May 29, 2013

VIA EMAIL

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
Washington, DC 20510

RE: Comments on EB-5 Provisions Included in MRW13335 Amendment to S. 744

Dear Mr. Chairman:

On behalf of the Association to Invest In the USA (IIUSA) and the EB-5 Regional Center Program (the "Program") industry that we represent, thank you for your thoughtful and continued leadership on EB-5 issues. Your tireless efforts have officially included permanent authorization of the Program in S. 744, the comprehensive immigration reform legislation currently pending in the Senate.

Our **89** EB-5 Regional Center members, operating in 35 states, make up approximately 95 percent of all capital raised through the Program. While we are encouraged and appreciative of the current iteration of the legislation, IIUSA has several substantive comments that are attached to this letter as an **Appendix.**

We believe our suggested changes will improve the Program's ability to achieve its intended economic impact of creating jobs for Americans without any cost to U.S. taxpayers.

Our attached comments are meant to support IIUSA's three point advocacy platform:

(1) **Permanent authorization for the program is the single most important step for the program to realize its full job creation potential.** The resulting certainty will provide both investors and domestic entrepreneurs the enhanced confidence needed to plan successful job-creating EB-5 projects.

(2) **Any augmentation of available visas to employment-based visa categories must also include the EB-5 Program.** IIUSA anticipates that the EB5 program will reach the 10,000

visa cap this or next year – absent Congressional action. A fully subscribed EB-5 Program with the changes you envision would create a minimum of 100,000 new American jobs annually.

(3) **Fixing processing times at USCIS is critical to the sustained vitality of the Program and must be addressed legislatively.** IIUSA estimates there is current backlog of over 7,000 un-adjudicated I-526 petitions pending at USCIS that represents a minimum of 70,000 jobs not created and $3.5 billion of foreign investor capital not invested in communities across the U.S. – even though over $11 million has been collected in filing fees on these backlogged investor applications. Regional Centers, related businesses, and other stakeholders require clear guidelines, predictability and consistent and timely application of EB-5 regulations and processes.

Thank you again for all of your efforts to improve and make this job creating Program more efficient and effective. We hope you find the attached comments helpful in revising the legislation as passed out of the Senate Judiciary Committee. Our industry is grateful for your leadership and look forward to working with you to on making the Program permanent and effective. Please contact me with any questions.

Sincerely,

Peter D. Joseph
Executive Director

CC: Senate Committee on the Judiciary

Appendix: IIUSA Comments on MRW13335

General Issue: RC vs. NCE

Regional Center, new commercial enterprise (NCE, typically the issuer of the securities), and job creating enterprise ("JCE") could be three separate entities. The legislation confusingly assumes that they are the same.

Page 7, line 17: "… money invested *through* the Regional Center" should be changed to "… money invested *in affiliation with* the Regional Center." Regional Centers are not necessarily involved in issuing securities or managing funds.

Industry Limitations on RCs

USCIS understandably seeks to track the industries in which jobs are created, including for purposes of reporting periodically to Congress. Thus, it makes sense for USCIS to require predictions of job creation to use North American Industry Classification System (NAICS) codes to identify the industries in which projects will create jobs. NAICS codes can range from two to six digits, with more digits representing a greater specificity in industry classification.

But USCIS has inappropriately turned a reporting requirement into a restrictive eligibility requirement. When a Regional Center applies for initial or amended designation, USCIS currently requires the economic analysis predicting indirect job creation from example projects to specify the affected industries down to the 4, 5, or 6-digit NAICS code, and then increasingly purports to limit filings for future projects under that Regional Center to those creating jobs in those limited NAICS codes. Thus, under USCIS' current construct, if a Regional Center identifies a project to construct a manufacturing plant, but is only approved for construction generally, not construction of manufacturing plant specifically, the Regional Center first must apply to USCIS and receive approval of an amendment to its Regional Center designation before investors may file I-526 petitions for that project. This exercise is unnecessary and counterproductive, frustrating a Regional Center's ability to foster job creation in new projects.

Regional Centers should be designated to conduct broad activity within their approved region. Without legislative mandate or authority, USCIS increasingly has limited Regional Centers to specific and extremely narrow industry sectors, down to the fourth digit of NAICS code, wastefully consuming adjudicative resources on superfluous issues. Regional Centers should regularly report the industries in which they create jobs, but USCIS should not artificially limit the kinds of projects they can sponsor to specific NAICS codes in which the Regional Center has previously projected job creation in real or hypothetical projects. Thus, in INA § 203(b)(5)(E)(ii) [page 2], "will" should be changed to "may" and at the end of (I) should be added "without limiting the scope of Regional Center activity to any specific industry or industries referenced in the proposal or otherwise."

