patterns are discussed below. The share figures are in percentages and are provided first on the basis of all investments and NCEs and next on the basis of high-unemployment TEA investments and NCEs (the last two columns of the table). DHS could have also presented the shares on a per total-TEA basis, but since almost all investments (97 percent) were made into TEAs, little additional insight would be gained by providing figures on such a basis.

Table 5. TEA Metrics						
TEA Cohort	Investments		NCEs		Share of high-unemployment TEA filings	
	Amount	Share (Percent)	Amount	Share (Percent)	Investments (Percent)	NCEs (Percent)

High-unemployment TEA	9,159	87	929	75	N/A	N/A
Qualify without state certification	735	7	135	11	9	18
Qualify with one Census Tract	1,883	18	177	14	20	18
Qualify with two Census Tracts	667	6	50	4	7	4
Cohort not affected by the rule because it would meet the provision	4,672	44	679	55	36	41

Qualify with three or more tracts (maximum that could be affected)	5,875	56	567	45	64	59
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DHS draws a number of conclusions from the metrics described above.

Foremost, a large share of investments (87 percent) were made in, and three-quarters of related NCEs were located in, high-unemployment TEAs. Second, a small share of investments (7 percent) qualified as high unemployment TEAs without state certification,⁷⁰ meaning that the MSA or county in which the related project was located qualified independently for such designation. About 18 percent of the investments qualified based on a single-census-tract designation, and a small share (6 percent) qualified based on a two-tract designation. Third, more than half of investments (56 percent) and just under half of related NCEs (45 percent) relied on three or more census-tract configurations.

DHS calculated additional metrics to assess the impact of the rule. To obtain the cohort that would be unaffected by the rule, DHS added together the five subcategories representing non-TEA, rural TEA, those that qualified without state attestation, single tract configurations, and two-tract configurations. This cohort is reported in the second to last row of Table 5. Next, DHS obtained the number of investments and related NCEs that could potentially be affected by the rule. This cohort is reported in the last row of Table 5. These figures represent our maximum. In reality, some portion of the maximum cohort for projects and NCEs would have continued to qualify for TEA designation under

⁷⁰ State certification is currently required for high unemployment areas encompassing geographic or political subdivisions smaller than an MSA or county. See 8 CFR 204.(6)(i) and 204.6(j)(6)(ii).

the changes proposed by this rule. However, currently DHS does not have reliable, statistically valid information from which DHS can estimate what share would likely be impacted by the rule.

DHS obtained Census Bureau data on adjacent tracts that were utilized in studies unrelated to the current rulemaking provision.⁷¹ From the population of 74,001 tracts provided in the Census dataset, DHS randomly sampled 390 tracts, which is slightly more than the 383 needed for 95 percent confidence and a 5 percent margin of error. The average number of adjacent tracts was 6.4 and the median was 6, with a maximum of 11, a minimum of 3, and a range of 8. Since “partial” tracts are not viable under the EB-5 program, the average was rounded to the nearest whole number and 1 tract was added to account for the primary tract for which the adjacencies were counted, to yield an average of 7 total tracts. This suggests that it may not be unusual for a TEA designation of three or more tracts to satisfy the adjacency requirements of this proposed rule.

The benefit of this aspect of the proposed rule is that it would prevent certain TEA configurations that rely on a large number of census tracts indirectly linked to the actual project tract(s) by multiple degrees of separation. As a result, some investments may be re-directed to areas where unemployment rates are truly high, according to the 150 percent threshold, and therefore may stimulate job creation where it is most needed.

Finally, DHS also considered an alternative provision, under which TEA designations would be subject to a twelve-tract limit. This limit is used by the State of

⁷¹ As of 2016, the Census Bureau records show 73,057 Tracts in the United States, including the District of Columbia but not counting U.S. Territories. U.S. Census Bureau, 2010 Census Tallies of Census Tracts, Block Groups and Blocks, available at <https://www.Census.gov/geo/maps-data/data/tallies/tractblock.html>. The data utilized in this analysis is currently available publicly from Brown University’s (Providence, RI) American Communities Project website at <http://www.s4.brown.edu/us2010/Researcher/Pooling.htm>.

California in its TEA certifications. DHS considered this limit as an alternative approach because it is the only case in which a state limits the number of census tracts to a specific number. Analysis of the NCE sample revealed that for tract configurations with two or more tracts, the average number of tracts aggregated was 16, but the median was 7. The figures are slightly higher at 17 and 8, respectively, when the cohort is isolated to three or more multiple tract configurations. The difference in the mean and median indicate that the distribution is right-skewed, characterized by a small number of very large-tract number compilations, evidenced by a sample range of 198 tracts. DHS notes that there is sufficient variation in the data to preclude state locational bias, as 22 states including the District of Columbia were represented in the 2016 NCE sample. Ultimately, DHS did not choose this alternative option because it is not necessarily appropriate for nationwide application, as the limitation to 12 census tracts may be justifiable for reasons specific to California but may not be apt on a national scale.

DHS stresses that the maximum cohorts presented in Table 5 overstate the number and shares of future investments and NCEs that would be impacted by the TEA reform provision because some of the configurations that relied on multiple tracts (3 or more) would be able to meet the requirements of the proposed rule. Furthermore, the number of impacted investments and NCEs is also likely to be lower because regional centers may be able to replace forgone projects in places that would not meet the high unemployment criteria under the proposed rule with other projects that would in fact qualify. For example, a regional center seeking to locate a project on one city block that would no longer qualify as a TEA may opt to locate the project on another block that could qualify as a TEA under the new rule. In that sense, the proposed rule may provide

additional incentive for investments in rural areas, because such investments would be unaffected by this rule, or in areas that are more closely associated with high unemployment. In other words, if a regional center is considering a project in a specific location that would no longer qualify as a TEA, the regional center can opt to move the project to a TEA or seek another project that would fall within a TEA. DHS believes that some regional centers will not be able to make such a substitution and that there may be costs in the forms of forgone investments and projects, and accompanying reductions in job creation and other economic activity.

