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U.S. Citizenship & Immigration Services
Immigrant Investor Program Office
20 Massachusetts Ave. NW
Washington, DC 20529

September 16, 2022

RE: Questions and Comments for October 19, 2022, EB-5 Stakeholder Engagement

To: Alissa Emmel, Chief, Immigrant Investor Program Office, USCIS

On behalf of the Board of Directors and membership of Invest in the USA (IIUSA), the non-profit trade association of the EB-5 Regional Center industry, please accept the below questions and comments related to the EB-5 Immigrant Investor Program (EB-5 Program) in preparation for the October 19, 2022, EB-5 Stakeholder Engagement.

We would like to start by expressing our appreciation to USCIS and the IPO for scheduling this EB-5 Stakeholder Engagement. Stakeholder engagements provide an opportunity for stakeholders to receive updates from IPO on the Program and engage in substantive and meaningful two-way communications with the IPO in a way that has not been possible for some time. We appreciate the opportunity to ask questions and to provide feedback on a number of pressing issues of great significance to the industry. We hope that in so doing we may assist you in making the EB-5 Program a more productive, efficient, and impactful EB-5 Program for the United States economy.

IIUSA is separately mobilizing its members to provide thoughts and guidance about implementation of the EB-5 Reform and Integrity Act of 2022. This letter does not address those issues as we wanted to not only provide questions and comments but thoughtful guidance on these very important topics to ensure the integrity measures included in the Act are effectively implemented. IIUSA believes it can be of assistance to USCIS and welcomes any and all opportunities to engage with USCIS, as the trade association for regional centers representing a broad spectrum of EB-5 stakeholders. We would be more than happy to answer questions on the comments below or to elaborate where needed.

Thank you again for taking these comments and questions from the industry and for scheduling the Stakeholder Engagement.

Sincerely,

Aaron Grau
IIUSA Executive Director

EB-5 Program Framework:

IIUSA views the mission of the EB-5 Program to be one of attracting foreign investment to be deployed in economic development projects that will create jobs for American workers. All of our comments set forth below are intended to support that mission and offer suggestions to USCIS intended to align USCIS' policies with that mission. With the recent long-term reauthorization of the EB-5 Regional Center Program, we finally have an opportunity to be strategic and collaborative in driving that mission forward – together. Implementing effective regulations and policies and efficient procedures to maximize the long-term success of the EB-5 Program. We offer the feedback below from an EB-5 stakeholder perspective

Easy-to-Fix Issues That Have a Substantial Impact on the Industry

Below are several issues that IPO might not be aware of but we believe are capable of being remedied fairly easily. Addressing these issues would significantly improve the adjudication process from a stakeholder perspective.

- **G-28s:** Attorneys report that very frequently G-28s submitted to notify IPO of a change of attorney and/or address do not result in updates to the USCIS database, which in turn causes a delay in receiving USCIS communications including Form I-797 notices of approvals, and time-sensitive requests for evidence (RFEs), etc.
- **IPO email box:** Stakeholders report a worrying trend of increasingly longer wait times between submitting an email to IPO and receiving a response – sometimes as long a month or more.
- **NVC File Transfers:** Stakeholders report that in recent years even though Form I-797 Notices of Approval issued upon approval of I-526 petitions state that the petitions have been sent to the Department of State National Visa Center (NVC), in many cases there are long delays between receipt of an approval notice and transfer of the approved petitions to NVC. This was originally noted by IPO as being due to the COVID-19 pandemic when IPO was experiencing operational deficits while transitioning to pandemic-safe operations. However:
 - there are still a troubling number of reports from stakeholders of instances where IPO has not forwarded approved petitions to NVC; and
 - there are many cases that have been eligible to proceed for over 6 months, but USCIS has not yet transferred them to NVC. Some of these cases involve children at risk of aging-out. In some cases, the delay in transferring the approved petition to NVC has exceeded one year (WAC1890233983). Stakeholders report that IPO has been largely unresponsive to follow-up inquiries.
- **Missing I-797s:** Stakeholders report instances of missing I-797C Notices of Receipt for I-829 petitioners and their dependents as far back as November 2019. Without the receipts petitioners and their dependents do not receive proof of residency needed for employment, school, driver's licenses, college applications, health insurance and other reasons.
- **I-829 Receipts and Extension of CLPR Status:** Currently the USCIS issues I-797C Notices of Receipt extending the validity of conditional permanent residence cards by 24 months. While the increase this represents over the previous validity periods of 12 and 18 months is helpful, the

