VIA EMAIL

May 16, 2017

Honorable Charles Grassley
Chairman
United States Senate Committee on the Judiciary

Honorable Patrick Leahy
Ranking Member
United States Senate Committee on Appropriations

RE: Re-Authorization & Reform the EB-5 Regional Center Program is Essential to the U.S. Economy

Dear Chairman Grassley and Ranking Member Leahy:

On behalf of Invest In the USA (IIUSA), we respectfully submit this letter of support for bipartisan, bicameral efforts to achieve long term re-authorization of the EB-5 Regional Center Program (the "Program") and in particular for providing us with new draft EB-5 legislation from your offices. IIUSA supports all congressional and industry organizations that are working toward the common goal of multi-year re-authorization and reform legislation, even when we may differ on some issues, and we believe your proactive steps have significantly increased the likelihood of reaching a long-term reform and reauthorization of the EB-5 program.

IIUSA is the national non-profit trade association for the EB-5 Regional Center industry, which is a vital source of tens of billions of dollars of investment capital that created hundreds of thousands of jobs since the financial crisis in 2008 – all at no cost to the taxpayer. Our Regional Center members are engines for economic growth in the United States and are responsible for the vast majority of EB-5 job-creation and capital investment nationwide. IIUSA is a diverse organization with over 260 Regional Center and 170 associate members, collectively representing large and small projects, urban and rural economic development, and industry sectors ranging from real estate, manufacturing and energy to infrastructure, education, hospitality and more.

We greatly appreciate your leadership in efforts to find a legislative solution to EB-5 policy issues. IIUSA's policy platform aligns with your draft legislation on multiple key issues. Specifically, IIUSA shares your interest in ensuring that reforms included in re-authorization of the Program both improve its integrity and support its growing economic contribution to the United States. To continue your efforts and the process to find an appropriate legislative solution, this letter does not describe the many areas where IIUSA's policies are aligned with your draft bill, but rather this letter contains concepts which IIUSA respectfully requests be considered.

A. Maximizing Capacity for Economic Impact with Enhanced Visa Capacity

IIUSA respectfully requests that the final language include an increase in the EB-5 Program's visa capacity. For the EB-5 Program to provide the greatest job creation and capital accumulation benefit to the United States, IIUSA requests that the number of visas be increased. To do this, and in the spirit of the original Congressional intent, IIUSA suggests that only principal investors be counted towards the visa cap and that the investor's spouse and minor children ("derivatives") should not be counted. Not counting derivatives would allow for more capital investment and job creation through the Program at a time when the annual allocation of 10,000 visas is being used up.

Also, EB-5 is backlogged for over 80% of applicants, who face a multiyear wait to receive a visa after USCIS approves the investor's I-526 petition. IIUSA suggests that the existing backlog of over 23,000 investors waiting for a visa be alleviated representing over $11.5 billion in foreign direct investment that is pending adjudication.

B. Raising the Minimum Investment Amount; Indexing to Inflation

IIUSA supports raising the Minimum Investment Amount and the TEA investment amount, but believes that staggering the implementation of the increases would enable the market to better adjust to the increases. In addition, IIUSA supports indexing the minimum investment amounts to inflation on a regular schedule to provide certainty to the marketplace regarding when minimum investment amounts will be adjusted. Accordingly, IIUSA requests that the provisions for adjustment of investment amounts outside the regular three-year schedule proposed in the draft be deleted.

C. Demonstrating Required Job Creation

1. Direct jobs make up at least 10% of EB-5 project jobs eligible for investor credit

IIUSA commends the drafters for providing that jobs, including "direct jobs," may continue to be evidenced by proper use of generally accepted econometric models. A model-derived direct job means that a real construction worker, a real hotel bellman, or real cleaning staff will actually be employed by the project, typically evidenced by construction expenditures or operating revenues. Use of econometric models should not give anyone the false impression that EB-5 does not lead to the creation of real jobs.

IIUSA, however, is concerned by the provision that USCIS can request additional evidence of the creation of direct jobs that are evidenced by such models. This is a very broad concept, and could be interpreted to enable USCIS to request I-9, W-2 or other evidence which a Regional Center would not have and could not obtain from a non-affiliated JCE. Furthermore, obtaining or providing this information to USCIS might violate federal or state laws, rules, regulations or policies (e.g., the Privacy Act, various civil service laws, and related regulations), conflict with a union contract or applicable private agreement, or encounter some other impediment that is impossible to foresee.

