April 1, 2013

VIA EMAIL - opefeedback@uscis.dhs.gov
U.S. Citizenship and Immigration Services ("USCIS")
Public Engagement and Customer Service Directorate

RE: Comments on USCIS draft memorandum, "EB-5 Adjudications Policy"

Dear USCIS Office of Public Engagement:

The Association to **I**nvest **I**n the **USA** (IIUSA), the national trade association for EB-5 Regional Centers ("Regional Centers") and other Program stakeholders, appreciates this opportunity to comment on the draft EB-5 adjudications policy memorandum (the "Memo"). Founded in 2005, IIUSA is the national membership-based 501(c)(6) not-for-profit industry trade association for the EB-5 Regional Center Program (the "Program") industry. IIUSA's primary mission is to make the Program a permanent and successful part of 21st century U.S. economic development policy. To date, IIUSA represents 83 Regional Center members, who account for approximately 95% of all the EB-5 capital formation (billions of dollars), resulting U.S. job creation (tens of thousands of jobs), and tax revenue (over a billion dollars in aggregate from the federal/state/local levels).[1]

First and foremost, IIUSA urges USCIS to implement the Memo after due analysis of public comments and appropriate revisions. The Memo, now published for public comment for the third time, has been in draft form since November of 2011 – over 15 months ago. The consolidation of EB-5 adjudications policy into one comprehensive memorandum is important step forward in achieving the goal of maximizing the Program's economic impact through efficient adjudications and clarity in policy.

IIUSA recommends USCIS make the following revisions prior to finalizing and implementing the Memo:

[1] These statistics are based on a comprehensive analysis of FY2011 I-924A's and economic modeling used in the USCIS/ICF International EB-5 Program evaluation obtained by IIUSA via Freedom of Information Act.

Policy Issues

(1) Inclusion of Other Administrative Policies Currently Missing from of Congress – While the Memo is successful in consolidating EB-5 statutes, regulations and previous policy guidance into one document in an unprecedented manner, there are a number of missing policies that must be included, as follows:

- Crediting construction jobs and/or the resulting indirect/induced economic impact to EB-5 investors, as articulated in the January 16, 2009 letter from USCIS to the Honorable Senator John Cornyn's office, stating: *"At the Form I-526, 'Immigrant Petition by Alien Entrepreneur' comprehensive business plan stage, construction jobs predicted to be of at least 2 years duration as 'continuous, full time employment,' rather than intermittent, seasonal employment, may be credited. At the Form 1-829, 'Petition by Entrepreneur to Remove Conditions,' stage, those construction jobs that have been 'continuous, permanent employment,' rather than intermittent, seasonal employment, having lasted a full 2 years and that continue in existence through adjudication of the I-829 petition, may be counted in the job creation total… Indirect and induced jobs created as a result of construction jobs whether counted or not may be included in the job count. Even when the construction jobs may not be counted towards the job creation requirement, they do have indirect and induced impacts that are eligible to be included in the final job count because they are 'continuous, permanent employment.'"*

- Crediting indirect jobs created outside of a Regional Center's boundaries, as articulated in the December 3, 2010 letter from USCIS to the Honorable Senator Patrick Leahy, stating: *"USCIS interprets the law to require that a regional center focus its EB-5 capital investment activities on a single, contiguous area within the defined geographic jurisdiction requested by the regional center. Nevertheless, we agree that the law does not further mandate that all indirect job creation attributable to a regional center take place within that jurisdiction."*

- "Tenant Occupancy" economic model guidance, as stated in USCIS operational guidance issued February 17, 2012, May 8, 2012, and December 20, 2012. The main point of all these guidance memoranda is that "tenant occupancy" is a *reasonable methodology* for the purposes of the EB-5 Program and that USCIS engages in a case-by-case analysis on when the model is appropriately applied based on the totality of the circumstances.

- "Visitors Spending" economic input, as stated in the USCIS published Q&A from July 5, 2012 that resulted from a public engagement with USCIS economists in June 2012, is a valid econometric input, so long as *"the applicant of petitioner can show by a preponderance of the evidence that the development of the EB-5 project or resort will result in an increase in visitor arrivals or spending in the area"* and that USCIS engages in a case-by-case analysis on when the input is being appropriately utilized based on the totality of the circumstances.

- **Given the fact that the current iteration of the Memo does not mention any of the above referenced interpretations, IIUSA recommends that all of the above administrative interpretations be included to ensure that its guidance to adjudicators is truly comprehensive. Furthermore, IIUSA urges USCIS specifically state that the required evidentiary burden for the above policies is limited to that which a reasonable person would need to believe, based on a preponderance of the evidence, that the job creation articulated in the business plan and forecast in the economic analysis will be created.**

(2) Definition of Material Change – Changes in initial business plans are a part of private enterprise. Any business needs to be able to adapt and change to succeed. It is in the interest of the Program as a whole that there are clear guidelines on this issue so Regional Centers know when they have to submit an amendment. This kind of certainty is imperative to investors' confidence in the Program, which will always be the backbone of this, or any investment deal.

It is also the position of IIUSA that USCIS should be very reluctant to find a "material change" and should only do so when the job creating purposes of the program would be frustrated. Changes to business operations involving EB-5 petitions should not require any additional filings when they represent the normal vicissitudes of business in reaction to changing market conditions and do not fundamentally change the type of business being invested in and the fact that jobs will be created. Even when a material change may have occurred, USCIS should allow a Regional Center to file an exemplar petition for a previously approved project to give notice to USCIS of revisions to the business plan without requiring every investor to file a new individual petition and without causing children who turned 21 after the initial I-526 was filed to "age out." Investors should be allowed to file an I-829 petition with evidence of a filed or approved I-924 to revise a business plan for the affected investors, showing that the new plan is viable and is reasonably likely to create the requisite jobs within a reasonable time using "reasonable methodologies," as is appropriate under the language in the 1992 legislation creating the Program and the normal regulatory standard for I-829 approval.