DHS requests any data sources or comments from the public on the estimated costs for the number of investments and projects impacted by this aspect of the proposed rule. DHS has described some of the possible negative consequences of a reduced number of investors. A decrease in investments and projects would potentially reduce some job creation and have other downstream effects.

Finally, DHS notes that because state designations will no longer be accepted, it is reasonable to expect cost savings germane to the labor time and opportunity costs of state government institutions previously involved in TEA designations. It is reasonable to expect that these cost savings to states would transfer into some additional costs for DHS in adjudication review time in order to evaluate TEA submissions. However, DHS cannot accurately predict such added time burden to the Government at this time.

e. Other provisions

DHS has analyzed the other provisions and sub-provisions to those discussed above:

Removal of Conditions Filing. DHS is proposing to revise its regulations to

clarify that, except in limited circumstances, derivative family members must file their own petitions to remove conditions from their permanent residence when they are not included in a petition to remove conditions filed by the principal investor. Generally, an immigrant investor's derivatives are included in the principal immigrant investor's Form I-829 petition. However, there have been cases where the derivatives are not included in the principal's petition but instead file one or more separate Form I-829 petitions. The proposed regulation clarifies that, except in the case of a deceased principal, derivatives not included in the principal's Form I-829 petition cannot use one petition for all the derivatives combined but must each separately file his or her own Form I-829 petition. Based on EB-5 program office review of historical filings for this group, on average over a 3-year period about 24 cases per year involved such circumstances. Biometrics are currently required for the joint Form I-829 petition submissions, so the provision requiring separate filings would not impose any additional biometric, travel, or associated opportunity costs. The only costs expected from the rule would be the separate filing fee and associated opportunity cost. The filing fee for a Form I-829 petition is \$3,750. DHS estimates that the form takes 3 hours to complete. DHS recognizes that many dependent spouses and children do not currently participate in the U.S. labor market, and as a result, are not represented in national average wage calculations. In order to provide a reasonable proxy of time valuation, DHS has to assume some value of time above zero and therefore uses an hourly cost burdened minimum wage rate of \$10.59 to estimate the opportunity cost of time for dependent spouses. The value of \$10.59 per hour represents the Federal minimum wage with an upward adjustment for benefits.⁷² Each applicant

⁷² Minimum Wage, U.S. DOL, <http://www.dol.gov/dol/topic/wages/minimumwage.htm>

would face a time cost burden of \$32, which when added to the filing fee, is \$3,782.

Extrapolating the past number of average annual filings of 24 going forward, total applicant costs would total \$90,762 annually.⁷³

Removal of Conditions Interview. In addition to the separate filing requirement discussed above, DHS is proposing to improve the adjudication process relevant to the investor's Form I-829 interview process by providing flexibility in interview scheduling and location. Section 216A(c)(1)(B) of the INA, 8 U.S.C. 1186b(c)(1)(B), generally requires Form I-829 petitioners to be interviewed prior to final adjudication of the petition, although DHS may waive the interview requirement at its discretion. See INA section 216A(d)(3), 8 U.S.C. 1186b(d)(3). Under this rule, DHS is proposing to give USCIS greater flexibility to require Form I-829 interviews and determine the appropriate location for such an interview. Additionally, current DHS regulations allow for Form I-829 petitioners to be interviewed prior to final adjudication of a Form I-829 petition, but require the interview to be conducted at the USCIS District Office holding jurisdiction over the immigrant investor's new commercial enterprise. However, there is no requirement that the immigrant investor reside in the same location as the new commercial enterprise, and DHS has determined through some very preliminary surveys conducted by the EB-5 program office that many immigrant investors are located a considerable distance from the new commercial enterprise. Therefore, DHS proposes to clarify that USCIS has authority to schedule an interview at the USCIS office holding

(indicating the Federal Minimum Wage is \$7.25 per hour). The calculation for total employer costs for employee compensation for dependent spouses and children of principals with an approved Form I-140: \$7.25 per hour X 1.46 = \$10.59 per hour.

⁷³ Calculation: the burdened wage of \$10.59 per hour multiplied by 3 hours. The individual fee and total cost figures are rounded from actuals of \$3,781.76 and \$90,762.12, respectively.

jurisdiction over either the immigrant investor's commercial enterprise, the immigrant investor's residence, or the location in which the Form I-829 petition is being adjudicated. DHS cannot currently determine how many petitioners would potentially be affected by these changes. From fiscal years 2011 to 2015, DHS received an average of 1,911 Form I-829 petitions. While not all of these petitioners would require an interview or face hardship to travel for an interview, some of this maximum population may be impacted.⁷⁴ Some petitioners would benefit by traveling shorter distances for interviews and thus see a cost savings in travel costs and opportunity costs of time for travel and interview time. DHS welcomes any comments by the public that may provide further data sources on the potential costs and benefits associated with this proposed change.

Process for Issuing Permanent Resident Cards. DHS also proposes to amend regulations governing the process by which immigrant investors obtain their new permanent resident cards after the approval of their Form I-829 petitions. Current regulations require the immigrant investor and his or her derivatives to report to a district office for processing of their permanent resident cards after approval of the Form I-829 petition. This process is no longer necessary in light of intervening improvements in DHS's biometric data collection program.⁷⁵ DHS now captures the required biometric data while the Form I-829 petition is pending, at the time the immigrant investor and his or her derivatives appear at an Application Support Center for fingerprinting, as required for the Form I-829 background and security checks. DHS then mails the permanent

⁷⁴ USCIS, Number of I-829 Petitions by Entrepreneurs to Remove Conditions by Fiscal Year, Quarter, and Case Status 2008 – 2016, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I829_performance_data_fy2016_qtr3.pdf.