Therefore, IIUSA requests that this provision empowering the Director to require other evidence of direct jobs creation be eliminated, or that it be narrowed to specifically define the evidence which the Director can require to demonstrate that the econometric model was properly utilized with respect to calculating direct job creation.

D. Demonstrating Required Job Creation

1. Criteria for Urban TEAs.

IIUSA applauds the drafters for addressing the problem of gerrymandering.

As previously communicated, IIUSA's policy platform supports the definition of an urban TEA as proposed in the Notice of Proposed Rulemaking ("NPRM") published in the Federal Registrar on January 13, 2017 by the U.S. Department of Homeland Security ("DHS"). In the NPRM, DHS proposed that an urban TEA consist of the census tract in which the project is principally operating, together with any or all adjacent tracts, if that geography has an average unemployment rate which is at least 150% of the U.S. national average. The DHS definition, like that in your draft bill, eliminates gerrymandering.

IIUSA had previously supported the standard in the draft bill, which defines a TEA as a single census tract, or tracts if principally operating in more than one tract, each of which meets 2 of 3 of the criteria for "severe distress" set forth in the rules governing the New Markets Tax Credit ("NMTC") program.

2. Manufacturing and Infrastructure Projects

IIUSA supports including infrastructure and manufacturing projects as being eligible for the lower investment amounts. On a practical note, infrastructure projects should include those in which a government entity contracts with a private entity to undertake a public works project. The current language restricts EB-5 capital to the government entity, which IIUSA believes is often impossible as a practical matter given modern public sector procurement practices.

3. USCIS Determination of Urban and Rural TEAs

IIUSA understands and supports the concept of removing the states (and sometimes other local jurisdictions) from the TEA designation process. However, centralizing such determinations at USCIS raises the troublesome issue of timeliness. Knowing whether a project is in a TEA is often fundamental to all other components of the EB-5 process. Hence, determining whether a project is in a TEA must be made quickly and early in the process. USCIS, despite ongoing initiatives to expand adjudication capacity and significant progress in some areas, is generally not prompt; adjudication times are long and getting consistently longer, and USCIS case load is increasingly heavy. IIUSA therefore urges USCIS to adopt the same approach used by the Treasury Department to administer the NMTC program. In that context, Treasury publishes on the internet and regularly updates a national map so that anyone can determine whether a particular census tract is NMTC-eligible in a matter of seconds. Adopting this approach would eliminate the cost and time associated with manual TEA adjudications, while at the same time providing Regional Centers and the general public with transparency and certainty with respect to which areas qualify and which do not.

4. Priority Urban Investment Area (PUIA) Determination

IIUSA believes Congress should provide a transparent structure to determine PUIAs which requires neither USCIS nor State designation, and is consistent nationwide. This can be accomplished by ensuring three

fundamental considerations are addressed: definition of eligible geography that can qualify, consistent and uniform data source, and a publicly accessible online mapping webtool.

First, the draft bill should establish the acceptable PUIA geography – either a single census tract or the standard set forth in the NPRM which allows for aggregation of tracts that are contiguous and adjacent to the tract that the project is located. Second, to ensure consistency and transparency, the bill needs to specify the data source by which TEA qualification criteria (e.g., the unemployment rate) is determined. IIUSA recommends the five-year American Community Survey ("ACS") averages. Determining whether a given project's location meets the unemployment threshold (or other metrics) established in the five-year ACS data is simple and straightforward, requiring no validation by a State or adjudication by USCIS. Rather USCIS would simply confirm that a project is located in a PUIA. Finally, IIUSA urges that legislation require the development of an online map of census tracts which meet the requirements of a PUIA so that anyone can easily determine if a project is located in a PUIA. IIUSA has proudly built multiple interactive maps to this effect, analyzing various TEA reform proposals including what is proposed in the NPRM and in various legislative proposals, demonstrating that these tools are not only possible to develop but actually are essential to understanding whether the program is succeeding in its policy objectives.[1]

5. Strict Timeline for USCIS Determination of Infrastructure and Manufacturing Projects

IIUSA believes that Congress should set a specific timeline, of not more than 30 days, within which USCIS must make these determinations. Determining whether a project meets the standards of an infrastructure or manufacturing project should be straightforward. Unlike the adjudication of an I-526 petition, which may have fraud or national security concerns, the determination whether a project is a manufacturing or infrastructure project does not have these issues which can rightly delay adjudication of an I-526 petition. The Agency should be allowed a specific limited timeframe to make these determinations and should report the statistics of meeting the timeline to Congress.

