



## Summary of IPO Stakeholder Engagement Held October 19, 2022

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In the original version of this summary posted on October 21, 2022, I wrote:

*As for any definitive guidance provided in the engagement, IPO confirmed the agency interprets the RIA as effecting no change in the requirement for EB-5 investors to sustain their investment at risk throughout the first two years of conditional residence.*

Upon closer review of the statements of IPO during the engagement it is evident IPO's current position is that different sustainment requirements apply to EB-5 investors who filed their I-526 petitions prior to the enactment of the EB-5 Reform and Integrity Act ("RIA") and those who filed afterward. For those who filed prior to RIA it has not changed - they must sustain the investment throughout the first two years of conditional permanent residence.

For EB-5 investors filing I-526 petitions after the enactment of RIA, IPO confirmed RIA changed the sustainment requirement, but has not provided guidance on exactly how it views RIA as having changed the sustainment requirement. The RIA amended the Immigration and Nationality Act to require that the investment must be "expected to remain invested for not less than 2 years," and the October 2022 Policy Manual updates echo this, stating "For petitions filed on or after March 15, 2022, the capital must be expected to remain invested for not less than 2 years."

Until such time as USCIS provides further guidance, the conservative approach to viewing the 2-year requirement would be to think of it as starting after:

- Investor has made the entire required investment;
- The entire required investment has been received by NCE;
- I-526E petition has been filed;
- The entire required investment has been received by JCE; and
- JCE has deployed entire investment amount

The below summary has been updated as of November 9, 2022 to accurately reflect the above correction.

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USCIS Immigrant Investor Program Office ("IPO") held a Stakeholder Engagement on October 19, 2022, presented through the Webex platform along with audio access by telephone. USCIS promised to have the content of the engagement available to the public in its electronic reading room within a few days. In the meantime, IIUSA is providing this summary.

The format was reminiscent of recent engagements, with the first 25 minutes or more spent – frustratingly – on preliminary remarks and personal introductions by IPO staff. The engagement was scheduled for one hour but was extended an additional 30 minutes as the question-and-answer session did not commence until almost an hour had passed. Given the complexity of the topic, the 90-minute session was far from sufficient to address many substantive issues, with at least 20 individuals left in the queue who did not have an opportunity to ask questions or make comments.

IIUSA's Legislative Counsel Carolyn Lee, along with AILA EB-5 Committee Chair David Morris and other AILA EB-5 Committee Members, expressed to USCIS great concerns about the lack of opportunities for meaningful engagement with IPO. They explained that listening sessions and occasional stakeholder engagements with stilted question-and-answer formats do not allow for meaningful engagement with IPO, and that much more can be done to facilitate collaborative analyses and discussions of complex issues pertaining to EB-5. David Morris cited the example of a very productive IPO engagement a few years ago focused on expenditures in job creation analyses. IPO had announced that engagement and invited questions in advance. A robust discussion ensued, and participants came away from the engagement with greater clarity around job creation based on expenditures.

Greater clarity around EB-5 law and policy is needed now more than ever, as the industry grapples with the interpretation of the EB-5 Reform & Integrity Act of 2022 ("RIA") and its compliance implications. As Carolyn Lee aptly pointed out during the engagement, USCIS is actively drafting implementing regulations, and we have already seen in the form of the *Behring I* and *II* lawsuits what can happen when IPO operates in a vacuum, eschewing offers from the industry and the private bar to provide real-world insights and expert guidance in this complex area of law.

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Other than that, USCIS statements pertained mostly to staffing information and policy around issues that were already fairly well understood in the industry. Here are a few take-away notes based on IPO remarks during the engagement:

- All *pooled* investors (i.e. more than one EB-5 investor in the NCE) must file I-526E petitions under the Regional Center Program
- Only after an approved regional center files Form I-956F Application for Approval of Investment in a Commercial Enterprise may the investors file their I-526E petitions
- Investors do not need to wait for USCIS approval of the regional center's I-956F filing to file their individual I-526E petitions

- If the regional center filed Form I-956F but does not have the formal USCIS receipt, investors may include with the I-526E petition a copy of the I-956F USCIS Lockbox notice and the first 6 pages of the I-956F; or they may submit proof of the cashed check or credit card debit for the I-956F filing fee and the first 6 pages of the I-956F, to be followed by the interfiling of the formal USCIS receipt notice when received
- IPO will continue to evaluate petitions filed prior to enactment of the EB-5 RIA under eligibility criteria in place at the time of filing the petitions
- Regional center investors filing under the RIA can count indirect jobs for up to 90% of the job requirement
- For jobs created by construction projects of less than two years in duration, only 75% of the job requirement can be met with indirect jobs
- Jobs attributed to prospective tenants can be claimed as long as the jobs are not relocated existing jobs

