## GOVERNOR'S OFFICE OF BUSINESS AND ECONOMIC DEVELOPMENT

## INITIAL STATEMENT OF REASONS (ISOR)

**Subject Matter of Proposed Regulations:** California EB-5 Investor Program procedures related to the United States Citizenship and Immigration Services EB-5 Investment Program ("EB-5 Program").

**Sections Affected:** California Code of Regulations, Title 10, Chapter 13, Article 3, Sections 8200-8230.

California Government Code section 6315.1 authorizes the Governor's Office of Business and Economic Development ("GO-Biz") to set the terms and conditions for issuing a state designation letter for a Targeted Employment Area ("TEA") within the structure and scope of the federal EB-5 Program.

### A. Background

Governor Edmund G. Brown Jr. signed Assembly Bill 2012 (Pérez, Chapter 294, Statutes of 2012), which designated the GO-Biz as the state agency primarily responsible for international trade and investment and repealed said authority from the Secretary of Business, Transportation, and Housing. As a result, GO-Biz became the state agency primarily responsible for international trade and investment, including the state's responsibilities related to the EB-5 Program (one of the federal employment-based methods of immigrating to the United States). California Government Code section 6315.1 also requires that GO-Biz prepare an annual report concerning the activities and performance of regional centers related to their involvement in the EB-5 Program. As a result, GO-Biz must collect information from the regional centers to complete this report.

The purpose of the EB-5 Program is to attract foreign direct investment ("FDI") projects to the United States. The EB-5 Program involves granting permanent resident status to immigrants who invest at least $1,000,000 into a new commercial enterprise or $500,000 into a new commercial enterprise made in a TEA that creates or preserves at least 10 jobs for US workers. California is the beneficiary of more FDI projects than any other state in the United States. In order for an applicant to obtain an EB-5 visa and invest less than $1,000,000, the state of California, through GO-Biz, must verify that the new commercial business is located in a TEA.

In order to effectively administer GO-Biz's responsibilities for the EB-5 Program, GO-Biz is required to promulgate regulations because it is not exempt from the rule making process under the Administrative Procedure Act. The EB-5 regulations provide a framework for GO-Biz to administer its responsibilities regarding the EB-5 Program, including establishing procedures for designating and certifying a TEA, outlining the process to obtain and renew a TEA certification letter, and how GO-Biz will conduct the annual survey of the regional centers' performance.

GO-Biz is proposing to adopt four distinct regulatory sections under Title 10, Chapter 13, Section 8200 et seq. to provide the framework of how to administer its EB-5 Program responsibilities. Specifically, GO-Biz is proposing to adopt the following sections: (1) the definitions; (2) the designation and certification of qualified TEAs; (3) the process to renew state designated TEA certification; and, (4) the description of how GO-Biz will conduct the annual EB-5 survey. The rationale for each of these sections, its benefits, the alternatives considered, and the reliance on any other third-party data or empirical study, if any, are

addressed below, unless explicitly excluded because the regulations are essential self-explanatory on their face.

**B. Discussion of Sections Affected**

**(1) Section Affected: Chapter 13, Article 3, Section 8200(a)-(u) – Definitions.**

California Code of Regulations section 8200 adds twenty-one (21) definitions that are used as part of the EB-5 Program. Most of the terms are self-explanatory or included for clarity purposes. In fact, a number of the definitions are self-evident based on the description of the definition (*e.g.,* applicant or GO-Biz); thus, such definitions are not explicitly described below. The only definitions covered below are those that are subject to multiple meanings or are defined in a particular manner for this Program. Each bulleted item below highlights one or more definitions that are defined in California Code of Regulations section 8200 and are accompanied by a discussion of the issue being addressed by the definition, why the definition is necessary to carry out the purpose of the EB-5 Program, the benefits anticipated from the regulatory action, including any technical, theoretical, or empirical study, if any, upon which GO-Biz relied, and the reasonable alternative definitions considered by GO-Biz and its reasons for rejecting those alternatives.