To speed the determination, IIUSA would support the use of premium processing in the adjudication of the TEA, infrastructure projects and manufacturing projects, and the statutory requirement that there be regulations to implement premium processing.

E. Fund Administration

IIUSA supports the concept of fund administration, especially when the Regional Center, NCE and JCE are under common control. IIUSA supports exempting any Regional Center, NCE or JCE from the fund administration requirement if such entity (1) is associated with a broker dealer or investment adviser registered with the SEC or any state, (2) is audited annually by an independent, licensed certified public accountant, with the results of each such audit subject to the record retention requirements in the bill and therefore available to the Secretary upon request or (3) meets another procedure established by USCIS. Regulated financial institutions are already subject to detailed, stringent rules regarding custody of investor funds, recordkeeping, and the like. Therefore, the exemption for registered, audited financial institutions avoids duplicative regulation

[1] See: https://iiusa.org/eb-5-tea-policy-proposals-analytic-mapping-tool-on-contiguous-adjacent-tea/ and https://iiusa.org/eb-5-tea-policy-proposals-analytic-mapping-tool/.

of these entities, while still accomplishing Congress' reasonable goal of imposing fund administration requirements on entities that are not currently subject to any such requirements at all.

F. Regional Center Oversight & Compliance (Section 2)

1. Bona fides of Regional Center principals and other associated persons

IIUSA strongly supports requiring background checks and reporting on regional center principals and the principals of any entity affiliated with the Regional Center, including any New Commercial Enterprise ("NCE") and affiliated Job Creating Entity (any job creating entity, a "JCE," and any affiliated job creating entity, an "AJCE"). These entities are all directly responsible for procuring and managing EB-5 capital, and it is appropriate to apply the bona fides requirements to their personnel.

However, IIUSA opposes application of these requirements to third-party, independent JCEs. As a policy matter, unaffiliated JCEs are third parties over which Regional Centers and NCEs that operate as capital providers have no control.[2] To understand why this distinction is crucial, consider this common scenario: an IIUSA member Regional Center plans to raise EB-5 capital via an NCE and lend it to or invest it in a project sponsored by a third-party JCE. In this circumstance, which applies to a significant proportion of the entire EB-5 capital market, the simple truth is that the IIUSA member does not have, and cannot reasonably be expected to negotiate, the ability to direct the independent JCE's hiring practices over the entire life of the EB-5 investment, which is generally anywhere from five to eight years, or longer. This is especially true when the independent JCE is a large and/or publicly traded company, and the same prescriptions could apply to a person or entity which is distant from the actual EB-5 investment project. In other words, this provision would subject Regional Centers using the capital-provider (lender) model described in the foregoing example (as distinguished from the vertically integrated model, which focuses on affiliated JCE's) to materially higher risk of noncompliance, through no fault of their own. This would likely result in a significant reduction of the use of the capital-provider (lender) model, which would cut against your desire, and that of IIUSA, to encourage program participation by small businesses and those located in underserved markets. To avoid that outcome, IIUSA recommends that these requirements be limited to Regional Centers, NCEs and affiliated JCE's.

2. Annual reporting and certification of compliance with EB-5 requirements and securities laws via expanded Form I-924A

IIUSA supports robust enforcement of U.S. securities laws and has encouraged inter-agency collaboration between USCIS and Securities and Exchange Commission ("SEC") for years. The law enforcement actions in the EB-5 context, whether civil or criminal, have demonstrated that each federal agency involved has a specific subject matter expertise that defines its roles in protecting the integrity of EB-5 by enforcing the existing laws to protect the public interest. As a general matter, anyone deemed to be selling securities is subject to U.S. securities law and the SEC should be in charge of enforcing such laws, not the private sector and not USCIS. Perhaps the clarification here is that the Secretary meant that issuers of securities in the context of the EB-5 Program should be prepared to make such certifications before the appropriate authorities, such as state and

[2] IIUSA members report that transactions under the capital-provider (lender) model almost by definition do not involve affiliated JCE's, but to the extent this did occur, the same analysis would apply to AJCEs.

federal securities regulators like the SEC. Accordingly, IIUSA does not support requiring certification of securities law compliance by Regional Centers about entities and individuals that it has no control over. Furthermore, USCIS' role must continue to be limited to immigration matters while continuing its important collaborative work with the SEC and other relevant agencies to ensure strong enforcement of existing laws and regulations can continue in the EB-5 context.

