



## Reserved Visa Rules, Possible Future Visa Allocation, and Recommendations

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One of the biggest challenges for EB-5 investors and Regional Centers after the passage of the 2022 EB-5 Reform and Integrity Act (RIA) is understanding the impact of the “Reserved Visas” provisions on immigrant visa wait times. These reserved visas impact actual job creation requirements and the timing of repayment of EB-5 capital to immigrant investors. The relevant RIA provisions state:

“(I) IN GENERAL.—Of the visas made available under this paragraph in each fiscal year—

“(aa) 20 percent shall be reserved for qualified immigrants who invest in a rural area;

“(bb) 10 percent shall be reserved for qualified immigrants who invest in an area designated by the Secretary of Homeland Security under clause (ii) as a high unemployment area; and

“(cc) 2 percent shall be reserved for qualified immigrants who invest in infrastructure projects.

“(II) UNUSED VISAS.—

(aa) CARRYOVER.—At the end of each fiscal year, any unused visas reserved for qualified immigrants investing in each of the categories described in items (aa) through (cc) of subclause (I) shall remain available within the same category for the immediately succeeding fiscal year.

(bb) GENERAL AVAILABILITY.—Visas described in items (aa) through (cc) of subclause (I) that are not issued by the end of the succeeding fiscal year referred to in item (aa) shall be made available to qualified immigrants described under subparagraph (A).

The two primary impacts of these provisions are (a) the incentive of a quicker visa number availability for new investments in qualifying areas or projects and (b) a reduction in the number of visas made available to pre-RIA EB-5 investors. It also changed the structure of the Visa Bulletin, which is issued each month by the U.S. Department of State (“DOS”) to summarize the availability of immigrant numbers for applicants waiting to apply for immigrant visas at U.S. consulates and embassies abroad or to file for employment-based or family-sponsored preference adjustment of status with U.S. Citizenship and Immigration Services (“USCIS”) and how Final Action Dates (“FAD”) will advance.

This article seeks to update EB-5 stakeholders on the U.S. government’s response to these provisions, provide insight on possible future visa allocation, and make recommendations so USCIS and DOS can best carryout congressional intent.

State Department Response



The May 2022 Visa Bulletin<sup>1</sup> was DOS’ first response to the RIA. It created new EB-5 preference categories to account for the reserved visa allocations and listed each as “Current” because there is no approved Form I-526s for such investments, and therefore, no visa demand.

The May 2022 Visa Bulletin also had two “unreserved” visa categories which distinguished (a) pre-RIA Regional Center EB-5 (I5 and R5) from (b) “direct” EB-5 (C5 and T5) and “all others,” presumably post-RIA EB-5 that do not qualify under a reserved visa allocation. The June 2022 Visa Bulletin<sup>2</sup>, first released on May 6, 2022, combined these two “unreserved” classifications into one, which includes all pre-RIA filings and any post-RIA, non-reserved immigrant visa applications, and this continues today, as shown below with the relevant portion of the October 2022 Visa Bulletin:

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	08JUN19	C	01APR12	C	C
3rd	C	15JUN18	C	01APR12	C	C
Other Workers	01JUN20	01SEP12	01JUN20	01APR12	01JUN20	01JUN20
4th	C	C	15MAR18	C	15SEP20	C
Certain Religious Workers	U	U	U	U	U	U
5th Unreserved (including C5, T5, I5, R5)	C	22MAR15	C	08NOV19	C	C
5th Set Aside: Rural (20%)	C	C	C	C	C	C
5th Set Aside: High Unemployment (10%)	C	C	C	C	C	C
5th Set Aside: Infrastructure (2%)	C	C	C	C	C	C

Next, on June 9, 2022, in response to questions by the American Immigration Lawyers Association (“AILA”) DOS Liaison Committee, DOS indicated: “Pending petitions filed prior to the enactment of the EB-5 RIA will be adjudicated under the law in effect at the time of filing. Petitions approved prior to the enactment of the EB-5 RIA will retain the classification set by USCIS at the time of approval.”<sup>3</sup> This means that no pre-RIA filings can take advantage of the reserved visa categories, despite being eligible based on an investment in rural or qualifying high unemployment area, as well as DOS’ general policy to give priority to earlier-filed petitions. This statement is consistent with the description of the visa categories included in the June 2022 Visa Bulletin and each monthly Visa Bulletin since then.

<sup>1</sup> See Visa Bulletin for May 2022, available at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last accessed August 8, 2022).

