Legal Immigration: The World's Bridge to America

The Case in Support of the EB-5 Foreign Immigrant Investor Program and Investment in Rural America

By Dr. Joseph Penbera

In order to appreciate the extent to which the Foreign Immigrant Investor Program (commonly known as the EB-5 Program) promotes the nation's economic welfare and represents a proven pathway for legal immigration, it is important to first understand the principles upon which legal immigration has been built. Therefore, this paper consists of two parts: Part I discusses the historical development of America as a new nation and the core principles of legal immigration that emerged from various major legislation. Part II discusses legal immigration as a social contract between prospective immigrants and America, the EB-5 Program's adherence to the core principles of legal immigration, and a call to action to reauthorize the Program and, pursuant to existing law and intent, extend the benefits of capital investment to rural areas.

Part I: Nation Building and the Development of Legal Immigration Principles

Migration, Colonialization, Birth of the Nation, and Manifest Destiny

Although immigration to America began as early as the 15th century, it was not significantly increased until many territorial and resource claims were made by various countries in the 16th and 17th century, and, specifically, immigration establishing settlements and colonies by England, France, Netherlands, Portugal, Russia, Sweden and Spain.(1) The Declaration of Independence in 1776 initiated the break of colonies from British rule, but, however, it was not until 1790 that the codification of rights and freedoms that the colonies wished to protect were ratified in the U.S. Constitution. A series of 85 essays authored by Alexander Hamilton, James Madison and John Jay were published in New York newspapers in 1787 and 1788 –collectively known as *The Federalist Papers* – were influential in proscribing that a strong federal government was necessary to achieve a "more perfect union".(2)

An institutionalized system governing immigration would not exist for the next 90 years as the newly formed nation focused its attention on how to qualify persons for citizenship who had already immigrated to America. Under the Naturalization Act of 1790 there were no religious or skill tests, or limits on national origin, or length of residency or racial or gender requirements. However, this relatively easy pathway to citizenship soon became

encumbered by legislation aimed both on current residents and on new immigrants which imposed various restrictions based on perceived foreign or internal security issues. Among the restrictions (and year imposed) were lengthy residency requirements (1795, 1798), proof of good moral character (1795), authority for immediate arrest followed by deportation by presidential decree (1798), monitoring the origin and number of immigrant arrivals (1819), charging immigrants or their sponsors with passage fees or credit remittances (1819, 1830), favoring nativists over immigrants (1830), passing certain literacy and loyalty tests (1819, 1830, 1881), granting priority for contract and other labor (1862, 1864), and imposing restrictions by country of origin (1870, 1875). (3)

It is important to note that the restrictions imposed in the 1800s are coincident with the period of rapid expansion of the nation's territorial boundaries under the doctrine of "Manifest Destiny". (4) This doctrine posited that America was destined to expand from sea to sea in order to protect the union from future potential threats from other nations and to secure democracy on the continent. Expansion of the nation's borders was initiated by President Thomas Jefferson in 1803 with completion of the Louisiana Purchase which doubled the nation's borders both west and south. This acquisition was then followed by the addition of various territories including Florida in 1819, Texas in 1845, Oregon in 1846, plus two expansions in what is known as the American southwest in 1848 and 1853 following the Mexican-American War, and the purchase of large addition of land in the upper northwest of the continent known as the Alaska territory in 1867.(5) In a period of only 64 years, the U.S. had more than quadrupled in size and protection of such a vast land area, and the settlements within it, was done with little or no valid legal oversight.

One would be remiss in not identifying persons who were not technically immigrants but, nonetheless, found themselves as residents of a new nation. These persons included those who came through forced immigration, i.e., through slavery of persons primarily from Africa, or through contracted de facto slave labor of persons from Asia, or through the forced migration of indigenous people displaced from their trial lands. These were legacy groups subject to state conditions over naturalization and civil rights. The Naturalization Act of 1870 reflects the prominence of state authority as it passed by the slimmest of margins in granting naturalization rights to aliens who were white or of African descent, but denied these rights to Native Americans.

States had also asserted their authority over issues related to immigration. But this authority was gradually whittled down by U.S. Supreme Court rulings in 1823, 1849, 1850, and 1875 which bolstered advocates of federal control. These rulings should be considered as landmark because they determined that even though the U.S. Constitution does not

explicitly list immigration as reserved to the federal government, federal control is implied by the need to execute other matters of sovereignty such as over trade and defense.

