



And The Compliance Beat Goes On



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One could broadly simplify the business of a Regional Center into two main elements: 1) capital aggregation and deployment and 2) fund management. While it is true this is an oversimplification, it helps to narrow our focus.

At the time of this writing, the EB-5 Regional Center Program, originally known as the Immigrant Investor Pilot Program when it was established by Congress in 1992, has expired. As of June 30th, 2021, the program has officially lapsed and USCIS will not accept any new investors or process any further conditional green card applications related to this program. For all intents and purposes, until the EB-5 Regional Center program is re-instated, the capital aggregation element of the business for Regional Centers is over (or at least on hiatus). Sure, a Regional Center operator could switch their business model to do direct deals. However, because of the nature of direct deal requirements, the amount of capital that could be raised for a project

would be significantly less than in a regional center offering.

While Regional Centers are no longer function as capital aggregators, the fund management element of the business continues. As noted by USCIS on July 1, 2021, the program expiration does not affect those EB-5 investors that have already received conditional residency. Those investors can still file I-829 petitions and continue on their journey to permanent (unconditional) residency and then citizenship should they desire. It is estimated that there are currently more than 20,000 investors at the conditional residency status. Within the next 24 months, each of these investors will be eligible to have their I-829 petitions adjudicated. The successful I-829 petition has always been the primary motivation for investors and its success depends on significant support from the sponsoring Regional Center. So, despite the program lapse, there remains a lot of very important work to do.

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While most believe that the program will eventually be reinstated, current compliance regulations remain in effect, and it is likely that the reinstated program will include expanded and more rigorous compliance regulations. Therefore, Regional Centers would be wise to use the time and capacity available during the program shutdown to focus on the key areas of compliance.

Immigration Compliance for Existing Investors

For Regional Centers with investors currently in their period of conditional residency, now is a great time to ensure documents to support investors' I-829 petitions are organized and readily available for filing. In general, there are four main categories of evidence that each investor will need to include as part of his or her I-829 petition. These categories are as follows:

- Is the NCE properly established, and is it in good standing?
- Was the full (and proper) investment amount made into the NCE and subsequently into the job-creating activity?
- Was the full investment amount maintained at risk during the conditional residency period?
- Were the required 10 or more permanent jobs created?

For each one of the above categories, there are multiple pieces of supporting documentation that can be used as evidence. Different immigration attorneys may request different information in order to best position their investor clients for immigration success. Therefore, as a best practice, Regional Centers should be prepared to provide a range of documentation that immigration attorneys might want. Far too often, pulling together the required documents is left to the last minute, resulting in an expensive effort and a less robust I-829 submission.

If unsure as to what supporting documentation might be required, or if the information is not currently organized in the most effective manner, Regional Centers can turn to service providers within the EB-5 ecosystem that can help perform an initial audit and provide services to identify, assemble, organize and store information in the most effective way.

Ongoing Regional Center & NCE Compliance

Since 2010, EB-5 Regional Centers have been required to file a form I-924A at the end of each year. The purpose of this form is to demonstrate that the Regional Center has been conducting job-creating economic activity consistent with the goal of the EB-5 program in order to retain their Regional Center designation. Information required to be reported includes details about the amount of capital invested, job creation totals, and current statistics on investor filings and petitions.

With the termination of the Regional Center program, USCIS has announced that it will reject any new I-924 filings unless such are meant to amend the Regional Center's name, organizational structure, ownership or administration. USCIS has not said anything about I-924A's, and therefore Regional Centers should continue the practice of preparing and filing an I-924A as long as they have investors with pending petitions filed prior to June 30, 2021. For the avoidance of doubt, USCIS will still accept and process I-829 petitions associated with Regional Center projects, so it would be prudent to keep all Regional Center records and filings current in support of those petitions and the investors' final steps to permanent residency.

Similarly, the NCE entity (typically an LP or an LLC) has annual filing requirements with federal, state and local government agencies. The specific requirements will vary based on where the entity is domiciled and/or registered to do business, and how it is structured (i.e., an LLC vs. a Partnership or Corporation). The termination of the EB-5 Regional Center program does not relieve managers from maintaining

filing compliance for the NCE (or other entities). Regional Centers should continue to plan to meet their entity maintenance compliance requirements in order to keep the entities valid and in good standing in the appropriate jurisdictions.