<sup>2</sup> See Visa Bulletin for June 2022, available at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-june-2022.html> (last accessed August 8, 2022).

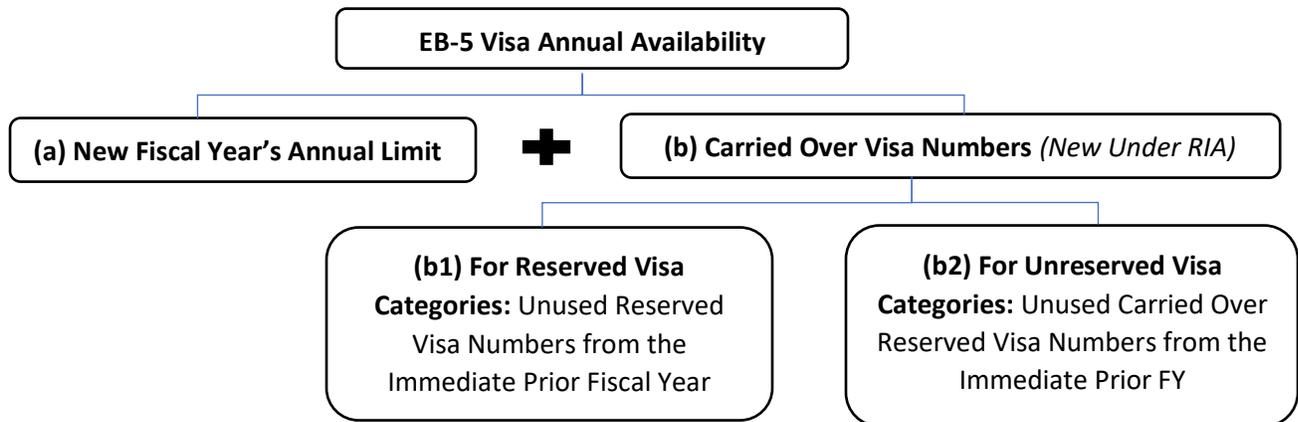
<sup>3</sup> See Department of State/AILA Liaison Committee Meeting June 9, 2022, available at <https://travel.state.gov/content/travel/en/News/visas-news/department-of-state-aila-liason-committee-meeting-06-09-2022.html> (last accessed August 8, 2022).



Moreover, it appears that USCIS and DOS are not seeking to establish a process by which an investor could “upgrade” or “reclassify” or “port” a pending or approved petition filed pre-RIA to take full advantage in an investment in a rural or high unemployment area. As discussed below, we believe this decision is inconsistent with Congress’ intent to use all available immigrant visas numbers because USCIS processing times will impact reserved visa numbers usage.

EB-5 Visa Numbers: Facts and Projections

After the RIA, the Immigration and Nationality Act now reads that the number of immigrant visas allocated to EB-5 each fiscal year will be the sum of (a) the new fiscal year’s limit which is 7.1% of the worldwide employment-based annual limit – statutorily set at 140,000 (plus any unused Family-sponsored numbers from the prior fiscal year) plus (b) any unused reserved visa numbers carried over from the immediate prior fiscal year’s applicable limits, and (c) the unused carried over reserved visas not required for use in the current fiscal year which can then be “made available” to the unreserved visa numbers limit. See the graphic below for illustration:



(a) Reduced Annual Allocation in Future

In the past few years, as USCIS and DOS dealt with COVID-19 restrictions and staffing challenges that prevented issuance, a surplus of employment-based visa numbers became available due to unused family-based visa numbers “falling across” from the prior fiscal year. See 8 U.S.C. §§ 1151(c)(3)(C), (d)(2)(C).

The annual limit for employment-based visa use in FY 2021 was 262,288, nearly double the typical annual total. Overall, the two agencies combined to use 195,507 employment-based immigrant visas in FY 2021. DOS issued 19,779 employment-based immigrant visas, and USCIS used 175,728 employment-based immigrant visas through adjustment of status, more than 52% higher than the average before the pandemic. Unfortunately, 66,781 visas went unused at the end of FY 2021.

In the September 2022 Visa Bulletin DOS announced that the FY 2022 employment-based annual limit was 281,507. A total of 19,987 of these visa number were available under the EB-5 annual limit to EB-5, with 13,591 (68%) going to unreserved and 6,396 (32%) to reserved.