Foundations of Legal Immigration Principles

The Immigration Act of 1882 could be viewed as the first piece of legislation that comprehensively institutionalized federal control over immigration. (It should be noted two later U.S. Supreme Court rulings–1884 and 1898 -further solidified that immigration control is at the federal level). The 1882 Act placed authority over immigration in the U.S. Treasury Department. The nation was still reeling from Civil War which not only challenged the union's very political existence, but also imposed huge national economic costs on the U.S. Treasury resources which were impacted even more by the Reconstruction of the South. In addition, by the late 1870s, the concentrated flow of immigrants to eastern U.S. cities that had begun in the mid-1850s had placed a serious strain on municipal resources. And there were still fears that prior conflicts with Britain, France, and, especially, Mexico might reappear. (6) Thus, the establishment of the Bureau of Immigration within the Treasury Department was strategic because it created the apparatus for a tax to be levied on each immigrant.

The Immigration Act of 1882 and the U.S. Supreme Court rulings from 1823 to 1898 are prescient given the current discourse about immigration. Most importantly, they set the foundations for legal immigration principles which should guide legal immigration processes, as follows:

- protecting the sovereignty and security of the nation;
- granting the federal structure exclusive authority over immigration matters, including over evidentiary requirements;
- using preferences and categories to determine who qualifies to petition for entry; and
- recognizing the costs to government, immigrants should make a contribution to the nation.

Three other major immigration laws — the Immigration Act of 1891, the Emergency Immigration Quota Act of 1921, and the Immigration Act of 1924 – demonstrated that these foundations should guide federal regulations. For example, written records were required to be submitted and approved (meaning that those "without papers" were summarily denied entry) and immigrants were required to be screened at U.S. consulates abroad. New categories of persons not allowed to immigrate to the U.S. were created through such policies as the capping of the number of immigrants who could come from a particular

country. And a policing apparatus was formed –the Border Patrol – which could summarily deny physical entry to persons who did not meet the regulatory requirements.

First Two Waves of Legal Immigration, Assimilation, and the Idealism of the American Dream

From 1882 to 1925, more than 25 million people immigrated to the U.S. which represented a nearly 50% increase in the U.S. population. Immigrants during this period were decidedly of northern European origin. Owing to historical animosities among these countries of origin, conflicts and resentments arose between established residents and newly arrived immigrants. During this period, the federal government played a very minimal role in the mitigation of these conflicts. Social assimilation occurred by immigrants confining their activities to neighborhoods composed of other immigrants from their country of origin, and from private support provided by religious institutions, privately-funded social welfare organizations located in these neighborhoods, and by family and friend connections. Immigrants were expected to find their own way. And most did through hard work associated with America's need for persons with certain skills and a work ethic. It is notable that many heads of immigrant households who came to the U.S. before World War I were artisans and skilled laborers.

The next wave of immigration occurred from the mid-1920s through the mid-1960s. It was fomented by economic hardships during the Great Depression from 1929-1933 and it continued through the political storms that engulfed the planet during and after World War II. Again, the attraction to immigrate to America was driven first by the effectiveness of informal communication channels used by immigrants, especially via letter writing to friends and families, and through newspaper reporting, radio broadcasts, and movies, and, then, later by television broadcasts and labor programs. This period continued to bring in trades people, but it also included many people with higher technical skills, including machinists and engineers, as well as professionals from all walks of life such as financiers, architects and builders, teachers, scientists, inventors, artists and writers. Immigrants or children of immigrants took on iconic stature. These persons included Madeleine Albright, Albert Einstein, Joe DiMaggio, Walt Disney, Enrico Fermi, Henry Kissinger, Ray Kroc and Diane Von Furstenberg, among many others.

During the period of 1925 to 1965, U.S. immigration policy could, at times, be thought of as highly restrictive. In 1933, an Executive Order merged the Bureau of Immigration and the Bureau of Naturalization into the Immigration and Naturalization Services (INS) agency within the Department of Labor because of the concern that immigrants would take jobs already scarce from the Great Depression from American citizens. In 1940, immigration authority was transferred to the Department of Justice to thwart enemy infiltration efforts,

and persons from countries who were combatants with the U.S. (Japanese and Germans) were subject to reporting and detention. The 1952 Immigration and Nationality Act created quotas allotting highest priority admissions to immigrants with needed skills and to parents of adult citizens, next to the spouses and children of legal residents, and then to the siblings and adult children of citizens. It also created certain nonimmigrant visa categories, including trader or investor (E), student (F-1), and temporary worker of distinguished ability or merit (H-1).