⁷⁵ DHS already has authority to collect this information under 8 CFR part 103.

resident card directly to the immigrant investor by U.S. Postal Service registered mail after the Form I-829 petition is approved. Accordingly, there is generally no need for the immigrant investor and his or her derivatives to appear at a district office after approval of the Form I-829 petition.

DHS does not estimate any additional costs for this proposed provision. This proposed provision will likely benefit immigrant investors and any derivatives, including by providing savings in cost, travel, and time, since this regulation will no longer require them to report to a district office for processing of their permanent resident cards. DHS also benefits by removing a process that is no longer necessary.

Miscellaneous other changes. DHS is also proposing a number of other technical changes to the EB-5 regulations. First, DHS is proposing to update a reference to the former United States Customs Service, so that it will now refer to U.S. Customs and Border Protection. Second, DHS is proposing to conform DHS regulations to Public Law 107-273, which eliminated the requirement that immigrant entrepreneurs establish a new commercial enterprise from both section 203(b)(5) and section 216A of the INA. Accordingly, USCIS proposes to remove references to this requirement in 8 CFR 204.6 and 216.6. Third, DHS is proposing to further conform DHS regulations to Public Law 107-273 by removing the references to “management” at 8 CFR 204.6(j)(5) and 8 CFR 204.6(j)(5)(iii). Fourth, DHS is proposing to remove the phrase “as opposed to maintaining a purely passive role in regard to the investment” from 8 CFR 204.6(j)(5). Fifth, DHS is proposing to allow any type of entity to serve as a new commercial enterprise. Sixth, DHS is proposing to amend 8 CFR 204.6(k) to remove the requirement on USCIS to specify in the decision on the EB-5 immigrant petition whether the new

commercial enterprise is principally doing business in a TEA. Finally, DHS is proposing revisions to otherwise unaffected sections of section 204.6 and 216.6 to replace the term “entrepreneur” with the term “investor.” These provisions are technical changes and will have no impact on investors or the government. Therefore, the benefits and costs for these changes were not estimated.

Miscellaneous Costs.

Familiarization costs: DHS assumes that there will be familiarization costs associated with this rule. To estimate these costs, DHS relied on several assumptions. First, DHS believes that each approved regional center would need to review the rule. Other than regional centers, the NCEs would also need to be familiar with the proposed rule. Based on the 790 regional centers referenced herein as having approved Forms I-924 and 520 non-regional center NCEs, a total of at least 1,310 identified entities would likely need to review the rule. DHS believes that lawyers would likely review the rule and that it would take about 4 hours to review and inform any additional parties of the changes in this proposed rule. Based on the BLS “Occupational Employment Statistics (OES)” dataset, the 2015 mean hourly wage for a lawyer was \$65.51.⁷⁶ DHS burdens this rate by a multiple of 1.46, consistent with other rulemakings, to account for other compensation and benefits, to arrive at an hourly cost of \$95.64. The total cost of familiarization is \$501,154 annually based on the current number of approved regional centers and non-regional center NCEs in the recent past.⁷⁷

⁷⁶ Bureau of Labor Statistics, May 2015 National Occupational Employment and Wage Estimates United States, https://www.bls.gov/oes/current/oes_nat.htm#23-0000.

⁷⁷ Calculation: 1,310 entities X 4 hours each X burdened hourly wage of \$95.64. Final figure is rounded from 501,153.6.

D. Executive Order 13132

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Although DHS has historically deferred to state designations of high unemployment areas, DHS is ultimately responsible for the adjudication of each petition (including TEA designations).⁷⁸ This proposed rule would not directly alter the states' rights or obligations under the EB-5 program, and is fully consistent with the federal role in administration of immigration programs. DHS is unaware of any state laws that would be preempted or otherwise affected by this proposed rule.⁷⁹ Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. DHS nonetheless welcomes public comment on possible federalism implications of this proposed rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121,

⁷⁸ USCIS Policy Manual, 6 USCIS-PM G at 8 (May 30, 2013) (“However, for all TEA designations, USCIS must still ensure compliance with the statutory requirement that the proposed area designated by the state in fact has an unemployment rate of at least 150 percent of the national average rate.”).

⁷⁹ For example, California’s Office of Business and Economic Development notes: “While the EB-5 visa program is administered by the U.S. Citizenship and Immigration Services and is therefore governed by federal laws and regulations, GO-Biz provides customized TEA certifications for projects that qualify under the \$500,000 special TEA requirements.” EB-5 Investor Visa Program, California Governor’s Office of Business and Economic Development, <http://www.business.ca.gov/Programs/International-Affairs-and-Business-Development/EB-5>.

110 Stat. 847 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An “individual” is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, courts have held that the RFA’s regulatory flexibility analysis requirements apply to direct small entity impacts only.⁸⁰ Consequently, any indirect impacts from a rule to a small entity are not costs for RFA purposes.

However, the changes proposed by DHS to modernize and improve the EB-5 program may have the potential to affect several types of business entities involved in EB-5 projects. Therefore, DHS has prepared an Initial Regulatory Flexibility Analysis (IRFA) under the RFA because some of the entities involved may be considered small entities.