- "COMMERCIAL ENTERPRISE"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the US Citizenship and Immigration Services ("USCIS") and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. Applicants need to understand what constitutes a "commercial enterprise" in order to apply for an EB-5 visa. To provide clarity and avoid confusion or ambiguity, the definition proposed in the regulations is identical to the definition provided in the federal regulations governing the EB-5 Program located at 8 C.F.R. 204.6(e).

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program. By including this definition, GO-Biz seeks to consolidate all relevant definitions in one place for the applicants' ease of understanding and convenience.

c. Underlying data:

GO-Biz reviewed and used the definition found at 8 Code of Federal Regulations section 204.6(e). No relevant data or empirical studies were available regarding the definition of "commercial enterprise."

d. Consideration of alternatives:

As the EB-5 Program is a federal program, the use of federal definitions is appropriate and no other alternatives were considered.

- "CONTIGUOUS CENSUS TRACT"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the USCIS and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. When the investment is below $1,000,000, the applicant can still qualify for the EB-5 visa if the location of the project is in qualifies as a TEA or Special TEA. In order for a project location to qualify as a Special TEA, the census tract where the project is located must be part of 12 or fewer contiguous census tracts with a total average unemployment rate of at least 150% the national average rate. This definition provides applicants with the understanding of what constitutes a "contiguous census tract" in order to qualify as a Special TEA.

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to assist applicants in understanding the means to establish that their project is located in a Special TEA. This definition is also consistent with other states that permit a Special TEA designation based on adjacent census tracts.

c. Underlying data:

No relevant data or empirical studies were available regarding the definition of "contiguous census tracts."

d. Consideration of alternatives:

Some states place no limit on the number of census tracts that can be counted to establish that the project is located in an area with a total average unemployment rate of at least 150% the national average rate. However, without limits, GO-Biz believes that this would lead to some abuse of the system by applicants simply continuing to add an unlimited number of census tracts to qualify as a Special TEA. By restricting the number of census tracts to 12 or fewer, GO-Biz can limit consideration to areas with high unemployment.

- "NEW COMMERCIAL ENTERPRISE"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the USCIS and therefore governed by federal laws and regulations, which provides for some state involvement when investments are

at least $500,000, but less than $1,000,000. Applicants need to understand what constitutes a "new commercial enterprise" in order to apply for an EB-5 visa. To provide clarity and avoid confusion or ambiguity, the definition used in the regulations is consistent with the language used in the federal regulations.

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program. By including this definition, GO-Biz seeks to consolidate all relevant definitions in one place for the applicants' ease of understanding and convenience.

c. Underlying data:

We reviewed and tracked the language found at 8 Code of Federal Regulations section 204.6(h) and 8 United States Code section 1153(b)(5)(A). No relevant data or empirical studies were available regarding the definition of "new commercial enterprise."

d. Consideration of alternatives:

As the EB-5 Program is a federal program, the use of federal statutory and regulatory language is appropriate and no other alternatives were considered.

- "SUPPORTING LETTER"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the US Citizenship and Immigration Services ("USCIS") and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. When the investment is below $1,000,000, the applicant can still qualify for the EB-5 visa if the location of the project is in qualifies as a TEA or Special TEA. Supporting letters by the city, county, or regional or local economic development organization are needed to establish that the proposed census tract(s) where the proposed project will be located will reasonably be a source of workforce for the project and therefore qualify as a Special TEA. This definition provides applicants with the understanding of the purpose of the letter and who must fill it out.

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program. By including this definition, GO-Biz seeks to assist applicants by providing them with the knowledge of what they need to complete their applications.

c. Underlying data:

No relevant data or empirical studies were available regarding the definition of "supporting letter."

d. Consideration of alternatives:

No other alternatives were considered.

- "SPECIAL TEA"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the USCIS and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. The definition used here is consistent with the language used in the federal regulations to provide clarity and avoid confusion or ambiguity.

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program and how a project can qualify as a Special TEA. By including this definition, GO-Biz seeks to consolidate all relevant definitions in one place for the applicants' ease of understanding and convenience.

c. Underlying data:

GO-Biz reviewed and used the term found at 8 Code of Federal Regulations section 204.6(h). No relevant data or empirical studies were available regarding the definition of "Special TEA."

d. Consideration of alternatives:

As the EB-5 Program is a federal program, the use of federal definitions and language is appropriate and no other alternatives were considered.

