February 11, 2020

Ms. Sarah M. Kendall
Chief, Immigrant Investor Program Office
U.S. Citizenship & Immigration Services
Washington, DC

RE: Questions for EB-5 Stakeholder Public Engagement on March 13, 2020

Dear Ms. Kendall:

Please accept the following questions for the EB-5 Stakeholder Public Engagement to be held on Friday, March 13, 2020. These questions are submitted on behalf of and with consultation of the Public Policy Committee, Board of Directors and the membership of Invest in the USA (IIUSA), the nonprofit trade association of the EB-5 Regional Center industry.

We thank you for this opportunity to provide questions and comments ahead of the engagement and for providing an outlet for our members and the EB-5 industry to interact with your office on important matters pertaining to the EB-5 Regional Center Program.

Questions and Comments:

- Can you explain the drastic increase in denial rates for I-526 applications in Q3 and Q4 of 2019? Practitioners and investors base their document preparation on past USCIS decisions and adjudications. The average approval rate for I-526 petitions over the past five years has been approximately 86%-88%. By comparison, Q3 and Q4 of fiscal year 2019 show approval rates of 58% and 65%, respectively, without any regulatory or legislative changes to the standards for documenting lawful sources of funds to account for that drastic change.
- Projects seeking EB-5 financing through the incentivized government programs rely on existing USCIS standards and published average approval rates to determine their exposure to risk by accepting EB-5 funding into their projects. Until recently, based on average approval rates, they could reasonably anticipate a 12% risk exposure. With the recent changes to adjudication rates, they are not exposed to an approximate 40% denial rate, which in turn renders funds from denied petitions potentially unusable for the projects. This can lead to potential default on hundreds of millions of dollars in construction loans issued in reliance on EB-5 funding. This drastic change in adjudication standards without notice of basis in any new regulations or law is extremely concerning and could be detrimental to the program as a whole. Please provide an

explanation for the increased denial rates and information about any new standards for I-526 adjudications that USCIS has not shared with stakeholders.

- Which Chart (Dates for Filing or Final Action Date) will USCIS rely on for the adjudication. It should be Chart B -- e.g., as India & Vietnam are current in Chart B, those approved but waiting for the priority date to become current in Chart A, can file I-485 and retrieve the EAD and Advance Parole.
- The newly announced switch to visa availability approach has a serious problem you might not have considered:

  Under the new regulation that took effect Nov. 21, only an **approved** I-526 gives rise to priority date retention. Priority date retention is meant to have the effect of tending to protect innocent investors from some of the effects of poorly or maliciously executed business plans by people operating NCEs/JCEs/RCs (and RC terminations). The people most at risk for losing their immigration benefit through such events are the people who must wait the longest for a visa number, because there is more time for bad things to happen, whereas people who can immigrate quickly are protected by USCIS policy from many ill effects (i.e., termination of RC or other material change does not affect them, and failure of the business after job creation does not lose their immigration benefit). But this new visa availability approach leaves them unapproved for much longer, and by the time USCIS gets around to adjudicating their petition, bad things might have happened leading USCIS to deny their I-526, losing their place in the visa queue that they would have been able to retain if adjudicated and approved earlier on.

  Proposed solution: If the original plan was approvable when filed but it has become infeasible as reflected by subsequent events (or lack of progress), then the I-526 petition should be first approved, in order to afford priority date retention, but then can be promptly revoked, which by the regulation does not prevent priority date retention unless the alien is somehow responsible or what led to revocation. Or USCIS should amend the regulation to create some type of "as filed" petition approval that can be used or priority date retention while still denying the petition based on facts as of the time of adjudication.

  Without this solution, USCIS is subject to class-based litigation to rectify this problem. The better solution is to staff up and get the petitions all adjudicated.
- When can the EB-5 community expect more guidance from USCIS on redeployment?
- What is the cause of the greatly increased time for petition adjudication and when can adjudication timing be expected to return to the previous much shorter times?
- Can you provide any specific causes for the increase in I-526 petition denial rates?
- Because more ROW visas will be taken up by non-Chinese investors for the next few years while USCIS gets through the backlog of unadjudicated I-526s, the speed in which the visa numbers move for Chinese investors who already have approved I-526s will slow down – this very unfair to people who invested in 2016/2017/2018 with approved I-526s.