Initial Regulatory Flexibility Analysis

EB-5 investment structures are complex and can involve numerous entities involved in project financing and development. The rule proposes to raise the investment levels to account for inflation and reform the way in which TEAs are constructed. It is difficult to determine the small entity status of regional centers because there is a lack of official data on employment, income, and industry classification for these entities. Such a determination is also difficult because regional centers can be structured in a variety of

⁸⁰ See, e.g., *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (concluding that an agency may certify a rule under Section 605(b) of the Regulatory Flexibility Act when the agency determines the rule will not directly impact small entities).

different ways, and can involve multiple business and financial activities, some of which play a direct, and some an indirect, role in linking investor funds to NCEs and job-creating projects or entities. Although DHS does not know if regional centers are small entities, DHS believes some regional center NCEs and some non-regional center NCEs could be small entities. A detailed description of DHS's attempt to identify such entities is provided below. DHS welcomes public comment on the potential impact of the proposed changes on small entities.

- a. A description of the reasons why the action by the agency is being considered.

DHS proposes to update its EB-5 regulations to update aspects of the EB-5 program in need of reform and to reflect statutory changes and codify existing policies. Elsewhere in this preamble, DHS provides further background and explanation for the proposals contained in the rule.

- b. A succinct statement of the objectives of, and legal basis for, the proposed rule.

DHS objectives and legal authority for this proposed rule are discussed in Section II of the preamble.

- c. A description and, where feasible, an estimate of the number of small entities to which the proposed changes would apply.

DHS believes the changes outlined in the proposed rule could affect the following types of groups that are involved in EB-5 investments: entrepreneurs, regional centers, and new commercial enterprises (NCEs). Below, DHS identifies which of these groups may qualify as small entities under the RFA.

1. Entrepreneurs

An entrepreneur who wishes to immigrate to the United States must file an Immigrant Petition by Alien Entrepreneur (Form I-526). DHS analysis of filing data for the Form I-526 reveals that for FY 2013-2015 an average of 10,547 EB-5 foreign entrepreneurs filed Form I-526 petitions to DHS annually, and DHS forecasts that over the next ten years the annual average will be about 16,000. Form I-526 petitions are filed by individuals who voluntarily apply for immigration benefits on their own behalf and thus do not meet the definition of a small entity. Therefore, entrepreneurs were not considered further for purposes of this RFA.

2. Regional Centers

As previously mentioned, the small entity status of regional centers is very difficult to determine because of the lack of official data concerning employment, income, and industry classification of the regional center itself. Regional centers use Form I-924 to obtain regional center designation and use Form I-924A to demonstrate continued eligibility for regional center designation annually. The information provided by regional center applicants as part of the Form I-924 and I-924A processes does not include adequate data to allow DHS to reliably identify the small entity status of individual applicants. Although regional center applicants typically report the North American Industry Classification (NAICS) codes associated with the sectors they plan to direct investor funds toward, these codes do not necessarily apply to the regional centers themselves. In addition, information provided to DHS concerning regional centers generally does not include regional center revenues or employment.

DHS nonetheless attempted to identify how many regional centers may be small

entities. DHS obtained a sample of 440 regional centers operating 5,886 projects. At the time of DHS's analysis, there were 790 approved regional centers.⁸¹ DHS used subscription and publicly available data to identify those regional centers that may qualify as small entities by trying to obtain revenue information or information on the number of employees and the NAICS codes. Obtaining the revenue or employee count and NAICS codes would allow DHS to determine if the regional center was a small entity as recommended by the SBA. For the vast majority of the entities in the sample, DHS could not conclusively determine the entity's small entity status. For 15 of the regional centers in the sample, search queries generated preliminary results, but DHS could not confirm them as the entities of interest. This is because regional centers often utilize very broad terms, such as a combination of the term "regional center" and the name of the state, city, or geographic area in which the regional center is located. Non-regional center entities, such as local economic development organizations, as well as consultancies and legal units involved in the EB-5 program, often utilize very similar or even exact name syntax, and, as such, the multiple initial results could not be de-conflicted. For about 5 of the target regional centers, DHS could reasonably verify the results of the search query. However, such a low response proportion prevents DHS from drawing statistically valid conclusions.

DHS did not attempt to determine the small entity status of regional centers based on the bundled capital investment amounts available to such regional centers. Such bundled investments are not indicative of whether the regional center is appropriately

⁸¹ DHS attempted to conduct a small entity analysis on regional centers for another DHS rule in January 2016.

characterized as a small entity for purposes of the RFA because there is no way to know, based solely on the information available, how much of these bundled investment amounts are used for the investment projects that the regional center may be affiliated with and how much may be used as administrative fees paid to the regional center. DHS assumes that some amount of the administrative fees contribute to a regional center's revenue, and if DHS were able to obtain information on administrative fees, along with industry data, DHS might be able to make a determination on whether the regional center was a small entity. DHS welcomes any public comment on data sources or information on regional centers, including their sources of revenue, their employment data, the industries in which they should be categorized, and other information relevant to their small entity status.

3. New Commercial Enterprises (NCEs)

Similar to the challenges with identifying regional centers as small entities, DHS experienced challenges when attempting to identify NCEs as small entities, whether the NCE is affiliated with a regional center or not.

First, NCEs can be involved with the job-creating activity in a variety of ways that create analytical challenges. Regional center NCEs usually are established to receive EB-5 funding, and then deploy the funding to a separate JCE. They can also engage in the job creating activity directly. Both regional center NCEs and non-regional center NCEs can fund multiple job creating activities. Under USCIS's current regulations at 8 CFR 204.6(e), an NCE can constitute a parent company and its wholly-owned subsidiaries and through these wholly-owned subsidiaries an NCE can also engage in job-creating activities in multiple industries. The multiplicity of ways in which an NCE can

engage in the job creating activity make it difficult to assign a NAICS code to any particular entity that constitutes or comprises part of what is considered the NCE.