But, despite restrictions, the motivation to come to America –either as an immigrant or as a visitor– had become embedded into the imagination of foreigners. America was idealized as a place where dreams could come true, and where all good things are possible. This was popularized as the "American Dream". Moreover, America had proved that it was prepared to fight and make the ultimate sacrifice in defense of democracy. It is important to remember that by the 1960's, America had achieved nationhood and economic and military power at lightspeed and in a manner that had no historical precedent. For the first time in human history, a powerful nation arose not through ethnic homogeneity, but through a mix of people from many cultures and other nations –a "melting pot" – who were , yet, loyal and respectful of the rule of law. Foreign regimes had found it difficult to avoid the spirit of American capitalism and impossible to fight the American Dream.

A new era of immigration expansion began with the passage of the Immigration and Nationality Act of 1965. Neither the internal political pressures related to America's involvement in various world conflicts, particularly the Cold War and the Vietnam War, nor the speculation that foreign powers were involved with the assignation of President John F. Kennedy, nor an influx of refugees, dampened the support for legal immigration. In fact, the passage of the Immigration and Nationality Act (INA) of 1965 made immigration policy less restrictive and in many ways more welcoming towards other countries, especially immigrants from developing countries. The country-based quota system was eliminated which significantly increased immigration by persons from Africa, Asia, and Central and South America, while still giving priority to immigrants who already had family in the U.S.

The purpose of this paper is not to provide a complete history of immigration legislation. Rather, it was to confirm that the foundations of legal immigration have deep, enduring roots. And that we have today criteria upon each piece of legislation and each government program can be evaluated.

Part II: The Enduring Social Contract, The EB-5 Program Adherence to the Core Principles of Legal Immigration, and A Call to Action On Behalf of Rural America

Legal Immigration to America Viewed As A Social Contract

The entire 144-year history of immigration legislation has created a critical path that, if followed, will result in the achievement of personal and national goals. A binding social contract is created around the four legal foundations previously cited. The social contract places certain demands on government and on the prospective immigrant:

- *First, protection of the sovereignty and security of the nation is of paramount importance.*
- *Second, an immigrant may legally enter the U.S. only through evidence embodied in documents reviewed and approved through administrative processes.*
- *Third, the central authority over immigration matters is the federal government, and the course of that administration, the U.S. Congress may place definitive restrictions on who might immigrate, including restriction for cause and restrictions applying to whole countries.*
- *And, fourth, there is a cost benefit to immigration meaning that what an immigrant may contribute to the nation is weighed against the cost to government and the nation.*

In short, through this social contract America is providing residency and the attendant freedoms and opportunities in exchange for the immigrant's taking responsible actions and committing to making contributions to the nation.

Not one of these four principles can be omitted. The inscription on the Statue of Liberty – *"Give me your tired, your poor, your huddled masses yearning to breathe free"*—is inspiring, but neither the *Federalist Papers* nor in the ratification process of the U.S. Constitution, nor various immigration laws since enacted, encourages the bypassing of the four principles so as to create something like an open border.

So, too, when one someone enters the U.S., they are expected to act responsibly and follow the law. And if they desire to immigrate to the U.S., they have a responsibility to make a contribution in support of themselves, their family, and their community. So even when immigration is extended to persons under programs of humanitarian relief, all of the terms of the social contract still apply.

There is a personal message embedded in the social contract. It is the importance of individual effort and responsibility. Adam Smith's *Wealth of Nations* was published in 1776 and it conceptualized for the nation's founders the interdependence between a prosperous economic system and the capacity to broaden and sustain personal freedoms. It posits that individual effort and responsibility is the glue that binds the theories of capitalism and democracy. The strength of that bond determines the wealth and the future of the nation.

The EB-5 Program Exemplifies the Social Contract in Action

Among the available legal immigration pathways, the EB-5 Program stands out as the most immediately actionable mechanism through which the U.S. Congress can reinforce all four core principles of the legal immigration social contract. This Program is of great value to rural areas as well as to regional economies and to the entire nation. But this Program is now threatened with sunsetting in 2027 because special interests are attempting to blur the difference between illegal immigration and legal immigration.