In FY 2023, which began on October 1, 2022, we estimate a new trend of the annual employment-based annual limit being much lower than in the two preceding fiscal years, based on increased number use under the family-sponsored annual limit. It is expected that for FY 2024 the employment-based annual limit will return to near pre-COVID levels, around 150,000 visas per year. See Table 1 below for the FY2022 EB-5 visa annual limit and our projections of annual limits in FY2023-2025:

**Table 1: EB-5 Visa Annual Limit in FY 2022 by Category & Projections for FY 2023-FY 2025**

	FY 2022	FY 2023*	FY 2024*	FY 2025*
Employment-Based Total	281,507	200,000	150,000	150,000
EB-5 Total (7.1% of EB Total)	19,987	14,200	10,650	10,650
Unreserved	13,591	9,656	7,242	7,242
Reserved	6,396	4,544	3,408	3,408
Rural (20% of EB-5)	3,997	2,840	2,130	2,130
High Unemployment (10% of EB-5)	1,999	1,420	1,065	1,065
Infrastructure (2% of EB-5)	400	284	213	213

\* Data for FY 2023 and beyond are based on author's estimates.

PLEASE NOTE - Carried over visa numbers are not included in the table above.

(b) Carried Over Visa Numbers

At this early stage in post-RIA implementation by USCIS, with few, if any, Form I-526 or I-526Es filed by those who qualify for reserved visa allocation, reserved visa number use will be impacted by how quickly USCIS adjudicates new petitions. The current Form I-526 processing time online is 76 months for Chinese petitioners and 52 months for petitioners from all other countries.<sup>4</sup> If USCIS' case processing information is to be believed, then cases filed in 2022 may not be approved for 4-6 years, with a 32% decrease in total EB-5 visa numbers available during this time to pre-RIA investors and little benefit, if any, to post-RIA investors. Further, in this scenario, DOS would have limited time to process these cases before the Regional Center program sunsets in 2027 again. This is undoubtedly not what Congress envisioned. Furthermore, even if Section 108 of the RIA does indicate that DHS "may not suspend or terminate the allocation of visas to the beneficiaries of approved petitions" filed before September 30, 2026, it does not signal how that allocation is to occur.

Even if USCIS implements priority processing of Forms I-526 and I-526E for investments in rural projects, or increases filing fees to adjudicate such petitions within 240 days, as the RIA directs, it's unlikely that any of the reserved visa numbers in FY 2022 would be used, which means that all of the 6,396 visa numbers that were made available to the reserved EB-5 categories in this fiscal year will be carried over to the same reserved categories in FY 2023. Importantly, the term "priority processing" is not defined in the RIA, so it is unclear of its impact on processing, should USCIS implement.

<sup>4</sup> See USCIS Processing Times for Form I-526, available at <https://egov.uscis.gov/processing-times/> (last accessed August 15, 2022).



We estimate that the FY 2023 annual limit for EB-5 visas will be approximately 14,200, 4,544 of which would go to the reserved categories. With the 6,396 visa numbers carried over from FY 2022, the total number of reserved EB-5 visas available in FY2023 could be 10,940. See Table 2 below for more details.

**Table 2: EB-5 Visa Availability Projection for FY2023**

	FY2022*			FY2023*		
	Annual Limit	Carryover	FY Total	Annual Limit	Carryover	FY Total
EB-5 Total	19,987	-	<b>19,987</b>	14,200	-	<b>14,200</b>
Unreserved	13,591	0	<b>13,591</b>	9,656	5,766	<b>15,422</b>
Reserved	6,396	0	<b>6,396</b>	4,544	6,396	<b>10,940</b>
Rural	3,997	0	<b>3,997</b>	2,840	3,997	<b>6,837</b>
High Unemployment	1,999	0	<b>1,999</b>	1,420	1,999	<b>3,419</b>
Infrastructure	400	0	<b>400</b>	284	400	<b>684</b>

\* Data are based on author's estimates on I-526/I-526E processing and visa usage.

However, post-RIA EB-5 applicants will not be able to benefit from the estimated 10,940 reserved visa numbers in FY 2023 unless their Forms I-526/I-526E receives a timely adjudication from USCIS. Unfortunately, given the current processing times, we estimate that very few post-RIA applicants could become documentarily qualified and eligible for reserved visa number final action in FY 2023. If that is the case, it's likely that the reserved visa numbers that carried over from FY 2022 would remain unused by the end of FY 2023, hence available to the "unreserved" categories as RIA directs.