### *IPO Staffing*

- IPO currently has 100 staff members adjudicating EB-5 filings, many of whom are assigned to work on particular forms, e.g. I-526 petitions, or I-829 petitions, although some split their time working on more than one form type
- IPO staff routinely collaborate with each other, relying on research and analysis by compliance officers, economists who evaluate NCE and JCE business plans and organizational documents, etc. They will collaborate on compliance reviews and audits going forward.
- 35 of IPO's staff members are assigned to the review and adjudication of I-829 petitions, and 40 are assigned to I-526 petitions and I-290B motions, I-824 applications pertaining to I-526 petitions, and I-941 International Entrepreneur Parole applications. This is fewer staff members than in FY2018, when IPO had approximately 60 staff assigned to I-526 petitions. IPO is in the process of onboarding additional adjudicators.
- IPO's Compliance Division has 4 branches: Research & Analysis; Audits; Background Investigations; and Regional Center Adjudications. Compliance has a multi-disciplinary staff including CPAs, certified fraud examiners, global sanctions experts, money laundering experts, and others focused on compliance with EB-5 law.
- The Compliance Division is responsible for investigating and terminating regional centers for non-compliance. The Division looks forward to using new tools afforded by RIA, including full audits of regional centers, authority to issue sanctions, terminate regional centers, and a permanent bar from the EB-5 Program issued against regional centers, NCEs and persons who, e.g. engage in acts that might present a threat to national security

### *Forms I-526 and I-526E*

- Comments on Forms I-526 and I-526E are still being accepted through October 24, 2022. Go to [www.regulations.gov](http://www.regulations.gov) and search USCIS-2007-0021-0072
- IPO processes I-526 petitions based on FIVA (first in, visa availability). I-526 petitions are separated into three groups:
  1. I-526 petitions for which visas are not available nor soon to be available per the Department of State Visa Bulletin. When visas do become available or soon to be available the petitions are moved to group 2 if project review is still needed, or group 3 if project review is completed (e.g. prior approval of I-924 exemplar petition)
  2. I-526 petitions for which visas are available or soon to be available, but project review is still required
  3. I-526 petitions for which visas are available or soon to be available, and for which project review is completed or the petition involves a stand-alone (non-regional center) NCE. USCIS reviews these petitions in order of oldest to newest.

### Form I-956 et seq.

- If a regional center does not file Form I-956G it may be subject to termination
- If a regional center does not file Form I-956 pursuant to the settlement in *Behring* it may be subject to termination for failure to establish eligibility under the RIA
- IPO's Compliance Division anticipates publishing form overview videos at USCIS.gov for Forms I-956, I-956F, I-956G and I-956H. Similar to prior Form I-924 overviews, the I-956 series will provide explanations of how to complete forms and tips on how to provide the required information
- The I-956 series of forms are the subject of a 60-day notice and comment period published in the Federal Register. Comments should be submitted to [www.regulations.gov](http://www.regulations.gov) through November 1, 2022. Look for Agency Information Collection Activities / New Collection.
- IPO advises regional centers to pay close attention to form instructions, and avoid putting "see attached"
- As required under the *Behring* settlement, existing regional centers must file an I-956 amendment application. USCIS will grant deference to the existing regional centers, and will be focused on whether the regional centers are complying with the RIA. But if the regional center wants to change an element of their designation (such as expanding the existing geographic scope), that part of the application would not be granted deference.
- All regional centers designated on or before September 30, 2022, regardless of whether they plan to sponsor new offerings, must file Form I-956G Annual Report of Regional Center by December 29, 2022
- If a regional center does not receive the I-956F formal USCIS receipt within 10 calendar days of digital filing, their investors may include a copy of the I-956F USCIS Lockbox notice and first six pages of the I-956F filing, or proof of the filing fee in the form of a cashed check/credit card debit followed by interfiling of the formal USCIS receipt when available
- So far, the biggest problem for regional center compliance officers is having to issue RFEs for persons who should file Form I-956H Bona Fides of Persons Involved With Regional Center. Nearly all the RFEs involve people with titles such as "Chief Lending Officer" or "Director of Investor Relations" that appear to fall under the definition of persons "involved with" the regional center as defined in the RIA
- For the Form I-956H, individuals should list their home address – not the address of the regional center – so that the biometrics appointments are scheduled near their home.

**[Author's note** – While IPO gave the example during the stakeholder engagement of the individual with the title of Chief Lending Officer, our experience is USCIS is issuing RFEs that ask for Form I-956H from an overly broad range of individuals. The RFEs appear to be the result of review of regional center websites, with the RFEs asking for I-956H forms from every employee of the regional center whose name appears online regardless of whether there is some indication of the individual being, directly or indirectly, in a position of *substantive authority to make operational or managerial decisions* over the pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the Regional Center Program. ]

### Form I-829

- As noted in USCIS FAQ, for regional centers redeploying repaid EB-5 funds from a JCE, the redeployment may be outside the regional center's geographic scope
- IPO is working on the development of a digital platform for electronic adjudication of I-829 petitions. Digitization involving scanning I-829 petitions and attachments, migrating Form I-829 to ELIS, and enabling petitioners to upload documents through MyUSCIS accounts
- The sustainment period has not changed under the RIA. Investors must sustain their investment at risk throughout the first two years of conditional permanent residence

### *Integrity Fund*

- Every regional center must pay an annual fee to the Integrity Fund of \$20,000 or \$10,000, depending on the number of investors they had in the fiscal year. USCIS will publish guidance on when and how to pay these fees, and will not impose late fees for Integrity Fund payments in 2022
- Also, individual EB-5 petitions must include a \$1,000 Integrity Fund fee for I-526E petitions filed on or after October 1, 2022.
- USCIS will use the Integrity Fund for specific purposes including detecting and investigating fraud or other crimes, compliance with Immigration laws, and other actions DHS deems necessary including compliance under RIA Section 107