- "TARGETED EMPLOYMENT AREA"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the USCIS and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. The definition used here is consistent with the language used in 8 United States Code section 1153(b)(5)(B)(ii) in order to provide clarity and avoid confusion or ambiguity.

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program. By including this definition, GO-Biz seeks to consolidate all relevant definitions in one place for the applicants' ease of understanding and convenience.

c. Underlying data:

We reviewed and used the term found at 8 United States Code section 1153(b)(5)(B)(ii). No relevant data or empirical studies were available regarding the definition of "Targeted employment area."

d. Consideration of alternatives:

As the EB-5 Program is a federal program, the use of federal definitions and language is appropriate and no other alternatives were considered.

- "TEA CERTIFICATION LETTER"

a. Issue being addressed:

The EB-5 Program is a federal program administered by the USCIS and therefore governed by federal laws and regulations, which provides for some state involvement when investments are at least $500,000, but less than $1,000,000. The definition used here clarifies the role GO-Biz plays in verifying that a project is located in a designated TEA or Special TEA. In order to provide clarity and avoid conflict with federal expectations and procedures, the proposed definition is consistent with the language used in 8 United States Code section 1153(b)(5)(B)(ii).

b. Anticipated benefits from this regulatory action:

A clear definition of this important term is necessary to promote accurate and consistent understanding of the EB-5 Program. By including this definition, GO-Biz seeks to consolidate all relevant definitions in one place for the applicants' ease of understanding and convenience.

c. Underlying data:

We reviewed and used the term found at 8 United States Code section 1153(b)(5)(B)(ii). No relevant data or empirical studies were available regarding the definition of "TEA certification letter."

d. Consideration of alternatives:

As the EB-5 Program is a federal program, the use of federal definitions and language is appropriate and no other alternatives were considered.

**(2) Section Affected: Chapter 13, Article 3, Section 8210(a)-(n) – Designation and Certification of Qualified TEAs.**

a. Issue being addressed:

In order for an investment of less than $1,000,000, but at least $500,000, to qualify under the EB-5 Program, the new commercial enterprise receiving the investment must be in a TEA or Special TEA. California Code of Regulations section 8210 describes how applicants can establish to the federal government that the location in which the new commercial enterprise is going to principally do business in is a TEA or Special TEA.

California Code of Regulations section 8210(a) provides that applicants may establish that the area in which the new commercial enterprise is going to principally do business in, is a TEA, by submitting evidence that the location of the project will be within a metropolitan statistical area, a specific county within a metropolitan statistical area, or a county in which a city or town with a population of 20,000 or more is located, that had an average unemployment rate of at least 150% of the federal Bureau of Labor Statistics' most recently published national average unemployment rate before the date of the application. This option is allowed when an applicant cannot obtain a TEA certification letter from GO-Biz, but believes that it has sufficient evidence to demonstrate that the area where the new commercial enterprise will principally do business in is located in an area of high unemployment. Applicants need to know that they can still apply to the federal government for an EB-5 visa if they have sufficient evidence, notwithstanding that GO-Biz was unable to provide the applicant with a TEA certification letter.

Alternatively, California Code of Regulations section 8210(b) provides that applicants may establish that the area in which the new commercial enterprise is going to principally do business in, is a TEA, by submitting a letter from GO-Biz, which certifies that the geographic or political subdivision of the metropolitan statistical area or the city or town with a population of 20,000 or more has been designated a high unemployment area.

California Code of Regulations section 8210, subsections (c)-(k), set forth the process by which applicants seeking a GO-Biz TEA certification letter must follow. These subsections inform

applicants that they must utilize the GO-Biz TEA Interactive Tool and the information required to be submitted. These subsections also set forth the step-by-step process to use the GO-Biz TEA Interactive Tool and how to obtain a supporting letter when necessary in the case of a Special TEA.

California Code of Regulations section 8210(l) informs the applicants that TEA certification letters are valid for one year. California Code of Regulations section 8210(m) informs applicants that they can still apply for an EB-5 visa from USCIS even if they do not receive a TEA certification letter from GO-Biz.

