

Pending EB-5 Legislation Provides a Comprehensive Response to the GAO

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In its [report](#) published on August 12, 2015, the Government Accountability Office (GAO) identified three areas for improvement and provided recommendations to U.S. Citizenship and Immigration Services (USCIS) in relation to its administration of the EB-5 Immigrant Investor Program. We summarized the GAO's report [here](#).

This article will examine the way in which three pending bills in Congress address the GAO's recommendations. The ***American Entrepreneurship and Investment Act*** (H.R.616), the EB-JOBS Act (H.R.3370), and the American Job Creation and Investment Promotion Act (S.1501) have overlapping policy provisions designed to enhance agency oversight authority, promote program integrity, and enhance data collection. These bills provide Congress with a menu of policy ideas that answer GAO's recommendations. In its response letter to the GAO, USCIS concurred in all of the GAO's recommendations and agreed to implement them. Pending legislation, however, provides lawmakers with the opportunity to further support USCIS in making the changes the GAO recommended.

In its report, the GAO recommended that USCIS: 1) conduct future risk assessments of the EB-5 Program; 2) expand information collection through petitioner interviews and revised forms; 3) report immigrant investor information collected by USCIS; and 4) include a discussion about program costs and reasons for exclusion of such costs from a forthcoming study on the program by the Department of Commerce. . For the purposes of this article, we will not address the GAO's fourth recommendation.

In the discussion underlying the recommendation for USCIS to conduct future risk assessments, the GAO cites two areas in particular. First, the GAO describes the challenges adjudicators can experience in verifying an investor's lawful source of investment funds. Second, the GAO discusses the challenges associated with evaluating the legitimacy of an investment entity and USCIS' limitations in dealing with suspected fraudulent investments.

Verification of Investor Funds

S.1501 contains provisions intended to address agency challenges related to verification of investor funds. The bill would require extensive documentation from investors, including tax returns going

back seven years, business records, any evidence of monetary judgments against the investor, and the identity of individuals who transfer funds to the United States on behalf of the investor. The bill also places restrictions on loans that are used by an investor, requiring that the capital be secured by the investor's own assets, and issued by a properly licensed and chartered lending institution that has been vetted by USCIS using relevant government databases. S.1501 places restrictions on the use of funds gifted to the investor, limiting donors to an investor's spouse, parent, child, sibling or grandparent. And if the gift comprises a "significant" portion of the capital invested, the donor is subject to the documentation requirements listed above. Though responsive to the GAO's findings, the source of funds provisions in S.1501 may benefit from further refinement to ensure that they will be effective in helping USCIS verify investor funds without creating unnecessary or unrealistic burdens that could hinder foreign investment.

Legitimacy of Investment Entity

The GAO also discussed challenges in verifying the legitimacy of an investment entity. In combination, H.R.616, H.R.3370, and S.1501 contain provisions designed to give USCIS new authority over regional center operators to identify and deter program misconduct. Specifically, all three bills contain one or more new authorities for USCIS to conduct background checks of regional center-associated individuals, prohibit participation by individuals who have past criminal or civil violations, terminate regional centers on a variety of grounds, debar individuals for misconduct, deny or revoke investor petitions, restrict foreign government ownership or involvement with regional centers and limit participation to U.S. citizens and lawful permanent residents, and impose graduated sanctions against regional centers. Additionally, S.1501 and H.R.3370 contain provisions to mandate or authorize regional center project site visits, enhance regional center reporting requirements, require the registration of groups or individuals that source investors, and create a fund to be used to promote program integrity.

Data Collection and Reporting

With respect to the GAO's recommendation to enhance data collection and reporting of program impact, S.1501 and H.R.3370 contain highly detailed annual reporting requirements, including an accounting of job creation and deployment of investor funds. H.R.3370 requires a study and report within one year of enactment concerning job counting methodology, as well as a biennial report to measure the economic impact of the program with a variety of metrics including foreign and domestic capital investment and the number of jobs created. S.1501 requires the GAO to conduct another report to be issued by Dec. 31, 2018 concerning, among other things, the program's economic benefits. While there is much USCIS can do internally to enhance reporting and thus the measurement of the program's economic impact, the reporting requirements in both S.1501 and H.R.3370 have the potential to spur vigorous data collection and reporting at the agency—and to produce reports that will be useful to lawmakers when considering any future policy changes to the program.

Market-Based Safeguards

Finally, in addition to agency and congressional actions to strengthen the EB-5 Program, it is important to consider the way in which the program's own evolution will continue to bring about positive change. Since 2008, the program has attracted an increasing number of highly sophisticated developers and other business interests. This is a positive development for the program overall; the involvement of long-established businesses—whether hotel companies, international manufacturing

companies, national assisted living enterprises, or world class real estate development companies—provides additional, market-based safeguards. An established company with a reputation to protect is far more likely to have strong compliance controls in place and will ensure strict adherence to program rules, securities law and regulations and other applicable laws and regulations. There is little incentive for any legitimate business concern seeking financing through the program to engage in activity outside of its rules. In this respect, the transformation of the EB-5 Program into a mainstream source of capital investment, with an increasing number of established businesses turning to it, creates countervailing pressure against those who would seek to engage in prohibited activity. As established businesses continue to raise the quality of investment opportunities and the standards by which they are offered, would-be bad actors that have no place in the EB-5 marketplace will be increasingly isolated and ultimately forced out.

The deadline for reauthorization of the EB-5 Program is fast approaching. The GAO's report provides a roadmap for lawmakers to reauthorize the EB-5 Program with the reforms that will meet the GAO's recommendations, and which industry stakeholders can largely accept. When Members of Congress return from their August recess, they will have 12 legislative days in which to act to keep this job-creating program alive. With the GAO report as guidance, and three pending bills from which to draw policy ideas, two of which are bipartisan, leaders in the House and Senate are now well-positioned to come together to assemble and quickly pass a consensus reauthorization package.

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