IIUSA also suggests that "Certification of Irrevocable Commitment of Capital" be clarified to ensure that the NCE's foreclosure rights or other default provisions, or the repayment of a loan to an NCE, do not violate this requirement. All commercially reasonable loan agreements will have default provisions that give lenders rights, including required repayment, if the borrower fails to meet its obligations. Also, with lengthy retrogression times, it is possible that existing, pre-negotiated loan agreements, may result in the repayment of the NCE before an Investor's I-829 petition is approved. It is important that any provisions requiring "irrevocable commitment of capital" be commercially normal in loan agreements, and EB-5 program requirements must be conducive to commercial standards to be a useful tool for economic development and job creation.

3. Regional Center terminations, sanctions, and amendment requirements and "unreviewable discretion" to deny or terminate

IIUSA agrees that enhanced statutory authority for USCIS to sanction Regional Centers is an important enhancement to program integrity. However, the draft bill introduces the concepts of automatic termination or sanctions (without providing any discretion to the Secretary) and "unreviewable discretion" in a broad set of potential circumstances. The financial and immigration repercussions associated with terminating or sanctioning a Regional Center, NCE or JCE, are potentially massive. Therefore, IIUSA believes the bill should clearly define the applicable rules and include robust and clear due-process measures, such as codifying the burden of proof as "preponderance of the evidence," the right of access to the facts and documentation underlying any allegations (with appropriate provisions to protect the integrity of any national security or law enforcement investigation, if applicable), the right to cross-examine witnesses, and – especially – judicial review. There is no reason to vest the Secretary with such an enormous power without any mechanism to correct an honest error or, conceivably, intentional abuse by executive branch personnel.

4. Registration of foreign promoters with USCIS

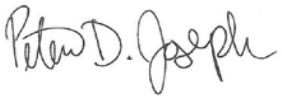
IIUSA supports the provisions in the draft bill limiting registration to identifying information and confirmation of the existence of a written agreement with each promoter by which such promoter agrees to be bound by the rules and standards prescribed by the Secretary. This limited filing requirement is appropriate because the bill also includes several enhancements to USCIS' existing authority to investigate and sanction Regional Centers, including site visits. IIUSA believes it is appropriate for the Secretary to impose rules and standards in areas where the Secretary's expertise is relevant, such as "guidelines for representing the visa process to foreign investors." However, IIUSA opposes the provision directing the Secretary to issue guidelines describing permissible fee arrangements. The bill clearly provides for robust disclosure of any such fees; as long as such fees are disclosed, it is far outside the Secretary's expertise to opine on what fee structures are or are not appropriate. The market will dictate this.

Finally, IIUSA strongly urges that the list of registered promoters be kept confidential. Foreign distribution networks are the lifeblood of IIUSA Regional Center members; the names and contact information of their promoters are among IIUSA members' most closely guarded trade secrets. Publication of such a list would be grossly unfair, providing competitors and new market entrants an extremely valuable competitive advantage they did nothing to create. Further, publication is unnecessary, because USCIS will have access to the list for investigative purposes. IIUSA recognizes and supports the principle that transparency should be encouraged, but in this particular case, the harm caused by public dissemination of an entire industry's trade secrets clearly merits an exception to the general principle.

Conclusion

The policy recommendations herein are not meant to be an exhaustive review of the complex draft bill. IIUSA looks forward to the opportunity to discuss the contents of this letter, other ideas for policy options to enhance program integrity and effectiveness, and technical fixes to the legislative language. Thank you again for your support of the EB-5 Regional Center Program. I welcome any questions and/or comments and would welcome the opportunity to discuss further in person anytime.

Sincerely,



Peter D. Joseph
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