Amendments to RC Designations

USCIS inappropriately has tended to stop adjudication of all filings, including those by investors, relating to a Regional Center that has a pending application to amend its designation. To prevent this, the following should be added to page 4 at the end of § 203(b)(5)(E):

"AMENDMENTS. -- The Secretary may require approved Regional Centers to give notice of significant changes to their organization and may approve or disapprove of such changes based on substantial evidence, but the filing of such a notice or amendment by a Regional Center shall not interrupt the Secretary's adjudication of any filings by or related to such Regional Center, including investor petitions under section 203(b)(5)."

Technical Fixes:

- Page 3, line 11: In Subsection (iii) on Regional Center "COMPLIANCE," subsections I and II should be collapsed into one provision. The list that is encompassed within I and II is one list (in keeping with the same list of Regional Center purposes in preceding sections at page 2 lines 12 through 17). The provision about counting indirect jobs created outside the Regional Center area (page 3 line 25 through page 4 line 4) should apply to the entire list, as it did in previous drafts that did not use this list. Collapsing I and II into one paragraph of subsection (iii) accomplishes that. Another option would be to move the concept about jobs created outside the Regional Center into subsection (iv) about "indirect job creation."
- Page 4, line 5: Technical correction: subsection (iv) on "indirect job creation" should come before Section (iii) on "COMPLIANCE." The current order gets the cart before the horse.

Project Pre-Approval and Deference

§ 203(b)(5)(F) (Page 4, line 13)

- Require that the Regional Center entity be the entity to file a request for project approval, on behalf of an affiliated NCE, rather than by the NCE itself. This will ensure that the NCE and its project in fact are affiliated with the Regional Center, as is implicitly required.
- Premium processing: Add to the option for premium processing Regional Center applications for pre-approval themselves (which currently comes as an "amendment" on Form I-924), not just investor petitions relating to investments in such projects. Making the EB-5 program useful for truly good projects requires expediting of both parts of the process. Allow Regional Center geographic expansion to be included in such applications. Language authorizing a fee for the pre-approval process is unnecessary, as USCIS is already mandated to charge a filing fee to cover costs in new processes under INA § 286 (8 USC § 1356). Thus, revise subsection (iv) at page 6 line 16 as follows:

  "The Secretary shall establish a premium processing option for Regional Center applications for business plan pre-approval and for petitions by alien investors into enterprises for such approved plans."

- Regional Centers, project developers, investors, and their families need to be able to rely on favorable adjudications of projects in making investment decisions and completing those projects. While USCIS has stated a policy to give "deference" to prior approvals, in practice USCIS adjudicators have tended to apply shifting eligibility principles to successive investor petitions in the same project, over-using a USCIS exception if the

earlier decision was "legally deficient." IIUSA suggests that the amendment's excellent language requiring deference to project pre-approvals be extended to the other contexts in which reliance is critical: I-526 petitions for a project with previous I-526 approvals, and I-829 petitions based on methodologies previously approved (in effect codifying the relevant portion of the decision in Chang v. United States, 327 F.3d911 (9th Cir. 2003)). Thus, we request that the subsection concerning the effect of pre-approval, at page 6, line 1, be amended as follows:

> "The preapproval of an application this subparagraph, or the approval of an investor's petition under Section 204(a)(1)(H), shall be binding for purposes of the adjudication of subsequent petitions filed under subsection 203(b)(5)(E) by immigrants investing in the same commercial enterprise concerning the same commercial activity, and of petitions filed under Section 216A, unless the Secretary determines that there is evidence of fraud, misrepresentation, criminal misuse, a threat to national security, or other evidence affecting program eligibility that was not disclosed by the petitioner during the preapproval process."

