

IIUSA & FOIA: Compelling Information Through the Court



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In recent previous editions of the *Regional Center Business Journal*¹, I have written about IIUSA's ongoing efforts to collect important EB-5 industry data through Freedom of Information Act (FOIA) requests and the subsequent frustration with the lack of timely response or of relevant information resulting from those requests. To quickly summarize, IIUSA relies on FOIA requests to gather information from the federal government that in turn helps us inform our members of industry trends and to create and update pertinent resources for our members' business development. These resources include, but are certainly not limited to, I-526 and I-829 data reports, economic impact reports and interactive tools on iiusa.org like our TEA map and Investor Markets Portal. Without information through FOIA, these tools and resources would be impossible to create.

The problem is, in recent years, the response time between when we submit a request to U.S. Citizenship & Immigration Services (USCIS) to when we receive a response that includes the data we requested has become untenable. The table below demonstrates the backlog we are experiencing in getting responses to our requests. Additionally, it is important to note that we have requests pending that are over three years old.

In the 12 months since the last article on

¹ Vol. 6, Issue 1; Vol. 7, Issue 2 <https://iiusa.org/news-publications/regional-center-business-journal/>

Table 1: IUSA FOIA REQUESTS OF SEPTEMBER 2020

Total Requests	Pending	Denied	In Appeal	Fulfilled
285	82	20	1	182

Table 2: IUSA FOIA REQUESTS OF AUGUST 2019

Total Requests	Pending	Denied	In Appeal	Fulfilled
248	70	20	0	158

FOIA, we have submitted an additional 37 requests and our pending cases increased from 70 to 82. In that same time period, we received 24 responses, moving our fulfilled cases to 182.

FOIA statute² states that the agency to which a request is sent has 20 business days to provide a response. Towards the end of 2019, we decided it was time to take a more active approach in compelling USCIS to provide information in a more reasonable time frame. We filed law suits in the US District Court for the District of Columbia, citing USCIS's failure to meet the standards of the FOIA statute that require the agency to reply within 20 days of receipt of our request.

Below I will outline the various requests we have made since December 2019 for which we also filed complaints in court against USCIS. As of the date of writing this article, IIUSA has filed three complaints covering four FOIA requests. We have carefully chosen which requests on which we should take legal action, based on the necessity of the information that would be provided in a response and its timeliness and importance to association and industry intel. We have not filed complaints for every request we have submitted. In fact, in the last nine months, we have submitted 31 requests.

Complaint 1

Request Subject: I-526 USCIS Adjudicator Training Materials for Petitions Filed Before November 21, 2019

² Public Law No. 114-185

I-526 USCIS Adjudicator Training Materials for Petitions Filed After November 21, 2019

Submission Date: December 16, 2019

Request Details: At IIUSA's EB-5

Industry Forum in Seattle, WA in October 2019, Immigrant Investor Program Office (IPO) Chief Sarah M. Kendall stated, "...in the last year we conducted a training update for all I-526 adjudicators and economists." Citing her remarks, IIUSA requested the updated adjudicator training materials referenced by Ms. Kendall.

Two separate requests were made, one for adjudicator training materials for petitions filed *before* November 21, 2019 and one for adjudicator training materials for petitions filed *after* November 21, 2019. With the substantial regulatory changes made to the EB-5 Regional Center Program that went into effect on November 21, 2019, there was an assumed corresponding major update to training materials for adjudicating under the new rules.

Complaint Filed: March 2, 2020

Status: The U.S. Department of Justice, on behalf of USCIS, answered our complaint and entered into a "Joint Status Report" with IIUSA agreeing to a schedule for document production. The Court accepted the filing thereby holding USCIS accountable to adhering to the JSR's schedule. As of August 2020, USCIS has produced roughly 500 pages per month in response to IIUSA's original FOIA request and subsequent lawsuit. The agency is obligated to continue

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doing so until our request is fulfilled. IIUSA and the Department of Justice agree that will take until the end of November 2020.

Complaint 2

Request Subject: Copies of I-924As filed for fiscal year 2017

Submission Date: March 6, 2018

Request Details: IIUSA makes an annual request for copies of all I-924As that were filed for the previous fiscal year. It is an annual requirement for any designated Regional Center to file an I-924A, regardless of the Regional Center's activity (or lack of) in that fiscal year.

This year request has been made by IIUSA every year since 2012 and the information received is used to create economic impact reports. Without this information being provided to us by USCIS, it is impossible to make a comprehensive analysis of the annual economic impact of the EB-5 Regional Center Program.

Complaint Filed: July 30, 2020

Status: As with IIUSA's March lawsuit, the Department of Justice answered the complaint and entered into a JSR. Again, the Department of Justice and IIUSA acknowledge that USCIS's pace for document production is roughly 500 pages per month. Pursuant to the JSR, IIUSA will begin receiving its requested information at the end of October 2020 and is likely to receive its final document delivery on or about January 2022.

That pace, however, can be accelerated. Once IIUSA begins receiving information, we will be able

to discern what is responsive and what is detritus. That will allow us to amend our request to focus on the meaningful information and decrease the overall size of our request, thereby increasing USCIS's response time.

Additionally, the Department of Justice and IIUSA agree that if the pace is too slow to yield any meaningful outcome that IIUSA can petition the court to accelerate USCIS's activity.

Complaint 3

Request Subject: Redeployment Policy Records

Submission Date: August 3, 2018

Request Details: The details within this request were rather extensive³, but essentially it seeks to gather all records of development and implementation of the July 24, 2020 USCIS Policy Manual Volume 6, Part G update that updated the policy on further deployment of funds (also known as redeployment).

The purpose of this request was to shed light on how the agency came to this new policy and better understand any and all consideration given to how the new policy would impact the EB-5 Program, including current and future investors and current and future projects.

Complaint Filed: September 3, 2020

Status: On or about September 15, 2020, IIUSA perfected service of process of its complaint to the Department of Justice, USCIS, and the Department of Homeland Security. As of the time of this article,

³ IIUSA would like to thank John Pratt from Kurzban Kurzban Tetzeli & Pratt for his assistance in drafting this FOIA request. Mr. Pratt provided extensive and exhaustive verbiage to ensure the request encompassed all possible information that would shed light onto the development and implementation of the new redeployment policy published on July 24, 2020.

the government has until October 15, 2020 to answer our complaint.

We have every reason to believe the Department of Justice will do so and, depending on the Court's orders, again enter into a JSR to begin complying with IIUSA's FOIA request.

After finding initial success from filing our first complaint in March 2020, we looked at our other pending requests to see which ones may benefit from added persistence in the same manner.

The information we garner from FOIA requests is essential to the operation of IIUSA and the EB-5 industry. While we are pleased with our preliminary results from, we must remain patient and diligent in the ensuing activity to gather all of the responsive documents as USCIS's standard procedure is to send only 500 pages per month of responsive documents. Therefore, depending on the breadth of the request, this could take several months, if not well over a year, to get all of the documents associated with a single request. For instance, our request for FY2019 I-924As was determined to have over 6,700 responsive pages. At 500 pages per month starting in October, it will likely be November or December 2021 until we have all of the pages associated with the fulfillment of this request.

We are hopeful that this new approach will result in not only receiving the information sought in the subject of the complaints, but also more timely responses to all requests moving forward. ■