Second, DHS does not require regional center applicants or petitioners to submit on their applications or petitions the type of revenue and employment data appropriate for analysis, regardless of the type of NCE or how it is structured.⁸²

Although petitioners are required to submit a number of different types of documents to DHS to establish eligibility, DHS does not specifically require revenue or employment data for a specific NCE entity itself. Rather, petitioners relying on future job creation must provide a business plan for the job-creating activity (regardless of which entity is engaged in the activity), and the plan may contain projected revenues, although it is not required to. The business plan or an accompanying economic analysis will also project the expected number of jobs created by the EB-5 investment. However, these are projections only. It is not appropriate to use these projected revenues as a substitute for actual revenues in this analysis. For these reasons, although DHS recognizes that the proposed rule could result in some impacts to NCEs that may be small entities, DHS cannot feasibly or reliably estimate the number of such small entities that could be impacted. DHS requests comments from the public that provide more information how to identify the small entity status of NCEs, what the potential impacts of the rule might be on small entity NCEs, and whether and to what extent those impacts could be transferred to small entity regional centers.

4. Job-Creating Entities (JCEs)

⁸² DHS notes that regional centers and individual petitioners provide such information regarding the NCEs with which the regional centers are associated or in which the petitioners have invested.

Due to the complex nature of the EB-5 program and the various structures involved, DHS assumes that the proposed provisions that would increase the investment amount or change the TEA designation criteria could indirectly impact the JCEs. However, DHS requests public comment on this assumption given the various structures that are possible under the EB-5 program. Due to data capture limitations, it is not feasible for DHS to reliably estimate the number of JCEs at this time. DHS anticipates forthcoming form revisions that may collect additional data on JCEs that receive EB-5 capital, and expects to be able to examine this more closely in the future.

- d. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills.

The proposed rule does not directly impose any new or additional “reporting” or “recordkeeping” requirements on filers of Forms I-526, I-829 or I-924. The proposed rule does not require any new professional skills for reporting. However, the proposed rule may create some additional time burden costs related to reviewing the proposed provisions, as is discussed above. As noted above, DHS believes that lawyers would likely review the rule and that it would take about 4 hours to review and inform any additional parties of the changes in this proposed rule. Based on the BLS “Occupational Employment Statistics (OES)” dataset, the 2015 mean hourly wage for a lawyer was \$65.51.⁸³ DHS burdens this rate by a multiple of 1.46, consistent with other rulemakings, to account for other compensation and benefits, to arrive at an hourly cost of \$95.64, or

⁸³ Bureau of Labor Statistics, May 2015 National Occupational Employment and Wage Estimates United States, https://www.bls.gov/oes/current/oes_nat.htm#23-0000.

\$382.56 per entity.

While DHS has estimated these costs, and assumes that they may affect some small entities, for reasons stated previously, data limitations prevent DHS from determining how many such small entities may be impacted or the extent of the impact to the small entities.

- e. An identification of all relevant Federal rules, to the extent practical, that may duplicate, overlap, or conflict with the proposed rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

- f. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

This proposed rule would modernize and make necessary updates to the EB-5 program. While DHS knows that some regional centers may be considered small entities, DHS does not have enough data to determine the impact that this proposed rule may have on those entities.

With respect to the proposal to reform the TEA designation process, DHS considered several alternatives, but found that they did not feasibly accomplish the stated objective of INA section 203(b)(5)(B)(ii). One alternative DHS considered was limiting the geographic or political subdivision of TEA configurations to an area containing up to, but no more than, 12 contiguous census tracts, an option currently used by the state of

California in its TEA designation process.⁸⁴ However, DHS is not confident that this option is necessarily appropriate for nationwide application, as the limitation to 12 census tracts may be justifiable for reasons specific to California but may not be feasible on a national scale.

Another significant alternative DHS considered that would be relatively straightforward to implement and understand would be to limit the geographic or political subdivision of the TEA to the actual project tract(s). While this option would be easy to put in practice for both stakeholders and the agency, it was considered too restrictive in that it would exclude immediately adjacent areas that would be impacted by the investment.

DHS also considered options based on a “commuter pattern” analysis, which focuses on defining a TEA as encompassing the area in which workers may live and be commuting from, rather than just where the investment is made and where the new commercial enterprise is principally doing business. The “commuter pattern” proposal was deemed too operationally burdensome to implement as it posed challenges in establishing standards to determine the relevant commuting area that would fairly account for variances across the country.⁸⁵ In addition, DHS could not identify a

⁸⁴ See Cal. Governor’s Office of Bus. and Econ. Dev., EB-5 Investor Visa Program, available at <http://business.ca.gov/International/EB5Program.aspx>.

⁸⁵ DHS reviewed a proposed commuter pattern analysis incorporating the data table, Federal Highway Administration, CTPP 2006-2010 Census Tract Flows, available at (http://www.fhwa.dot.gov/planning/census_issues/ctpp/data_products/2006-2010_tract_flows/) (last updated Mar. 25, 2014). DHS found the required steps to properly manipulate the Census Transportation Planning Product (CTPP) database might prove overly burdensome for petitioners with insufficient economic and statistical analysis backgrounds. Further, upon contacting the agency responsible to manage the CTPP data table, DHS was informed that the 2006-2010 CTPP data is unlikely to be updated prior to FY2018 to incorporate proposed changes to the data table. U.S. Census is currently reviewing the CTPP proposed changes. As an alternate

commuting-pattern standard that would appropriately limit the geographic scope of a TEA designation consistent with the statute and the policy goals of this proposed regulation.