published processing time for I-829 petitions is 57 months¹. After the expiration of the twenty-four-month extension, permanent residents must secure an Infopass appointment to request a temporary I-551 stamp. With apologies in advance for the following granular detail, we note that to request an Infopass appointment the principal or his/her attorney (and not a paralegal) must telephone the USCIS Contact Center.

The attorney or applicant might wait on hold for up to an hour to speak with a contractor at the Contact Center. As noted above, often a new attorney's G-28 Notice of Appearance will not have made it into the USCIS database, and the representative will not discuss the matter with the attorney calling on behalf of a client. At any rate, if willing to discuss the matter the representative will ask how soon the current evidence of permanent residence will expire. If the expiration date is more than 30 days off the request for an Infopass appointment is refused.

If the expiration is coming up within less than 30 days the representative will explain that a USCIS officer will make two attempts to call the applicant sometime in the next 30 days to discuss whether they will be granted an Infopass appointment, which, depending on any looming deadlines the applicant may have to present proof of status, can put them perilously close to being without proof of lawful status for a period of time.²

If the applicant's cellphone is off when the USCIS officer calls, or they are out of cell phone range, on a plane or otherwise unavailable, the Infopass request is closed, and they must begin again with a new call to the Contact Center.

It would make an enormous difference in the stakeholder experience if USCIS were to issue I-797 Notices of Receipt with a validity period that matches the published processing time. Even better would be a notation on the I-797 Notice along these lines: "This Notice of Receipt confirms the filing of your I-829 Petition to Remove Conditions with the U.S. Citizenship and Immigration Services. Pursuant to 8 CFR 8 CFR §216.6(a)(1) and Matter of Lok, 18 I&N Dec. 101, 105 (BIA 1981), based upon the timely filing of an I-829 Petition to Remove Conditions of Permanent your conditional permanent resident status is automatically extended, if necessary, until such time as a final order of removal is issued by an immigration court, or, if an appeal is taken, until such time a final order of removal is issued by the Board of Immigration Appeals."

- **Missing RFEs or NOIDs:** Stakeholders often report that the USCIS online case status will reflect an update in the case status indicating issuance of an RFE or NOID, but the related USCIS correspondence is not received, or arrives weeks later. As noted above, emailing an inquiry to IPO in these instances is often not helpful, as the delay in IPO response to email inquiries is increasingly delayed. Such notices are time-sensitive to have sufficient time to prepare a response to RFEs or NOIDs. We see this as a problem that could be remedied by dedicating resources to monitoring e-mail inquiries to IPO and by e-mailing copies of the notices to stakeholders as a regular practice.
- **Inter-Filings for Project Documents:** For petitions that will continue to be adjudicated under the law in effect prior to the advent of the RIA it would be helpful if IPO would consider implementing a formalized process for communicating to officers working on individual I-526 and I-829 petitions the receipt of updated project information from regional centers by way of

¹ <https://egov.uscis.gov/processing-times/> (last visited September 13, 2022).

² Section 264(e) of the Immigration and Nationality Act states, "every alien, eighteen years of age and over, shall at all times carry with him and have in his possession any certificate of alien registration or alien registration receipt card issued to him . . . Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both."

inter-filings to I-924 applications. Regional Centers are frequently asked to provide duplicative responses and documents in response to RFIs or RFEs for individual I-526 or I-829 petitions that have already been submitted via inter-filings to I-924 applications. This change in internal communications at IPO could eliminate the need to issue multiple duplicative RFEs, conserve agency resources, and speed up adjudications.