- Many Chinese investors have started pulling out of the EB-5 line once the initial EB-5 investment matures rather than have their funds be redeployed and wait for their green cards. This trend will become more pronounced as Chinese investors who invested in 2017 that were hit with a much longer wait than expected reach their investment maturities in 2022 and 2024. And as a result of this new policy, the wait times will become even longer so even more Chinese investors will pull out of the immigration wait. If the goal of the new policy is to attract more foreign investment, USCIS needs to be aware that the harm of existing investors pulling their funds out of the US economy will outweigh the benefit of more non-backlogged country investors being motivated to do EB-5 investments.
- Many projects offer I-526 denial guaranties. With delayed adjudication of the backlogged country applicants, the U.S. guarantors will face more uncertainties and longer exposure to potential refund liabilities.
- How will USCIS decide who to adjudicate and who to put aside? Are they going to do an initial review of birth certificates before putting them in a box or are they just going to look at passports? We have a number of investors with Chinese passports that were born in other countries - New Zealand, Austria, Italy, etc. for different reasons. There are also many investors with Indian passports that were born in countries like the UAE.
- Will USCIS start reviewing petitions based on the movement of the visa bulletin? If so, how? Will there be a trigger point so that if the visa number is expected to become current in 6 months/one year, they will start reviewing? If so, how will USCIS deal with petitions that have still not been reviewed when a country's visa numbers move much more quickly than anticipated (which is what is happening with Indian EB-5 numbers currently)?
- This will have an impact on people who marry non-backlogged country spouses after the I-526 is filed. Will USCIS introduce a way for petitioners to alert USCIS that they are now eligible for cross-chargeability? (This also affects investors from backlogged countries who already have spouses from non-backlogged countries; but the backlogged country spouse became the main petitioner because of estate tax or gift tax reasons, for example.)
- Inventory management is not only about priority. There's also the question of resources and productivity.
    - In FY2018, IPO had about 50 adjudicators assigned to I-526, and completed over 15,000 I-526. That same resource commitment and volume could clear the entire current backlog of pending petitions in about a year. What staffing allocation and specific volume goals does IPO have for I-526 in FY2020? If I-526 resources, commitment, and volume are much lower in FY2020 than they were in FY2018, what is the explanation and justification?
    - The visa availability approach intends to "give priority to petitions where visas are immediately available, or soon available." Does it also, conversely, intend to delay I-526 for petitions where visas are not soon available – not only incidentally as a side effect of taking current countries first, but as a strategy to match I-526 wait time to visa wait time, providing a justification to reduce the volume of petitions that call for timely attention from IPO? If IPO clears the backlog of pending petitions from current countries, will it move resources away from I-526 adjudications, leaving I-526 from non-current countries to wait, pending visa availability?

- How will IPO will balance visa availability priority with other forms of priority? Consider the following hypothetical scenarios. The answers should not be case-specific and need not address these particular hypotheticals but should express the general guidelines that would clear up the specific ambiguities illustrated by practical example.

    - The I-526 petition has an approved expedite request, but it's for a Chinese petitioner with 2019 priority date that won't be current for over a decade. The backlog of pending petitions includes many petitions with no expedite requests, but current visa availability.
    - The petition is for a project that has Exemplar approval, but it's for a Chinese petitioner with 2019 priority date.
    - Two Vietnamese have identical 2019 priority dates. One invested in a project with Exemplar approval; the other invested in a project without Exemplar approval.
    - The petitioner is Chinese with a 2017 priority date that won't be current for at least a decade. He's part of a pooled investment in project for which IPO has already reviewed all the project documents, and denied all I-526 for other investors in the project.
    - The petitioner is Chinese with a 2017 priority date. He's part of a pooled investment in project for which IPO has already reviewed all the project documents, and approved all I-526 for other investors in the project.
    - The petitioner is Chinese with a 2017 priority date. The petition was issued a Request for Evidence prior to March 30, 2020, but a decision has not yet been made.
    - The petition is affected by a court order, but it's for a Chinese petitioner with 2019 priority date.