As background, the Congressional authority for the EB-5 program stems from Article I, Section 8 of the U.S. Constitution, which grants Congress the power to regulate immigration. Congress created the EB-5 program in 1990 through the Immigration and Nationality Act (INA) to encourage foreign investment and job creation in the U.S. (8) This program is known as EB-5 for the name of the employment-based fifth preference visa that participants receive. The Act established (in 1992) foreign immigrant capital investment in local projects sponsored by designated regional investment centers. The Reform and Integrity Act (RIA) of 2022 reauthorized the entire EB-5 program through 2027. (9) The U.S. Citizenship and Immigration Service (USCIS) administers the EB-5 Program. Under this program, investors (and their spouses and unmarried children under 21) are eligible to apply for lawful permanent residence (i.e., become a Green Card holder) if they make the necessary investment in a commercial enterprise in the United States under a comprehensive business plan towards meeting the mandate of creating and sustaining a minimum of 10 permanent full-time jobs for qualified U.S. workers.

The EB-5 Program is one of the very few government programs which utilizes immigration policy to directly and indirectly stimulate the U.S. economy through the creation of jobs for Americans and by encouraging substantial capital investment in projects located in underserved communities. Remarkably, it is one of the few programs that is entirely self-supporting, i.e., it depends on fees and does not require tax dollars to support operations. It, again, supports every one of the four principles of legal immigration. The EB-5 program, in fact, strengthens legal immigration policy. The Program is controlled at the federal level, creates jobs for Americans which support small business, increases both personal and household income, and is of virtually no cost to the U.S. taxpayer.

It is noteworthy that the nationally recognizing consulting firm Fourth Economy conducted an independent analysis of EB-5 investments from 2016 to 2019 and found that the EB-5 Program had attracted $75 billion in private investment, created 1.7 million jobs, and paid $122 billion in wages to American workers. EB-5 projects contributed $184 billion to the U.S. Gross Domestic Product, and generated $14.5 billion in tax revenue. (10) It is estimated that over the last 20 years, the Program has generated more than $300 billion in combined total capital investment (EB-5 capital and private capital) and in excess of 3 million jobs.

A Call to Action On Behalf of Rural America

The pre-announcement that the EB-5 Program may be abandoned in 2027 is already rendering the U.S. less effective in recruiting foreign immigrant investment. As important, there is a critical "grandfathering" deadline of September 30, 2026, after which certain investor protections are removed which negatively impacts the incentive to invest in American projects. There is evidence that immigrant investors are being drawn to Canada and Australia, that even existing petitions for immigration are being withdrawn, and that project financing and development of great potential value is being disrupted. Rather than abandoning the Program, the U.S. Congress is urged to recognize that the EB-5 Program fully satisfies the core principles of legal immigration and, therefore, clearly merits reauthorization. As indicated in the following section, the Program can be strengthened greatly by taking targeted actions pursuant to current law, and, specifically, with respect to bringing capital to underserved rural America.

Call to Action: The USCIS definition of rural should revert back to the language and intent of the underlying legislation which is "rural area" not rural counties.

The Immigration and Nationality Act defines "rural area" as any area outside a metropolitan statistical area (MSA) and outside cities or towns with 20,000 or more people. *The term "area," not "county," is central; treating counties as rural/non-rural ignores the statutory language and functionally impairs states and communities with large rural areas from receiving investment capital*. The distinction between 'area' and 'county' is legally dispositive because the Immigration and Nationality Act defines rural eligibility by geographic area rather than by county boundaries, and, therefore, substituting counties for areas alters the statutes plain meaning and as well its intended economic impact. Prospective projects find it extremely difficult to identify qualifying rural counties even though vast parts of a region or state are rural areas because having even just a single town or city with population of 20,000 in a county disqualifies that county and, thus, all rural areas within it. This denies potential investors certain advantages afforded by the Congress to rural areas, including the ability to invest at the lower threshold for investment and

processing priority. As a result, finding a rural project to invest in has become highly problematic.

A majority of Members of Congress have rural areas in the states or districts they represent. Broad support for both rural investment and legal immigration exists both in the Congress and also among the American people. The following observations are directed to a small sample of U.S. House and Senate members who support legal immigration and whose constituencies include rural areas that, in practice, are effectively excluded from the benefits of EB-5 foreign immigrant investment.

Senator John Kennedy, Louisiana: his state has the second highest percentage of people living below the national poverty line, and over 90% of the land mass of his state is considered rural by various federal agencies, and, yet, about one-fourth of parishes do not qualify for rural investment because they have a town with a population of 20,000 or more.