Processing Times

As currently written, the legislation would do much to improve processing times for EB-5 related petitions. However, given the need for the prompt infusion of EB-5 capital into job-creating projects, IIUSA believes that a specific time deadline for USCIS would help in implementing processes that will bring Regional Center-related petition/application processing in line with commercial realities. We suggest adding the following language after page 4, line 12, as INA § 203(b)(5)(E)(v) (the amendment's general section on the Regional Center Program):

> "The Secretary of Homeland Security shall adjudicate filings relating to Regional Centers and their investors (including for designation or amendment of a Regional Center, for project pre-approval, for investor eligibility, and for removal of conditions from residence) not later than 60 days after the date on which the filing is submitted. In the event that additional information or documentation is requested by the Secretary during such 60-day period, the Secretary shall adjudicate the petition not later than 30 days after the date on which such information or documentation is received. The filing party shall be notified in writing within 30 days of the date of filing if the filing does not meet the standards for approval. If the filing does not meet such standards, the notice shall include the reasons therefore and the Secretary shall provide an opportunity for the prompt resubmission of a modified filing."

Inadmissibility and Deportability Issues Confused with EB-5 Eligibility

References to fraud, misrepresentation, criminal misuse, and threat to national security (pages 6/7 regarding project approval, general criteria, page 16 re "denial or revocation," page 23 regarding terminating residence):

- Provisions related to misrepresentation, crimes, and national security give too much discretion to Secretary and subject the Secretary to possible suspicions of political influence under guise of broad discretion, while inappropriately injecting into the petition adjudication process the existing inadmissibility and deportability grounds at INA §§ 212 and 237 and related procedures, where such considerations more appropriately are brought to bear. These provisions should be removed.

- I-526: If a petition involves misrepresentation, of course it should be denied, and no new law in that regard is needed. Otherwise, inadmissibility issues should not be injected prematurely into petition adjudication.
- I-829: If an investor has become deportable for such grounds, he is already subject to rescission of adjustment under existing INA § 245 or to removal under INA § 240. No new provisions are needed.
- The standards in current inadmissibility and removal grounds and procedures should be sufficient.

- Screening of Regional Center principals (subsection (H) at page 10 line 15) should include such considerations and is supported.

Annual Financial Statements and Sanctions

- Page 8, Lines 6-7: Delete "100 percent of" and "have been dedicated" to "were dedicated." This is consistent with the current regulations at 8 C.F.R. § 216.6(a)(4)(iii) requiring that the investor show that he has " in good faith, *substantially met* the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence." (emphasis added)
- Page 8, Lines 15-17: NCEs funding capital investment projects need to provide information, evidence, and attestation of accuracy to Regional Centers, and Regional Centers should be required only to collect such statements from NCEs and provide to USCIS with annual statement (with ability for the USCIS to request further evidence). Regional Centers should not be required to make Dodd-Frank type attestations of accuracy of records it does not control but only seeks to monitor the projects offered under their Regional Center designation.
- Page 8, Line 21: The Director should be authorized to require a Regional Center to amend or supplement annual filing not only if the filing "is deficient," but also "if the Director otherwise deems appropriate." The Director should not need to make adverse findings, giving rise to possible Regional Center sanctions, only to obtain more information about Regional Center activities.
- Page 9, line 14: There needs to be a warning and opportunity to cure the issue before sanctions are imposed.
- Page 9, line 20: USCIS authority should be limited to barring program participation, temporarily or permanently – not issuing fines. The SEC already has ample authority for civil enforcement actions for violation of securities laws. If a fine has to stay in, the maximum fine should be one percent of the capital invested. Five percent is too high. Extreme cases meriting heavy sanctions should result in other types of sanctions.

Bona Fides of RC persons

- Page 10 line 17 through page 11 line 2 should be amended to distill the language as follows: "No person shall be permitted by any Regional Center to be in a position of substantive ownership or authority for the operations or management of the Regional Center if the Secretary …" The implicit definition of persons "involved with the Regional Center" is too broad, particularly as it relates to marketers and promoters. We believe the legislation mixes up Regional Centers, which generally promote only the region and not particular projects, with NCEs, which issue securities under complex securities rules. The real concerns about promoters relate to securities matters (see below for more on this issue).
- The absolute prohibition on Regional Center participation by persons with past civil violations seems too rigid. The Secretary should be authorized to allow exceptions as a matter of discretion, such as in the case of an ancient violation of an essentially technical securities law rule, including under foreign legal systems. Therefore, at page 11, line 13, the following should be added: ", unless the Secretary determines in the exercise of discretion that the past violation should not prevent Regional Center participation."