- The visa availability approach will result in petitioners in a pooled investment who file I-526 at the same time but come from different countries potentially reaching adjudication at very different times. How will this affect the policy that "The 2-year period is deemed to begin 6 months after adjudication of Form I-526. The business plan filed with the immigrant petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this 2-year period."
- Which metric will IPO use to select the "petitions where visas are immediately available, or soon available." Will the decision be based on public predictions by Charles Oppenheim for visa availability in the coming 12 months? If so, will USCIS look at his "best case scenario" or "worst case scenario" prediction for visa availability? Or will USCIS wait to react to the monthly visa bulletin? If so, how will it respond to monthly fluctuations and retrogression? Or does IPO plan to rely on private and undisclosed information about future visa availability? Or does IPO simply plan to shelve all I-526 from countries that are not current, regardless of petitioner priority date, in favor of adjudicating current-country petitions when the volume of current-country petitions is large? What assumptions does IPO make about I-526 touch time and visa application and I-485 processing times, when IPO decides how far in advance of visa availability an I-526 should be assigned for adjudication? How will IPO recognize the issue of cross-chargeability, and the fact that a visa may be available to the petitioner based on the spouse's nationality?

  To assist in answering these implementation questions, the following scenarios highlight areas of ambiguity. The answers need not discuss the specific hypothetical examples, but the answers

should express practical guidelines that resolve the practical ambiguities illustrated by the specific examples. (The answers would only be case-specific if IPO plans to implement the visa availability approach on an arbitrary case-by-case basis, lacking generally applicable principles.)

India

- **Circumstances**: India has been "current" in the Visa Bulletin Chart B Dates for Filing, which means that Department of State considers all Indian priority dates to be "within a timeframe justifying immediate action in the application process," and USCIS has been accepting I-485. Meanwhile, the Visa Bulletin Chart A Final Action Date for India is September 1, 2018. Charles Oppenheim predicted that in the next few months, this date could either progress to being "current" (best case scenario) or retrogress to November 1, 2017 (worst case scenario). [1]
- **Implications:** Considering this, starting in April 2020, will IPO:
    - Let all India I-526 stay in the queue together with current countries for FIFO adjudication, since the Visa Bulletin Chart B signals that that all Indian priority dates are currently "within a timeframe justifying immediate action," and Oppenheim predicted that India could be current in Chart A by October 2020; or
    - For now, shelve India I-526 with priority dates more recent than November 1, 2017, since Department of State predicted that could be the worst-case cut-off for India visa availability by October 2020; or
    - For now, shelve India I-526 with priority dates more recent than September 1, 2018, since these dates are not authorized for visa issuance per the current visa bulletin. Then react month-by-month to future visa bulletin date shifts; or
    - For now, prioritize India I-526 with priority dates older than September 1, 2018, since these dates are authorized for final action per the current visa bulletin (in the spirit of the stated goal to make each country "better able to use their annual per-country allocation of EB-5 visas").

Vietnam

- **Circumstances**: Vietnam is included in the "all chargeability areas except those listed" in the Visa Bulletin Chart B Dates for Filing. This category has been "current," and USCIS has accepted Chart B for Vietnam I-485 so far in 2020. This indicates that Department of State and USCIS consider all Vietnamese priority dates to be "within a timeframe justifying immediate action in the application process." Meanwhile, Vietnam has a Final Action Date of December 15, 2016 in the February 2020 Visa Bulletin. Charles Oppenheim predicted that by October 2020, the Vietnam Final Action Date will progress to either June 1, 2017 (best case) or April 1, 2017 (worst case).
- **Implications:** Considering this, starting in April, will IPO:
    - Let all Vietnamese I-526 stay in the queue together with current countries for FIFO adjudication, since the Visa Bulletin Chart B signals that that all Vietnamese priority dates are "within a timeframe justifying immediate action," and USCIS has been accepting I-485 for all Vietnamese priority dates; or

- For now, shelve all Vietnamese I-526 with priority dates before June 1, 2017, Oppenheim's outside estimate for final action visa availability for October 2020? If so, how will USCIS decide when to advance the "adjudication date" cut-off for Vietnam?