Timely filing of the I-924A and the applicable state reports is imperative and will help avoid potential Requests for Evidence (RFE's) or even Notices of Intent to Deny (NOID's) during the I-829 process. Among other things, the I-924A form requires detailed information related to Regional Center operations. In particular, the Regional Center needs to report on the amount of capital (both EB-5 and non EB-5) invested into the project and the resulting impact on job creation. This requires careful monitoring of the project, detailed tracking, and reporting. If the processes and systems currently in place are not as efficient as they could be, now (during the program suspension) is an ideal time to make the necessary improvements. For those that may not have the internal resources, there are many service provider options available to help Regional Centers implement procedures or automation to make these filings as cost efficient as possible.

Integrity Measures Compliance

Integrity measures were front and center in the proposed EB-5 Reform and Integrity Act of 2021.¹ However, that bill did not pass, and subsequently the Regional Center program expired on June 30th, 2021. It is important to know that the discussion of integrity measures like those included in that bill are nothing new. In fact, proposed integrity measures became one of the most substantial parts of the EB-5 dialogue as a result of the December 2013 Office of the Inspector General Report (OIG 14-19)² on the EB-5 Program. In that report, the OIG concluded that:

¹ <https://www.grassley.senate.gov/imo/media/doc/EB-5%20Reform%20and%20Integrity%20Act%202021.pdf>

² https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf

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“...USCIS has difficulty ensuring the integrity of the EB-5 regional center program... As a result, USCIS is limited in its ability to prevent fraud or national security threats that could harm the U.S., and it cannot demonstrate that the EB-5 program is improving the U.S. economy and creating jobs for U.S. citizens as intended by Congress.”

Since that report was published, many proposed EB-5 authorization bills have included integrity measures and many integrity measures have been proposed as stand-alone bills. Over the years, many of these measures have been refined and condensed into those proposed in the EB-5 Reform and Integrity Act of 2021. The Act itself is far too expansive to review in this article and Regional Centers would be wise to review the detailed legislation and/or seek the help of expert service providers to determine how they may be affected. However, there are several concepts that have been in legislative drafts consistently over the last several years. Three are worth discussing here because they are common best practices or requirements in traditional funds. They include:

1. The Establishment of an Integrity Fund

The purpose of the fund will be to enable USCIS to administer and ensure compliance with the integrity measures. It will be funded from annual fees charged to Regional Centers and, based on the proposal in the most recent Act, the amounts will likely be material enough to require proper planning and budgeting on the part of Regional Centers.

2. The Use of Third-Party Administration

As the name implies, a third-party fund administrator is an unrelated firm that provides the back-office administration services of the fund. This approach is commonly used with traditional private equity funds

at the insistence of investors in order to provide additional security, transparency and compliance. Commonly provided services in the EB-5 context include:

- Capital flow reporting of investor capital over the entire project lifecycle
- Proper bank account/escrow setup and daily bank account reconciliation
- Project expense document storage for Job Creating Enterprise expenses
- Monthly statements for each stage (Subscription, Invested, and Settlement)
- Storage for relevant documents:
 - Entity formation and operations documentation
 - Evidence of fund movement, and funding confirmation letters
 - Executed subscription agreements
 - Quarterly and annual statements
 - K-1 data storage and notification to investors
- Audit trail reports, summarizing investor funds tracked through all phases for I-829 support
- Invoices and receipts showing funds applied to project
- 24/7 transparent portal access for project owners, investors, and other interested parties
- EB-5 investor capital and settlement accounting
- Maintenance of key information and data for securities law compliance

Third party administration has been consistently included in proposed integrity bills for the last 5 years, and Regional

Centers should expect that it will be part of any reinstatement of the program. In most versions of the proposed legislation, there have been exceptions for those meeting various licensing or regulatory standards; however, the majority of Regional Centers need to be prepared to incorporate a third party fund administrator into their offerings.

3. Transparency in The Use of Promoters

Within the integrity measures conversation, there has been a steady push for increased transparency related to the use of third-party promoters (regardless of whether they are foreign or domestic). Despite industry pushback related to the difficulties in applying consistent standards in the use of foreign agents, the topic continues to appear in integrity-related measures.

While the details of what might ultimately be required are far from decided, this is an area in which it would be wise for Regional Centers to prepare. At a minimum, it is anticipated that there will be a requirement for Regional Centers to maintain a documented program to ensure that investors are receiving consistent, accurate, and truthful information as to the visa process and the offering itself. These types of policies and procedures should be well documented and organized, and a plan to audit them on a regular basis is advised.

Whether you believe the lapse in the program will be brief, long, or even permanent, Regional Centers still have significant work to do to meet their compliance obligations and to ensure their investors have every opportunity for success. Given that there can be no new Regional Center I-924 filings or new investor I-526 filings during this time period (unless for direct EB-5/non-Regional Center projects), there has never been a better time to focus on internal operations to make them as organized, professional, and efficient as possible. ▶