Senators Wicker and Hyde-Smith, Mississippi: Lee County, which has the largest rural hospital in the nation serving multiple rural areas including those in other states, has one town of over 20,000 people, and not one other town of over 5,000 people, and yet it does not qualify for rural investment under the USCIS definition.

Senators Cruz and Cornyn, Texas: more than 83% of Texas is a rural area, but about 25% of Texas counties do not qualify.

Senator Padilla, House Members Fong, McClintock and Costa, California: only 8 of California's 58 counties qualify for rural investment under USCIS' definition, and all four Central Valley counties which have among the highest agricultural production in the nation and also have high percentages of unemployment and poverty – notably, Fresno, Tulare, Kings, and Kern counties–do not qualify.

Senators Hawley and Schmitt, Missouri: More than 95% of the state is rural, yet the county of Springfield –which is Senator Hawley's home county and in which Senator Schmitt has an office serving constituents — does not qualify for rural investment because the city of Ozark has 23,000 people.

Senator Grassley, Iowa: Senator Grassley is appreciated for having been a leader in improving the EB-5 Program and advocating for rural areas in the landmark legislation that he helped pass in 2022. One must assume that he would find that the disqualification of large rural areas of the country from rural investment as totally inconsistent with the spirit and intent of the legislation, and that this would be understandably troubling to many of his Congressional colleagues.

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Legal immigration has represented the Bridge to America for generations of people. In many ways, immigrants have also been America's bridge to the rest of the world. America is at a critical juncture in our nation's history. We must decide: Do we want a nation gripped for years in an existential crisis over immigration, or are we going to move forward using the principles of legal immigration and the wisdom of the social contract as our guide?

For more than 30 years, the EB-5 Program has provided a proven, legal immigration pathway across the Bridge to America. It has enabled thousands of people from all over the world to gain permanent residency while, at the same time, making an upfront investment in the American economy. The Program satisfies every one of the four principles of legal immigration. It underpins the U.S. banking system and other forms of capital investment by reducing institutional risks through the at-risk nature of the immigrant's investment. It creates jobs for U.S. workers. It strengthens the personal and household income of local communities. It stimulates spending and purchasing on a local and regional basis. And the project revenues, income, and spending that winds through the economy has a multiplier effect which helps increase the tax base which supports public services. The Program uses no U.S. taxpayer funds.

Allowing the EB-5 Program to sunset would severely damage the Bridge to America. In contrast, reauthorizing the program and implementing an administrative adjustment consistent with legislative intent would facilitate bringing substantial foreign capital investment into rural areas. Through such actions, the United States affirms its ability to welcome and deploy the capital and human resources upon which a healthy democracy depends.

Reauthorizing the EB-5 Program and restoring the statutory rural definition does not require reinventing legal immigration policy. It only requires honoring Constitutional precedent.

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Dr. Joseph Penbera has been cited by various U.S. and foreign organizations and media as a leading economic expert. He is the Chairman of the California Energy Investment Center and the Hawaii Economic Investment Center, both federally designated EB-5 regional investment centers, whose projects since 2010 have encompassed over $3 billion in total capital investment in rural and targeted areas and the creation of thousands of jobs. He is a featured guest speaker on KMJ580 based on the Central Valley of California and on the iHeartMedia platform available to many parts of rural America.

Dr. Penbera is a former Fulbright Senior Scholar in Economics and served as dean of two university business schools. He has served as a director and audit chair of publicly traded and private companies, two of which were industry leaders, and as a consultant to federal, state and local government agencies. In Washington, he served as the director of the International Programs Department and head of the agro-industrial development program at the USDA Graduate School. He is a U.S. Navy veteran. His grandparents immigrated to the U.S. from Italy. A long-time resident of the Fresno, California area, he served as Chairman of the Fresno Council of Economic Advisors under Mayor Alan Autry, and is a founding director of the San Joaquin River Parkway and other community organizations.

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9. *Section 203(b)(5) of the Immigration and Nationality Act (INA; 8 U.S.C. §1153(b)(5)). The statute was amended by the EB-5 Reform and Integrity Act of 2022 (RIA; L. 117-103, Division BB*)
10. (https://iiusa.org/resources-data/eb-5-economic-impact/.) The estimate of total capital investment and jobs created over from 2005 to 2025 is based on a review of websites of many regional investment centers, and, in my opinion, is conservative given the proprietary nature of project business plans and reporting.