With respect to the minimum investment amount provision, DHS also considered an alternative to the proposed increase to the investment amount for TEAs. Specifically, DHS considered the alternative of setting the reduced TEA investment amount to \$900,000 instead of \$1,350,000, consistent with the existing regulatory framework.⁸⁶ DHS is proposing a 75 percent reduction rather than a 50 percent reduction to better balance the Congressional aim of incentivizing investment in TEAs with the goal of encouraging greater investment in the United States more generally. History has shown that a 50 percent reduction coincides with an extremely large imbalance in favor of TEA investments, at the expense of additional overall investment and therefore economic benefit that may accrue to the U.S. economy more generally. Removing the TEA discount entirely, although allowable by statute, would run the risk of removing the incentive to invest in TEAs altogether. Setting the reduced minimum investment at 75 percent of the standard minimum investment amount (i.e., the midpoint between the maximum discount and no discount) likely would produce greater investment levels in absolute terms while still providing, given the very significant imbalance in favor of TEAs produced by the 50 percent discount, a meaningful incentive to invest in TEAs.

methodology for TEA commuter pattern analysis, DHS reviewed data from the U.S. Census tool, On the Map, <http://onthemap.ces.census.gov/>, which is tied to the U.S. Census Bureau's American Community Survey. Although the interface appeared to be more user-friendly overall, using this data would be operationally burdensome, potentially requiring hours of review to obtain the appropriate unemployment rates for the commuting area.

⁸⁶ The current reduced minimum investment amount (\$500,000) is 50 percent of the standard minimum investment amount (\$1,000,000).

DHS is requesting comments on other alternatives that may minimize the impacts to small entities.

F. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. National Environmental Policy Act

DHS Directive (Dir) 023–01 Rev. 01 establishes the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. 40 CFR parts 1500–1508. The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii) and 1508.4. Dir. 023–01 Rev. 01 establishes Categorical Exclusions that DHS has found to have no such effect. Dir. 023–01 Rev. 01 Appendix A Table 1. For an action to be categorically excluded from further NEPA review, Dir. 023–01 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Dir. 023–01 Rev. 01 section V.B (1)–(3).

DHS analyzed this action and does not consider it to significantly affect the quality of the human environment. This proposed rule would change a number of

eligibility requirements and introduce priority date retention for certain immigrant investor petitioners. It would also amend existing regulations to reflect statutory changes and codify existing EB-5 program policies and procedures. DHS has determined that this rule does not individually or cumulatively have a significant effect on the human environment because it fits within Categorical Exclusion number A3(d) in Dir. 023– 01 Rev. 01, Appendix A, Table 1, for rules that interpret or amend an existing regulation without changing its environmental effect.

This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. This rule is categorically excluded from further NEPA review.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, all Departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. See Public Law 104-13, 109 Stat. 163 (May 22, 1995). USCIS is revising one information collection and requesting public comments on the proposed change as follows: Immigrant Petitioner by Alien Entrepreneur (Form I-526) to collect additional information about the new commercial enterprise into which the petitioner is investing to determine the eligibility of qualified individuals to enter the United States to engage in commercial enterprises. DHS is requesting comments on the proposed information collection changes included in this rulemaking. Comments on this revised information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will

have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, such as permitting electronic submission of responses.

Overview of Information Collection-Form I-526

a. Type of information collection: Revision to a currently approved information collection.

b. Abstract: USCIS uses this information collection to determine if an alien can enter the U.S. to engage in commercial enterprise.

c. Title of Form/Collection: Immigrant Petitioner by Alien Entrepreneur.

d. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form I-526; USCIS.

e. Affected public who will be asked or required to respond: Individuals.

f. An estimate of the total number of respondents: 15,990 respondents.

g. Hours per response: 1 hour and 50 minutes.

h. Total Annual Reporting Burden: 29,261 burden hours.

List of Subjects

8 CFR Part 204

Administrative practice and procedure, Adoption and foster care, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 216

Administrative practice and procedure, Aliens.

Proposed Regulatory Amendments

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 204 -- IMMIGRANT PETITIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1324a, 1641; 8 CFR part 2.

2. Section 204.6 is amended by:

- a. Revising the title of the section, paragraphs (a), (c), and (d); and

- b. Amending paragraph (e) by:

- i. Removing the terms “Immigrant Investor Pilot” and “Pilot” and adding in their place the term “Regional Center” in the definitions for Employee and Full-time employment;

- ii. Removing the term “entrepreneur” and adding “investor” in the definitions for Capital, Invest, Qualifying employee, and Troubled business;

- iii. Revising the definitions for Rural area and Targeted employment area;

Adding a new definition for Regional Center Program;

iv. Replacing “Form I-526” with “EB-5 immigrant petition”;

c, Revising paragraphs (f)(1), (f)(2), and (f)(3);

d. Amending paragraph (g)(1) by removing the term “entrepreneur” and adding in its place the term “investor” and revising paragraph (g)(2).

e. Revising paragraph (i);

f. Revising the paragraph (j)(2)(iii), (5) introductory text and (5)(iii), (6)(i), and (6)(ii)(B);

g. Revising paragraph (k);

The revisions and addition read as follows:

§ 204.6 Petitions for employment creation immigrants.

(a) General. An EB-5 immigrant petition to classify an alien under section 203(b)(5) of the Act must be properly filed in accordance with the form instructions, with the appropriate fee(s), initial evidence, and any other supporting documentation.

* * * * *

(c) Eligibility to file and continued eligibility. An alien may file a petition for classification as an investor on his or her own behalf.

(d) Priority date. The priority date of an approved EB-5 immigrant petition will apply to any subsequently filed petition for classification under section 203(b)(5) of the Act for which the alien qualifies. A denied petition will not establish a priority date. A priority date is not transferable to another alien. The priority date of an approved petition

shall not be conferred to a subsequently filed petition if the alien was lawfully admitted to the United States for conditional residence under section 203(b)(5) of the Act based upon that approved petition or if at any time USCIS revokes the approval of the petition based on:

- (1) Fraud, or a willful misrepresentation of a material fact by the petitioner; or
- (2) A determination by USCIS that the petition approval was based on a material error.