- **Material change should be specifically and narrowly defined to only apply when changes in the business plan lower the total job creation projection below ten per investor or if the Regional Center plans to engage in activities outside of its existing approved economic industry sectors and/or geography.**

(3) Bridge Financing – The Memo does not address the issue of when "bridge financing" is appropriate in the EB-5 Program. The unfortunately unpredictable processing times that Regional Centers are experiencing makes the utilization of this type of financing a necessity – or else risk the failure of the project due to lack of funding.

- **USCIS should therefore specifically state that "bridge financing" can be an approvable use of EB-5 capital. It is already being used as such, and is a consistent topic of discussion at EB-5 engagements.**

(4) USCIS should not allow foreign ownership of Regional Centers – In October 2010, IIUSA submitted a memorandum requesting that USCIS bar foreign ownership of Regional Centers – similar to the rules in place for sponsoring agencies in the "J" visa context. A myriad of U.S. anti-fraud laws apply to the activities of Regional Centers. Effective compliance requires that the ownership and control be *resident* in the U.S. and subject to prosecution and meaningful penalties for any violations of *inter alia* securities and immigration laws.

- **IIUSA again urges USCIS to consider this policy question as part of its efforts to protect Program integrity. If USCIS requires another copy of said letter, IIUSA will provide it immediately.**

(5) North American Industry Classification System (NAICS) Codes – When USCIS first introduced NAICS codes to the EB-5 Program, it was supposedly for informational and reporting purposes only. Now, USCIS requires Regional Centers to use at least four-digit NAICS codes to be approved for a particular industry sector. This level of specificity severely limits Regional Centers' ability to engage in ongoing economic development in similar project types. For example, a Regional Center approved for one type of construction would have to submit an amendment just to engage in a subsequent projects involving construction of a different type – even though the minimal difference in economic activity.

- **IIUSA recommends that USCIS specifically state in the Memo that NAICS codes two digits and higher are specific enough to approve for a Regional Center's approved industry sectors. IIUSA further questions whether "verifiable detail" and "detailed statement" are consistent with the amended law concerning Regional Centers that requires only "general proposal" and "general predictions" for Regional Center proposals.**

(6) Authority of the Memo – The Memo does not specify which of the existing administrative memoranda will be superseded once it is implemented.

- **IIUSA recommends that USCIS specifically state which of the existing administrative memoranda will be rescinded after the Memo is implemented. If all previous EB-5 related memoranda will be rescinded, the Memo should state this clearly to avoid any confusion in the marketplace as to what is guiding USCIS adjudication of EB-5 related petitions.**

<u>Processing Issues</u>

(7) USCIS Utilization of Requests for Evidence ("RFEs") – The current utilization of RFEs by USCIS in EB-5 adjudications is inefficient, thereby frustrating the Program's ability to achieve maximized economic impact. It is common for USCIS to issue up to three RFEs on the same petition before issuing a decision on the petition/application – often lengthening the adjudication timeframe to the point where the business attempting to utilize EB-5 capital for the purposes of job creation is no longer able to do so. Investment opportunities are fluid in nature and require certainty and predictability to perform as intended.

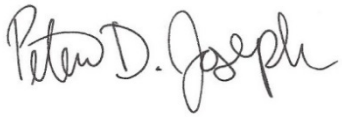
- **IIUSA recommends USCIS make all additional evidentiary requests to one RFE per case and urges USCIS to issue a single RFE when there is a question about the Regional Center business plan and/or economic model while holding adjudication of subsequent investor petitions in the same project until the issues have been resolved. Current USCIS practice is to issue identical RFEs to each and every investor in the project, duplicating efforts by all parties involved in responding and adjudicating the various responses.**

(8) Preapproval Process – The purpose of the preapproval process is for initial determination of EB-5 compliance. As it currently operates, those who are approved using this process receive a revised Regional Center designation letter that states the project's compliance, in theory. Then, once the first I-526 is submitted by an investor for that project, the business plan and/or economic analysis is often the subject of requests for evidence (RFEs), meaning that the adjudicator is re-evaluating these documents, even though the project has been pre-approved.

- **IIUSA recommends that USCIS issue an I-797 approval notice for I-924 applications for "actual" projects. This approval notice, along with evidence that the documentation has not been changed, can then be submitted with each I-526, eliminating the need for adjudicators to review that documentation again. This would allow this process to function in the streamlined manner that USCIS intended. As introduced in May 2011 by USCIS, "specialized intake teams" should be immediately implemented to allow the differentiation between minor and major changes to a Regional Center designation, putting amendments seeking "pre-approval" of a specific capital investment project that is ready for EB-5 capital deployment can be adjudicated more quickly. Lastly, the only reason USCIS should be able to challenge information that they have previously approved is if there is evidence of fraud or if there is evidence of material change (as defined above). The "legally deficient" concept has proven unreliable for those utilizing the Program for regional economic development because it is being applied too broadly in adjudications by USCIS.**

Thank you for your consideration of all of the above comments prior to implementing the Memo. IIUSA looks forward to continued partnership with USCIS in making this Program achieve maximum economic impact through efficiency, predictability, and integrity in the adjudications process. Our country is depending on the billions of dollars in investment capital and hundreds of thousands of jobs that will be created for American workers over the next several of years. Please contact me with any questions.

Sincerely,



Peter D. Joseph
Executive Director