The intent of this section is to provide applicants with a clear description of the process to obtain a TEA certification letter from GO-Biz, as well as inform the applicants that they can still apply for an EB-5 visa even if GO-Biz does not issue them a TEA certification letter.

b. Anticipated benefits from this regulatory action:

The section provides clear, concise, and necessary information to assist applicants with understanding the process to obtain a TEA certification letter. This section informs the applicants what information will be requested and what steps are needed to request a TEA certification letter. This section also provides applicants with an understanding that they can still apply to USCIS for an EB-5 visa, even if GO-Biz does not issue the applicants a TEA certification letter. By providing clear directions and expectations to applicants, GO-Biz staff can efficiently obtain information that will be needed to correspond with applicants and consistently evaluate each application, thereby facilitating foreign direct investment in California through the EB-5 Program.

c. Underlying data:

No relevant data or empirical studies were available regarding this issue. However, GO-Biz relied on its experience with questions received from applicants prior to the implementation of these proposed regulations.

d. Consideration of alternatives:

GO-Biz considered using a paper or hardcopy application process rather than the online GO-Biz TEA Interactive Tool, but determined that an online process would be more efficient and more reliable. The online process also prevents applicants from inadvertently failing to provide all the requested information.

**(3) Section Affected: Chapter 13, Article 3, Section 8220 (a)-(b) – Renewal of State Designated TEA Certification.**

a. Issue being addressed:

Some projects require a continuing TEA certification, while other applicants experience delays after receiving a TEA certification. In either case, applicants may need to renew their TEA certification. As a result, applicants have questions on how to proceed under either of these circumstances and California Code of Regulations section 8220 is designed to address these issues. California Code of Regulations section 8220(a) informs applicants that TEA certification letters will not be renewed automatically. California Code of Regulations section 8220(b), informs applicants that they must submit a request for a new TEA certification by following the procedures described in California Code of Regulations Section 8210 if an ongoing project requires a continuing TEA certification.

b. Anticipated benefits from this regulatory action:

By informing applicants that TEA certification letters will not be renewed automatically and how applicants must proceed to obtain a new TEA certification letter, GO-Biz is setting forth clear expectations and providing clarity to the process.

c. Underlying data:

No relevant data or empirical studies were available regarding this issue. However, GO-Biz relied on its experience with questions received from applicants prior to the implementation of these proposed regulations.

d. Consideration of alternatives:

Automatic renewals was considered and rejected because economic conditions can and do change. The purpose of designating a location as a TEA or Special TEA is to encourage economic investment in an area that is experiencing high unemployment. Automatic renewals could result in encouraging economic activity in an area that has low unemployment and is doing well many years after the initial TEA certification letter was issued. Additionally, GO-Biz considered having TEA certification letters remain valid for less than one year, but rejected this option as well. Applicants need some degree of certainty and a reasonable amount of time when making investment decisions. GO-Biz believes that having a TEA certification remain valid for less than one year would be insufficient for applicants to make use of the TEA certification, complete the EB-5 process, and make the necessary investments.

**(4) Section Affected: Chapter 13, Article 3, Section 8230 (a)-(d) – EB-5 Survey.**

a. Issue being addressed:

California Government Code section 6315.1(d)(2) requires that GO-Biz prepare an annual report to the Legislature concerning the number of clients served, location of investments, and number of direct and indirect jobs created by regional centers pursuant to the EB-5 Program. As a result, GO-Biz set forth in this proposed regulation what information it will need to collect from the regional centers. This proposed regulation informs the regional centers what information they will be asked to provide.

b. Anticipated benefits from this regulatory action:

This section informs regional centers as to what information GO-Biz will be asked to provide in order to facilitate the regional centers' collection and maintenance of the data GO-Biz will be seeking in order to complete its annual EB-5 survey. By providing the regional centers with clear expectations, the regional centers can collect and maintain this information efficiently and avoid any surprises when GO-Biz solicits the information to prepare its annual report to the Legislature.

c. Underlying data:

No relevant data or empirical studies were available regarding this issue. However, GO-Biz relied on its experience with having to collect information from regional centers prior to the implementation of these proposed regulations.

d. Consideration of alternatives:

No alternatives were considered because this requirement is set forth in the California Government Code.