Securities Laws

Page 14:

- This section on securities laws should be removed as unnecessary for the following reasons:
  - All industry participants are already subject to securities laws.
  - It is based on incorrect assumption that all Regional Centers are involved directly in issuing securities. Consider the Vermont Regional Center, run by the state government. It offers no securities, but rather provides immigration-based analysis, monitoring and reporting services relating to an NCE that issues securities. A Regional Center is not necessarily involved in securities offerings and should not be forced to vouch for participating enterprises' compliance with very complex laws subject to varying interpretations.
  - Under other provisions of the amendment, a Regional Center already must dis-associate with anyone identified as having been found liable for securities violations or be terminated
  - SEC already has what it needs to enforce. USCIS already can and does share with SEC any information filed by Regional Centers and investors, so that SEC can investigate and enforce as it sees fit. A recent EB-5 related enforcement action highlighted the efficacy and efficiency of inter-agency collaboration that respects separate authority. Investors received return of frozen funds in approximately 2.5 months.
- If this section must remain, it should be changed:
  - Regional Centers should be required only to collect attestations from those responsible for the offering. Regional Centers should not be required to attest to securities compliance by others. Without this change, municipalities and other

economic development organizations will be disinclined to use the Regional Center economic development tool.

Department of Commerce (page 17, § 4804(c))

While the Department of Commerce might have some expertise on job creation issues, the formal involvement of the Department of Commerce is too likely to create turf issues and delay adjudications that already tend to be far too long. We urge that all references to the Department of Commerce be removed. USCIS can and should develop the expertise to evaluate business projects and job creation for EB-5 adjudication.

Alternatively, if the Department of Commerce must be included:

- While injecting any specialized expertise of the Department of Commerce is interesting, coordination among departments in individual adjudications threatens even more delays. Therefore, Congress needs to specify that adjudications must not exceed 60 days. Time is of the essence in EB-5 petitions to make deals go forward in their job creation.
- Language in page 18 lines 1-5, while good to confirm that DHS consultation with the Department of Commerce as to already approved Regional Centers is voluntary, incorrectly implies that Secretary's coordination with the Department of Commerce in general is not voluntary (in conflict with page 17 line 12, "upon the request of the Secretary"). The "Savings Provision" should be changed to a more general clarification that any consultation with the Department of Commerce is voluntary and must not impede adjudications within 60 days of filing.

References to Financial Statement in I-829 and I-526

- Page 22, lines 20-23 The requirement for each investor's I-829 filings should allow submission of *reference* to the relevant portion of the RC's most recently filed financial statement (which contains evidence of use of EB-5 funds and job creation) instead of requiring submission of the *actual* financial statement (which should already be on file and may be quite voluminous). Similarly, page 5 line 23 through page 6 line 12 should allow I-526 filing to include reference to approved project without submitting the entire voluminous record about it. Currently USCIS feels bound to have each investor's file contain entire relevant record, and Congress should support efficient use of technology to avoid duplicative filings by multiple investors in a project. USCIS is already pursuing an electronic solution under current law, but any amendments should not accidentally cause USCIS to feel bound to past practices.

Definition and Requirements of Job Creation

- Page 26, lines 13-19: The recognition of "full time equivalents," in expansion of current law giving credit only for discrete positions, seems to be conflated with parenthetical reference to “intermittent or seasonal employment opportunities and construction jobs….” If Congress wishes to make clarifications about the durational component of jobs that may be counted (whether shown by discrete positions or by full time equivalents), it should more specifically do so.
- Page 22 line 17 relieves Regional Center investors from showing even indirect job creation in I-829 to remove conditions from residence after two years. While in one sense

attractive to business developers and investors, this provision could end up eroding the political basis for the EB-5 category. And while the Regional Center's required periodic financial statement includes reporting about job creation, it is not clear what responsibility a Regional Center could or should have to ensure job creation in enterprises it does not control. The problem to be addressed is USCIS' current application of rigid policy, requiring even Regional Center-affiliated investors to show at each stage that the jobs will be or have been created by the end of conditional residence, which tends to limit EB-5 to projects that can be completed and stabilized within the period of the investors' conditional residence. This policy tends to rule out larger projects that are truly transformational for a community. Thus, we recommend instead that at page 4, line 12 the following language be added to the end of proposed INA § 203(b)(5)(E)(iv): "The Secretary shall not limit immigrants under this subsection to job creation that will be accomplished within the period of conditional residence."

- We also recommend that, in order to add certainty for economic developers and investors, reference to particular economic methodologies already in use by Regional Centers (and accepted by USCIS) be included, by adding at page 3, line 16, after "reasonable methodologies" the following: "… (including but not limited to RIMS II, IMPLAN, and REDYN) … ."