China

- **Circumstances**: China has a Final Action Date of December 1, 2014 in the February 2020 Visa Bulletin. Charles Oppenheim predicted that by October 2020, this date will progress to February or March 2015. Meanwhile, If Charles Oppenheim's past predictions are correct, China priority dates since 2016 all face long waits to visa availability:
  - 2016 priority dates have visas available around 2023[2]
  - 2017 priority dates available around 2027[3]
  - 2018 priority dates available around 2032[4]
  - 2019 priority dates available around 2035[5]
- **Implications:** Considering this, starting in April, will IPO:
  - Even contemplate the option of leaving China I-526 unadjudicated for a decade or more, to free bandwidth for other work?
  - If so, what kind of "preliminary stage" adjudication and security checks does IPO think would be possible for the I-526 a decade or so after the investment was made and the project implemented? In other words, would the I-526 be possible to adjudicate as an I-526 after such extended delay?
  - Assuming it would be unthinkable to defer any currently pending petitions to the 2030s, how will IPO decide when to adjudicate China I-526? Assuming there will be a continual inflow of new current-country I-526, how will IPO decide when to take not- current China I-526 off the shelf and give them attention? What is the principle of fairness applied to pending I-526 from China?
  - What if the primary applicant is China-born with a 2018 priority date, but the spouse was born in Europe, and thus visas would be currently available to the family based on her place of birth, were the China petition approved?

South Korea, Taiwan, and Brazil

- **Circumstances**: South Korea, Taiwan, and Brazil are all "current" in the February 2020 Visa Bulletin, and expected to still be current in the October 2020 visa bulletin. [6] However, Oppenheim predicted in October 2019 that based on number of I-526 pending, each had a wait time from "today" for visa availability (3 years for South Korea, 1.9 years for Taiwan, 1.4 years for Brazil). [7]
- **Implications:** Considering this, starting in April, will IPO:
  - Let all South Korea, Taiwan, and Brazil I-526 stay in the queue together with other current countries for FIFO adjudication, since they are current in the Visa Bulletin and expected to remain so for all priority dates; or

- Actively prioritize I-526 from South Korea, Taiwan, and Brazil this year, since they have potential to reach the visa quota per Oppenheim's predictions, if only IPO can adjudicate enough of the pending petitions in time (in the spirit of the stated goal to make each country "better able to use their annual per-country allocation of EB-5 visas"); or
- Contemplate demoting petitions from South Korea, Taiwan, and Brazil behind petitions from countries that are not even on Oppenheim's radar to exceed the annual visa limit?

Countries other than China, Vietnam, India, South Korea, Taiwan, and Brazil

- **Circumstances** Any country becomes not current if annual visa demand reaches about 700. The USCIS press release for the "visa availability approach" indicates that a goal of the I-526 priority change is to make countries "better able to use their annual per-country allocation of EB-5 visas."
- **Implications:** Considering this, starting in April, will IPO:
  - Keep a certain I-526-to-visas multiplier in mind for each country, and adjudicate only a maximum number of I-526 per year per country to avoid exceeding the per-country visa allocation?
  - Publish timely data on I-526 receipts by county, so that the market is able to judge if countries are meeting or in danger of exceeding the annual per-country allocation, and moderate or encourage demand accordingly?
  - Consider any factor other than/in addition to priority date order, when adjudicating I-526 for countries with visas immediately available? For example, whether the project has Exemplar approval?

Sincerely,

Aaron Grau
Executive Director
IIUSA

References

[1] IIUSA Conference presentation October 2019 https://wolfsdorf.com/blog/2019/11/01/important-updates-on-eb-5-from-u-s-department-of-state-indian-eb-5-estimates-reduced-prepare-to-file-last-chance-cases-before-november-21-2019/

[2]IIUSA Panel with Charles Oppenheim https://event.crowdcompass.com/la2016/page/rFpfQUiXJw

[3] 2017 CIS Ombudsman Report (EB-5 visa backlog calc on p. 32-33) based on data and calculations from Charles Oppenheim https://www.dhs.gov/publication/2017-annual-report-congress

[4] Charlie Oppenheim presentation at AILA/IIUSA conference https://iiusa.org/blog/wp-content/uploads/2018/11/EB-5-AILA.IIUSA-Visa-numbers-panel-for-EB-5-Conference-October-2018.pdf

[5] Charlie Oppenheim at IIUSA Conference https://iiusa.org/wp-content/uploads/2019/10/IIUSA_Visa-Update-w-Charlie-Oppenheim-and-Roundtable-Discussion.pdf

[6] IIUSA Conference presentation October 2019 https://wolfsdorf.com/blog/2019/11/01/important-updates-on-eb-5-from-u-s-department-of-state-indian-eb-5-estimates-reduced-prepare-to-file-last-chance-cases-before-november-21-2019/

[7] Charlie Oppenheim at IIUSA Conference https://iiusa.org/wp-content/uploads/2019/10/IIUSA_Visa-Update-w-Charlie-Oppenheim-and-Roundtable-Discussion.pdf