**C. Anticipated Overarching Benefits of the Entire Proposed Regulatory Package:**

This regulatory package ensures that applicants understand the process to obtain a TEA certification letter, including what information and documents applicants will need to obtain and submit as part of the application and evaluation process. This regulatory package also informs regional centers what information GO-Biz will be seeking in order for GO-Biz to draft the annual report to the Legislature.

Through these proposed regulations, GO-Biz hopes to encourage greater investment and use of the EB-5 Program in the state. The proposed regulations improve the business climate within California by promoting both jobs and business development throughout the state.

**D. Reasonable alternatives to the regulation and GO-Biz's reasons for rejecting those alternatives**

No other alternatives were presented to or considered by GO-Biz, other than those discussed above.

## E. Reasonable Alternatives to the Proposed Regulatory Action that would Lessen any Adverse Impacts on Small Businesses

GO-Biz has not identified any alternative that would lessen any adverse impact on small businesses. To the contrary, these regulations will likely promote small business development by increasing direct foreign investment. The purpose of these regulations is to increase economic activity throughout the state by encouraging alien investors to make use of the EB-5 Program.

## F. Evidence Supporting Finding of no Significant Statewide Adverse Economic Impact Directly Affecting Business

The EB-5 Program is completely voluntary and therefore has no adverse economic impact on businesses, because no requirements or responsibilities are imposed on businesses by these regulations. These regulations merely facilitate the use of the EB-5 Program and encourage alien investors to make significant capital investments in California to create and preserve jobs and promote economic activity.

These regulations also make clear what information GO-Biz will ask for from the regional centers in order to assist regional centers with the collection and maintenance of information. Accordingly, GO-Biz expects that these regulations will simplify the regional centers' collection and maintenance of data by providing clarity as to the information GO-Biz will be seeking.

## G. Economic Impact Assessment/Analysis

Creation or Elimination of Jobs within the State of California

The regulations are designed to provide clarity to alien investors to facilitate their participation in the EB-5 Program, which involves significant capital investment in businesses and the creation or preservation of jobs within California.

As mentioned above, the EB-5 Program is completely voluntary and therefore has no adverse economic impact on businesses or job growth because no new requirements or responsibilities are imposed on businesses by these regulations. Further, there is no monetary fee associated with these regulations. Therefore, no jobs in California will be eliminated, but GO-Biz anticipates that many jobs will be created and preserved in California as a result of a clearer and more transparent EB-5 Program.

Creation of New or Elimination of Existing Businesses within the State of California

The regulations are designed to provide clarity to alien investors to facilitate their participation in the EB-5 Program, which involves significant capital investment in businesses and the creation or preservation of jobs within California.

As mentioned above, the EB-5 Program is completely voluntary and therefore has no adverse economic impact on businesses because no new requirements or responsibilities are imposed on businesses by these regulations. Further, there is no monetary fee associated with these regulations. Therefore, no businesses in California will be eliminated, but GO-Biz anticipates that many businesses will be created in California as a result of a clearer and more transparent EB-5 Program.

Expansion of Businesses or Elimination of Existing Businesses within the State of California

The regulations are designed to provide clarity to alien investors to facilitate their participation in the EB-5 Program, which involves significant capital investment in businesses and the creation or preservation of jobs within California.

As mentioned above, the EB-5 Program is completely voluntary and therefore has no adverse economic impact on businesses because no new requirements or responsibilities are imposed on businesses by these regulations. Further, there is no monetary fee associated with these regulations. Therefore, no businesses in California will be eliminated, but GO-Biz anticipates that many businesses will expand as a result of the capital investment made by alien investors participating in the EB-5 Program.

Benefits of the Regulations on Worker Safety and the State's Environment

The regulations provide a framework for obtaining a TEA designation in order to apply for an EB-5 visa. The regulations make clear the application process for prospective applicants interested in investing in California and provide guidance on how to request TEA certification.

GO-Biz has determined that the regulations do not provide direct benefits to the health of California residents or to worker safety or the state's environment.