(e) * * *

Regional Center Program means the program established by Public Law 102-395, Section 610, as amended.

Rural area means any area other than an area within a metropolitan statistical area (as designated by the Office of Management and Budget) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.

Targeted employment area means an area that, at the time of investment, is a rural area or is designated as an area that has experienced unemployment of at least 150 percent of the national average rate.

(f) * * *

(1) General. Unless otherwise specified, for EB-5 immigrant petitions filed on or after [INSERT EFFECTIVE DATE OF FINAL RULE], the amount of capital necessary to make a qualifying investment in the United States is one million eight hundred thousand United States dollars (\$1,800,000). Beginning on October 1, [INSERT YEAR FIVE YEARS AFTER EFFECTIVE DATE OF FINAL RULE], and every five years

thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, based on the cumulative annual percentage change in the unadjusted All Items Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average reported by the Bureau of Labor Statistics for the previous five years. The qualifying investment amount will be rounded down to the nearest hundred thousand. DHS may update this figure by publication of a technical amendment in the Federal Register.

(2) Targeted employment area. Unless otherwise specified, for EB-5 immigrant petitions filed on or after [INSERT EFFECTIVE DATE OF FINAL RULE], the amount of capital necessary to make a qualifying investment in a targeted employment area in the United States is one million three hundred and fifty thousand United States dollars (\$1,350,000). Beginning on October 1, [INSERT DATE YEAR FIVE YEARS AFTER EFFECTIVE DATE OF FINAL RULE], and every five years thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, to be equal to 75 percent of the standard minimum investment amount described in paragraph (f)(1) of this section. DHS may update this figure by publication of a technical amendment in the Federal Register.

(3) High employment area. Unless otherwise specified, for EB-5 immigrant petitions filed on or after [INSERT EFFECTIVE DATE OF FINAL RULE], the amount of capital necessary to make a qualifying investment in a high employment area in the United States is one million eight hundred thousand United States dollars (\$1,800,000). Beginning on October 1, [INSERT DATE YEAR FIVE YEARS AFTER EFFECTIVE

DATE OF FINAL RULE], and every five years thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, based on the cumulative annual percentage change in the unadjusted All Items Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average reported by the Bureau of Labor Statistics for the previous five years. The qualifying investment amount will be rounded down to the nearest hundred thousand. DHS may update this figure by publication of a technical amendment in the Federal Register.

(g) * * *

(1) * * *

(2) Employment creation allocation. The total number of full-time positions created for qualifying employees shall be allocated solely to those alien investors who have used the establishment of the new commercial enterprise as the basis for a petition. No allocation must be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. USCIS will recognize any reasonable agreement made among the alien investors in regard to the identification and allocation of such qualifying positions.

* * * * *

(i) Special designation of a high unemployment area. USCIS may designate a particular geographic or political subdivision as an area of high unemployment (at least 150 percent of the national average rate). Such geographic or political subdivision must be composed of the census tract or contiguous census tracts in which the new commercial enterprise is principally doing business, and may also include any or all census tracts

contiguous to such census tract(s). The weighted average of the unemployment rate for the subdivision, based on the labor force employment measure for each census tract, must be at least 150 percent of the national average unemployment rate.

* * * * *

(j) * * *

(2) * * *

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including U.S. Customs and Border Protection commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

* * * * *

(5) To show that the petitioner is or will be engaged in the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, the petition must be accompanied by:

* * * * *

(iii) Evidence that the petitioner is engaged in policy making activities. For purposes of this section, a petitioner will be considered sufficiently engaged in policy making activities if the petitioner is an equity holder in the new commercial enterprise and the organizational documents of the new commercial enterprise provide the petitioner

with certain rights, powers, and duties normally granted to equity holders of the new commercial enterprise's type of entity in the jurisdiction in which the new commercial enterprise is organized.

* * * * *

(6) * * *

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, nor within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, the county in which a city or town with a population of 20,000 or more is located, or the city or town with a population of 20,000 or more, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of at least 150 percent of the national average rate; or

(B) A description of the boundaries of the geographic or political subdivision and the unemployment statistics in the area for which designation is sought as set forth in 8 CFR 204.6(i), and the reliable method or methods by which the unemployment statistics were obtained.

(k) Decision. The petitioner will be notified of the decision, and, if the petition is denied, of the reasons for the denial. The petitioner has the right to appeal the denial to the Administrative Appeals Office in accordance with the provisions of part 103 of this chapter.

* * * * *

PART 216 –CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

3. The authority citation for part 216 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1154; 1184, 1186a, 1186b, and 8 CFR part 2.

4. Amend §216.6 by

a. Revising paragraph (a)(1) introductory text;

b. Removing “Form I-829, Petition by Entrepreneur to Remove Conditions” from paragraph (a)(1)(i);

c. Removing and reserving paragraph (a)(4)(i);

d. Replacing “entrepreneur” with “investor” in paragraph (a)(4)(iv);

e. Revising paragraphs (a)(5) and (6);

f. Revising paragraph (b);

g. Removing and reserving paragraph (c)(1)(i) and revising paragraphs (c)(2); and

h. Revising paragraph (d).

The revisions to read as follows:

§ 216.6 Petition by investor to remove conditional basis of lawful permanent resident status.

(a) * * *

(1) General procedures. (i) A petition to remove the conditional basis of the permanent resident status of an investor accorded conditional permanent residence pursuant to section 203(b)(5) of the Act must be filed by the investor with the appropriate fee. The investor must file within the 90-day period preceding the second anniversary of the date on which the investor acquired conditional permanent residence. Before the petition may be considered as properly filed, it must be accompanied by the fee required under 8 CFR 103.7(b)(1), and by documentation as described in paragraph (a)(4) of this section, and it must be properly signed by the investor. Upon receipt of a properly filed petition, the investor's conditional permanent resident status shall be extended automatically, if necessary, until such time as USCIS has adjudicated the petition.