If DOS continues to follow its long-time practice to maximize visa number use, it could be possible that the unused reserved visa numbers that were carried over from FY 2022 would be made available to the "unreserved" categories in FY 2023, providing a much-needed relief, albeit not sufficiently enough, given the current visa backlog for pre-RIA investors. For example, assuming only 630 visas are required in FY 2023 out of the 6,396 visa numbers that were carried over to the reserved categories from FY 2022, 5,766 unused carried-over visas could be allocated to the "unreserved" categories throughout FY 2023 in order to "maximize visa number use." In this case, pre-RIA investors who have been waiting in the backlog could receive a total of 15,422 visa numbers in FY 2023 (see Table 2 above).

In the future, with USCIS adjudicating more post-RIA Form I-526/I-526E petitions, more reserved visa numbers will be put into use and less will carry over to the next fiscal year.

Based on our calculations, and assuming an average of 3 visa numbers are used per Form I-526E, if USCIS approves more than 710 Forms I-526/I-526E associated with a rural project or 355 petitioners invested in a high-unemployment project or 71 investors for infrastructure projects, DOS would need to eventually establish an FAD for each such category because the reserved visa demand exceeds the applicable annual limit.

#### Impact of Per-Country Caps

Additionally, under the "per country" caps, no individual country may receive more than 7% of the total number of visas made available in a fiscal year. See 8 U.S.C. § 1152(a)(2). This includes 7% of any reserved visa category, which limits the benefit of the incentive of a quicker visa number allocation.



For countries where there is heightened infrastructure to attract EB-5 capital, like China, Vietnam, India, and South Korea, it's possible there is enough demand for reserved visa exceeds the low supply. Such countries could potentially benefit from the use of "otherwise unused" numbers, which would be made available in priority date order without regard to foreign state of chargeability, but it's clear the 7% per county cap impacts the efficacy of these RIA provisions.

EB-5 stakeholders should note (and disclose) that just because an investor's priority date is current at the time of I-526E filing does not mean that he/she will not be subject to a visa backlog or the establishment of a final action date at some point.

#### When will a Final Action Date be Established?

Based on USCIS' self-imposed "lapse", there is pent up demand for new EB-5 petitions, and USCIS is likely to see a glut of new Form I-526E filings now that Form I-956F receipt notices are being produced regularly. As discussed above, due to USCIS processing times, it is likely that DOS will not need to establish a Final Action Date for the reserved categories in FY 2023 and even possibly until the second half of FY 2024. This assumes that the historical USCIS processing times stay relatively consistent with the new reserved petitions. However, if there is priority processing implemented or expedited petition approvals, an FAD could be imposed earlier in FY 2024.

However, when DOS has visibility of increased number use and demand levels of the reserved visas, it will likely need to impose an FAD of mid-to-late 2022, the likely time period when a significant number of Forms I-526E will have been filed. If countries like China and Vietnam dominate these new filings, DOS could impose an FAD for only those nationals, but keep the "Rest of World" current. Further, depending on the number of Forms I-526E, the FAD is likely to move forward slowly to account for the large number of filings – just as it did with mainland China for September 2015 and December 2015, when there was a surge of filings before possible Regional Center program termination.

#### Conclusion and Recommendations on Reserved Visas

The RIA's reserved visa provisions open up a number of questions for EB-5 stakeholders. Below are our recommendations related to reserved visas that can be used as talking points when discussing RIA implementation with USCIS and DOS.

1. DOS should reconsider its decision to not make reserved visa numbers available to immigrant investors who filed Forms I-526 pre-RIA based on investments in rural areas or high unemployment areas.
2. DOS should allocate the reserved numbers that were carried over from the preceding fiscal year available for use first to allow for maximum use of all visa numbers in a current fiscal year. This would then allow any unused reserved numbers based on the current year's annual limit to be carried over for potential use in the next fiscal year.



3. Should there be insufficient demand for reserved visa numbers during the current fiscal year, DOS should make any unused carryover reserved visa numbers from the previous fiscal year available for use in the unreserved category during that fiscal year.
4. USCIS should publicly disclose the number of filings of each EB-5 visa category as well as country of chargeability per visa category, so DOS and the public can have visibility for demand as early as possible.
5. DOS should disclose the same detailed information in #4 above in their “Annual Waiting List at NVC as of November 1 of each year” report.
6. DOS and USCIS should allow the same petition to wait in multiple lines for visa number allocation (i.e. rural, high unemployment, unreserved, etc.) as long as the petition is eligible. Although this may be difficult from an operational perspective, such action will help reduce USCIS and DOS workload significantly and maximize visa number usage for all categories in a fiscal year.