- **Create a Vehicle for Redress of Simple Issues OR Improper Rejections:** There are many cases where there are relatively minor, technical issues that investors and their attorneys are unable to correct. We would ask IPO to implement an easily accessible, direct, and effective way to correct these minor issues. For example:
 - A number of stakeholders have reported approved non-regional center “direct” I-526 petitions coded incorrectly as regional center-affiliated petitions. This caused NVC and the consulates to refuse to process the immigrant visa applications of investors during the regional center program lapse. Stakeholders report that attempts to seek redress through the USCIS typo correction process, customer service, online inquiries, emails to IPO, and have either gotten no response, or a form response, with no meaningful result, and NVC will not change the classification.
 - Stakeholders report I-526 petitions being erroneously rejected for not including the NCE name when the name was included; for lack of a signature in the petitioner’s signature block, which was there; and for allegedly using an outdated version of the form, which was not outdated.
 - The erroneous rejection of these I-526 petitions had the further effect of causing the rejection of concurrently filed I-485 applications, which were rejected because “based on the information you provided, your priority date could not be established.”

Issues That Require Policy Review/Changes

- **Processing Times:** There continue to be long processing times for all filings at IPO, which is crippling to the industry. Over time it appears 3 to 5-year processing times have become the norm in EB-5, but we maintain these processing times are not reasonable. The lengthy processing times have serious repercussions for stakeholders, including:
 - Maximizing investor vulnerability to changing USCIS and visa policies;
 - Providing cover for fraud and abuse;
 - Making planning extremely difficult for project companies and investors; and
 - Making EB-5 less competitive with investor visa programs in other countries.
 - Making it more difficult to obtain documents USCIS might request several years into the EB-5 timeline. As time goes by, documents get harder to get. Companies go out of business or destroy documents, banks merge or dissolve, record retention periods lapse, accounts are closed, and people die. If an investor files a petition today with what he or she believes is sufficient documentation, he or she has a better chance of responding to an RFE in a year than in 3 years. By 7 years, most businesses, governments, and even the IRS do not expect document retention. USCIS, however, appears to have no limit to how far back in time it will request documents. RFEs issued 5, 7, or more years after a petition is filed often become self-fulfilling prophecies. While an investor might have been able to obtain a document in 3 years, by 5 or 7 it may be impossible to obtain whatever it is USCIS requests.

- Stakeholders report receiving RFEs in cases where USCIS has taken 3, 4, or more years to adjudicate an I-526 petition and issues an RFE requesting an updated business plan for no other reason than the passage of time (due to USCIS delay). These RFEs identify no deficiency in the petition, stating only- you said 4 years ago that you were going to do x, show us that you have done x. USCIS delays should not give rise to a conclusion that insufficient evidence of eligibility has been presented. Issuing RFEs because a case has been pending a long time simply extends the processing time and uses more adjudicator time and effort. The result- even longer processing times.
- **Processing Time Report:** Stakeholders report that the processing times on the USCIS Check Case Processing Times webpage are routinely used – including by the Ombudsman -- to represent normal and expected processing times, and thus to shut down petitioner inquiries about delayed processing with boiler plate responses and no meaningful action. We ask that USCIS note the published methodology behind the USCIS Processing Time represents the amount of time it took USCIS to complete 80% of adjudicated cases over the prior six months. It is not however, an indication of whether the processing time is reasonable, and we would suggest the processing times for EB-5 petitions are not reasonable. This seems particularly so since the EB-5 Program is self-funded through petitioner filing fees, which are supposed
- **Rule of Law and Reliance on Settled Decisions:** Stakeholders have recently reported a number of I-829 RFEs and Denials based on issues related to investor sources of funds - issues that were adjudicated in USCIS’ approval of the I-526 Petition, usually a decade or more earlier. No facts have changed, no misrepresentation or fraud has been alleged. They appear to be based upon a disagreement between the current adjudicator of the I-829 petition and the prior decision- either as a result of differing USCIS policy between then and now, or a simple disagreement with the findings. This is unacceptable. USCIS has approved the source of funds and I-526, granted these people permanent resident status. The investors and their family in turn have waited years for the adjudication of their I-829 petitions, only to be told their status in the United States is in peril because the new adjudicator disagrees with the prior result. This violates fundamental principles of American jurisprudence and due process. It undermines not only faith in the EB-5 program, but faith in our government and laws. We hope that USCIS can realign its adjudication priorities with the concept of deference for prior adjudications and focus instead on verifying sufficient job creation in the adjudication of I-829 petitions.
- **IPO Coordination of Adjudication:** USCIS creates significant redundant work for itself by having multiple adjudicators work on the project-related aspects of petitions filed by investors in the same project and not coordinating responses or inquiries. There are projects that have some investors whose petitions were approved with no RFE, some investors who received RFEs raising only investor-specific source of funds (SOF) issues, and still other investors who received RFEs with project-related issues. The issuance of RFEs with project-related issues violate the deference policy where an I-924 with exemplar I-526 petition as well as the individual I-526 petitions of other investors have already been approved.