(ii) The investor's spouse and children may be included in the investor's petition to remove conditions. Where the investor's spouse and children are not included in the investor's petition to remove conditions, the spouse and each child must each file his or her own petition to remove the conditions on their permanent resident status, unless the investor is deceased. If the investor is deceased, the spouse and children may file separate petitions or may be included in one petition. A child who reached the age of 21 or who married during the period of conditional permanent residence, or a former spouse

who became divorced from the investor during the period of conditional permanent residence, may be included in the investor's petition or must each file a separate petition.

* * * * *

(5) Termination of status for failure to file petition. Failure to properly file the petition to remove conditions within the 90-day period immediately preceding the second anniversary of the date on which the investor obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the investor's permanent resident status and the initiation of removal proceedings. USCIS shall send a written notice of termination and a notice to appear to an investor who fails to timely file a petition for removal of conditions. No appeal shall lie from this decision; however, the investor may request a review of the determination during removal proceedings. In proceedings, the burden of proof shall rest with the investor to show by a preponderance of the evidence that he or she complied with the requirement to file the petition within the designated period. USCIS may deem the petition to have been filed prior to the second anniversary of the investor's obtaining conditional permanent resident status and accept and consider a late petition if the investor demonstrates to USCIS' satisfaction that failure to file a timely petition was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge in proceedings and USCIS excuses the late filing and approves the petition, USCIS shall restore the investor's permanent resident status, remove the conditional basis of such status, and cancel any outstanding notice to appear in accordance with 8 CFR 239.2. If

the petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the investor and DHS.

(6) Death of investor and effect on spouse and children. If an investor dies during the prescribed 2-year period of conditional permanent residence, the spouse and children of the investor will be eligible for removal of conditions if it can be demonstrated that the conditions set forth in paragraph (a)(4) of this section have been met.

(b) Petition review. (1) Authority to waive interview. USCIS shall review the petition to remove conditions and the supporting documents to determine whether to waive the interview required by the Act. If satisfied that the requirements set forth in paragraph (c)(1) of this section have been met, USCIS may waive the interview and approve the petition. If not so satisfied, then USCIS may require that an interview of the investor be conducted.

(2) Location of interview. Unless waived, an interview relating to the petition to remove conditions for investors shall be conducted by a USCIS immigration officer at the office that has jurisdiction over either the location of the investor's commercial enterprise in the United States, the investor's residence in the United States, or the location of the adjudication of the petition, at the agency's discretion.

(3) Termination of status for failure to appear for interview. If the investor fails to appear for an interview in connection with the petition when requested by USCIS, the investor's permanent resident status will be automatically terminated as of the second anniversary of the date on which the investor obtained permanent residence. The investor

will be provided with written notification of the termination and the reasons therefore, and a notice to appear shall be issued placing the investor in removal proceedings. The investor may seek review of the decision to terminate his or her status in such proceedings, but the burden shall be on the investor to establish by a preponderance of the evidence that he or she complied with the interview requirements. If the investor has failed to appear for a scheduled interview, he or she may submit a written request to USCIS asking that the interview be rescheduled or that the interview be waived. That request should explain his or her failure to appear for the scheduled interview, and if a request for waiver of the interview, the reasons such waiver should be granted. If USCIS determines that there is good cause for granting the request, the interview may be rescheduled or waived, as appropriate. If USCIS waives the interview, USCIS shall restore the investor's conditional permanent resident status, cancel any outstanding notice to appear in accordance with 8 CFR 239.2, and proceed to adjudicate the investor's petition. If USCIS reschedules that investor's interview, he or she shall restore the investor's conditional permanent resident status, and cancel any outstanding notice to appear cause in accordance with 8 CFR 239.2.

(c) * * *

(2) If derogatory information is determined regarding any of these issues or it becomes known to the government that the investor obtained his or her investment funds through other than legal means, USCIS shall offer the investor the opportunity to rebut such information. If the investor fails to overcome such derogatory information or evidence that the investment funds were obtained through other than legal means, USCIS

may deny the petition, terminate the investor's permanent resident status, and issue a notice to appear. If derogatory information not relating to any of these issues is determined during the course of the interview, such information shall be forwarded to the investigations unit for appropriate action. If no unresolved derogatory information is determined relating to these issues, the petition shall be approved and the conditional basis of the investor's permanent resident status removed, regardless of any action taken or contemplated regarding other possible grounds for removal.

(d) Decision. (1) Approval. If, after initial review or after the interview, USCIS approves the petition, USCIS will remove the conditional basis of the investor's permanent resident status as of the second anniversary of the date on which the investor acquired conditional permanent residence. USCIS shall provide written notice of the decision to the investor. USCIS may request the investor and derivative family members to appear for biometrics at a USCIS facility for processing for a new Permanent Resident Card.

(2) Denial. If, after initial review or after the interview, USCIS denies the petition, USCIS will provide written notice to the investor of the decision and the reason(s) therefore, and shall issue a notice to appear. The investor's lawful permanent resident status and that of his or her spouse and any children shall be terminated as of the date of USCIS' written decision. The investor shall also be instructed to surrender any Permanent Resident Card previously issued by USCIS. No appeal shall lie from this decision; however, the investor may seek review of the decision in removal proceedings. In proceedings, the burden shall rest with USCIS to establish by a preponderance of the

evidence that the facts and information in the investor's petition for removal of conditions are not true and that the petition was properly denied.

Jeh Charles Johnson,

Secretary.

[FR Doc. 2017-00447 Filed: 1/12/2017 8:45 am; Publication Date: 1/13/2017]