Age-out protections

- Page 21, lines 6-15: this language is actually less clear and comprehensive than the existing age-out protection in the Child Status Protection Act of 2002 and should be deleted. A child who turns 21 during conditional residence (based on marriage under INA § 216 or investment under INA § 216A) does not age out of residence under current law. Nevertheless, if Congress feels a clarification is needed for § 216A, it should make a similar clarification for § 216.

- Page 29, line 10: This protects children from "age outs" if the child turns 21 in the event of denials/termination after processing to permanent residence and the investor cures the problem by making another qualifying investment. However, this protection should be extended to children of investors whose initial I-526 is denied (for instance if the project fails before the investor immigrates, or if USCIS finds the arrangements in the organizing documents initial petition "deficient" and unable to be cured, under Matter of Izummi, and who file another qualifying I-526.

Targeted Employment Area (TEA)

IIUSA supports the existing TEA determination regime (both as to rural and high unemployement), which has billions of dollars of investment already in process, and planned. Maintaining the current regime and adding certainty to it is the best option for all stakeholders. IIUSA requests that S. 744 remove all changes to the current provisions relating to high unemployment TEAs, and instead codify the current regulation at 8 C.F.R. § 204.6(i) about state TEA designations:

"*State designation of a high unemployment area*. The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more

within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526. Before any such designation is made, an official of the state must notify the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area."

Please see also discussion of effective dates below.

Regional Center Terminations

- Regional Center termination in the "unreviewable discretion" of the Secretary (several places in the amendment) is not appropriate. Some judicial review must be available.
- Regulations under existing law allow USCIS to terminate Regional Center designations broadly, and the amendment provides several specific situations when Regional Center designation must be terminated. Under current regulations at 8 C.F.R. § 204.6(m)(9), Regional Center termination seems to destroy the immigration benefits for all investors associated with the Regional Center and their families if their I-829 has not already been approved. The regulation states:

  (9) Effect of termination of approval of Regional Center to participate in the Immigrant Investor Pilot Program. Upon termination of approval of a Regional Center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the Regional Center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act.

This result is unfair to investors, who in almost all cases would have had nothing to do with the reason for the Regional Center termination. Congress should provide protection for such investors by allowing them to contract with some other party (including another approved Regional Center in any area) to fulfill the responsibilities of a Regional Center in relation to their investment project until their I-829 approval.

Concurrent Filing

- IIUSA supports the amendment's implementation of I-526 and visa application concurrent filing.

Effective Dates

- Any new definitions concerning TEA and job creation could have a negative and devastating effect on particular investment projects. The effective date provision at page 29 line 1 sensibly withholds those changes from I-526 petitions filed by investors within

the first year after enactment. But the new definitions and the five year TEA validity provision might have advantageous effect to other investment projects, especially new ones, and their developers should be able to organize, promote, and subscribe them with full and immediate reliance on the new definitions upon enactment. In addition, projects will need to subscribe investors over a period of time that spans both the first year after enactment and after that point, and success of the project will require that the same standards apply to all investors in the project. This problem could be solved by allowing an investor petitioning within the first year of enactment to choose which standards would apply. Thus, we propose that the effective date provision at page 29, line 1 be re-written as follows:

> (2) EFFECTIVE DATE.--The amendments made by this section concerning Targeted Employment Areas shall apply to any application for a visa under section 204(a)(1)(H) of the Immigration and Nationality Act that is filed on or after the date that is one year after the date of enactment of this Act, unless the investor requests in his petition that they take immediate effect."

- In addition, to protect investors who already relied on the prior definitions as they later file I-829 petitions to remove conditions from residence, the effective date provision should add, "The Secretary shall not use any provision of paragraph (1) to deny any petition under section 216A for any investor (or family member) who filed a petition under section 203(b)(5) before the date of enactment of this Act."

Foreign Ownership of Regional Centers

- In October 2010, IIUSA submitted a letter (with attachments) to USCIS advocating a ban on foreign ownership of Regional Centers. The 48 page brief that IIUSA submitted, which your office has received in the past, is readily available for your reading – if necessary. The requirement that a visa sponsoring organization be domestically owned is paralleled in the J visa program with this comparison utilized for the entirety of the IIUSA brief. 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 United States and subject to prosecution and meaningful penalties for any violations of *inter alia* securities and immigration laws.