Such adjudications create redundant work for USCIS by issuing unnecessary RFEs and cost the Regional Centers and investors more money to pay for additional legal services required to prepare responses. Moreover, principals of due process dictate that individuals in similar situations receive similar treatment. Inconsistent decisions undermine the rule of law and threaten program integrity. They also create duplicative adjudications and waste agency time and resources

Under the new law, USCIS has a great opportunity to ensure efficiency of adjudications while also maintaining due process. Having the project related form I-956F linked to the investor

related form I-526E allows the USCIS to adjudicate the project related documents one time and focus I-526E petition adjudications on the individual petitioner. Can USCIS confirm that was the intent of breaking up the collective filing into 2 forms while linking them through the NCE ID? Will the USCIS always adjudicate the I-956F prior to any I-526E or at least jointly with the first I-526E of the project?

While the new forms I-526E and I-956F will remedy some of these problems moving forward; it is still an issue for investors whose petitions will be adjudicated under the previous Regional Center Program law. We invite USCIS to provide guidelines for Regional Centers to submit lists of pending I-526 petitions by project to assist in speeding up adjudications by eliminating redundant work in adjudicating project-related information and decreasing the overall workload for adjudicators while not compromising the individual investor review process.

- Due process dictates that individuals in similar situations receive similar treatment. Inconsistent decisions undermine the rule of law and threaten program integrity. They also create duplicative adjudications and waste huge amounts of time and resources.
- **IPO's Scope of Adjudication:** Stakeholders report IPO has issued requests for evidence requiring petitioners to provide information outside the scope of the Program (e.g. requesting full employment/business history of a petitioner's spouse when the spouse is not the source of the invested funds). It is unclear which EB-5 eligibility criteria support such requests, or what knowledge/authority the adjudicators have to use this information in their adjudications.
- **Preponderance of Evidence Standard:** Stakeholders report that the preponderance of evidence standard is not being adhered to. Adjudicators continue to issue requests for additional evidence relating to matters where credible evidence was already provided and IPO offers no derogatory countervailing evidence, e.g. tax returns were provided, but the IPO asks for full company financials.
- **Making Program Data Available:** The stakeholder community requests that USCIS publish data on the number and status of all EB-5 filings (all forms) at regular, timely intervals. Currently, the data provided in the Today, "All USCIS Application and Petition Form Types" web portal is for the period ending March 31, 2022, - five and a half months old and, at best, was published three and a half months out on July 15, 2022. Despite repeated customer service requests and long-pending FOIA requests, USCIS has not released data on filed and pending I-526s by country of birth, data without which it is impossible to make accurate EB-5 wait time estimates.

Request for Regular Engagement with the Stakeholders

In conclusion IIUSA applauds USCIS for scheduling this Stakeholder Engagement. We appreciate IPO's invitation to provide feedback from a stakeholder perspective about the practical implications of USCIS policies and procedures. We are hopeful the engagement will be productive, and that going forward IPO will engage with EB-5 stakeholders regularly. Regular engagement and an opportunity for stakeholders to share information about what we are seeing in the industry will enhance IPO's ability to make effective management decisions based on facts.