

Testimony of  
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Chairman Leahy and Ranking Member Sessions, thank you for the opportunity to appear before the Senate Judiciary Committee to discuss the EB-5 Regional Center Program. During my tenure leading the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) within the Department of Homeland Security (DHS), I studied the EB-5 Program and made eight formal recommendations to U.S. Citizenship and Immigration Services (USCIS) to improve the Program. USCIS has formally responded to those recommendations. My testimony today will highlight parts of that exchange, and offer additional observations based in part on the Ombudsman's Annual Report to Congress.

I am currently a Strategy and Policy Consultant with the Raytheon Company. I am appearing today in my capacity as a former Ombudsman. My prepared and oral testimony should not be regarded as expressing the views or opinions of the Raytheon Company, its affiliates, or employees.

On March 18, 2009, my office issued a study entitled "Employment Creation Immigrant Visa (EB-5) Program Recommendations." The study was built on research occurring over a period of six months, which included meetings with USCIS officials, line managers and adjudicators, a public-forum teleconference, a variety of meetings with individual stakeholders, and communication with subject-matter experts. I will focus on two themes derived from the study.

#### Definitive and Comprehensive Rules to Grow the EB-5 Program

In my March 18, 2009 study, I commented that "uncertainty has plagued the EB-5 program from its inception" in 1990. While the Immigration and Naturalization Service (INS) issued "interpretive guidance on key legal issues" in the early years of the EB-5 Program, INS General Counsel later determined that some of the financial arrangements underpinning hundreds of approved applications were inconsistent with the EB-5 statute and regulations. USCIS' Administrative Appeals Office then issued four precedent decisions which altered "previously issued guidance and substituted new and more restrictive interpretations of the law."

In addition to these difficulties, my office reported that,

[a]lthough the EB-5 visa category and the Regional Center pilot program have been in existence for over 15 years, many key terms have not been clearly defined by USCIS. Such ambiguity

contributes to entrepreneur anxiety and uncertainty about the program, and ultimately to underutilization of this visa category.

My office recommended that "USCIS initiate formal EB-5 rulemaking to advance a new set of rules to replace the combination of existing rules and controlling precedent decisions."

USCIS formally responded to my recommendation on June 12, 2009, stating,

USCIS acknowledges that the regulations governing the EB-5 Program need to be updated. During the past 20 months the agency was directed to issue several rules that were designated as priorities by the previous presidential administration. USCIS met these challenges despite limited resources, and we are continuing with rulemaking efforts that are agency priorities. USCIS will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations which are currently in progress.

On June 17, 2009, USCIS issued some new guidance to its adjudicators that will benefit EB-5 investors, by defining when the two-year job creation requirement commences, and expanding on the meaning of what constitutes a "full-time" position for job-creation purposes.

It is undisputed that the EB-5 Program needs updated and better defined regulations to allow the Program to live up to Congressional mandates and expectations. It is not clear when such regulations will be produced, due to USCIS' other priorities and limited resources. Given current economic conditions, and the benefits that EB-5 investors can bring to U.S. workers in targeted employment and rural areas, Congress may wish to fund staff positions within DHS' Office of General Counsel specifically dedicated to rulemaking for the EB-5 Program and other critical emergent programs like USCIS transformation.

#### Consultation and Training to Improve the EB-5 Program

The Government Accountability Office remarked in a 2005 report that "qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law [because a] sophisticated knowledge of corporate, tax, investment and immigration law are required." Appreciating the complexity of the EB-5 Program for both immigration practitioners and USCIS adjudications staff, I recommended on March 18, 2009 that,

USCIS should form an EB-5 inter-governmental advisory group composed of selected representatives from the Departments of Commerce, Treasury, State, Labor, and possibly, the Small Business Administration. Without recommending that these agencies have any adjudicatory role in determining the merits of an application or petition, this group should meet regularly to consult with USCIS on Regional Center designations, and to address other business, economic and labor issues which impact the EB-5 Program.

Some of the specific matters which the inter-governmental advisory group could provide invaluable insight and assistance with include: the examination of Regional Center submissions for such designation, including the business plan; the financial instruments described; the designation of high unemployment areas; and the validity of "indirect job methodologies" advanced by EB-5 project developers. Additional issues might include: appropriate levels of due

diligence related to program integrity; the availability and reasonableness of requesting particular financial documents and/or asset identification; and issues surrounding the path of funds.

In its formal response to the my office's recommendation's, USCIS stated that it "is exploring the possibility of developing an inter-governmental advisory group to discuss operational and policy issues with respect to domestic business, economic, and labor considerations relevant to EB-5 adjudications. USCIS will advise the CIS Ombudsman if a group is convened."

USCIS would likely profit from the expertise of other federal agencies in administering and modifying the complex EB-5 Program. USCIS might similarly engage state agencies that have an interest in the formation of Regional Centers.

While USCIS engages in programmatic-level dialogs with government stakeholders on the EB-5 Program, it is of great importance that its EB-5 adjudications staff at the California Service Center receive the training necessary to readily and accurately evaluate the business and financial documents that support a foreign entrepreneur's immigrant application. USCIS should also consider providing training to its adjudicators on the economic modeling that is frequently submitted by entrepreneurs filing Regional Center investment petitions based on indirect job creation. Modeling is an essential predictive tool that is gaining ground among policy-makers and operators faced with complex problems, but modeling is only as good as the assumptions and variables that go into the construction of the model.

In concluding, I would like to encourage the Committee to consider the Ombudsman's office as a resource: the office is an impartial body of experienced professionals who can engage in targeted research on USCIS issues of interest to the Committee. In conformity with the Homeland Security Act, the Ombudsman annually reports to Congress on the recommendations that it has made to USCIS throughout the year, and summarizes "the most pervasive and serious problems encountered by individuals and employers" who transact business with USCIS. The Ombudsman's office has a broad mandate, and is committed to studying "issues of humanitarian, family, and economic importance across the spectrum of immigration benefits and services," working "cooperatively with government partners to benefit the public." The subject-matter expertise of the Ombudsman's office may be of increased value to the Committee when comprehensive immigration reform returns to the Senate agenda.

I have attached to this prepared testimony a copy of the March 18, 2009 Citizenship and Immigration Services Ombudsman's "Employment Creation Immigrant Visa (EB-5) Program Recommendations," and the June 12, 2009 USCIS "Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations." I respectfully request that these documents be made part of the record.