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

February 10, 2023

RE: Questions and Comments for March 20, 2023 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 March 20, 2023 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.

The enclosed documents specifically address questions and concerns related to the three topics the agency stated would be the focus of the engagement: Investment Period, Regional Center Operations, and Third-Party Promoters. We trust you will read our comments and questions in full and address them on March 20.

As always, IIUSA is committed to open communication with USCIS and IPO and we welcome any opportunity to work with you to improve the EB-5 Program.

Sincerely,

Aaron L. Grau
Executive Director

ENCLOSURE

To: Alissa Emmel, Chief, Immigrant Investor Program Office
From: Invest in the USA (IIUSA)
Re: March 20, 2023 IPO EB-5 Stakeholder Engagement | EB-5 Investment Sustainment Period under the EB-5 Reform and Integrity Act of 2022
Date: February 10, 2023

We are deeply concerned that USCIS is considering interpreting the RIA to require a substantially shorter investment duration than we believe compelled by the best interpretation of the RIA, Congressional intent, and sound policy.

USCIS's brief remark on the point during the last stakeholder engagement held on October 19, 2022, and the language used in the invitation for the upcoming March 20, 2023 engagement reprised above suggest that USCIS may interpret the RIA as requiring merely a two year investment period, after which presumably, investors may receive a return of capital irrespective of their conditional residency. To the extent that USCIS is considering this interpretation, we submit that such an interpretation of the RIA is contrary to both the clear intent of Congress and the policy goals of the EB-5 Program. While the RIA states that EB-5 capital is expected to remain invested for "not less than 2 years," there is no indication anywhere in the RIA suggesting that the referenced 2-year period is independent of the two-year required conditional residency period as is the current written USCIS policy. See 6 USCIS-PM G.5, FN 4 ("Sustainment Policy").

The Sustainment Policy aligns with regulations at 8 CFR 216.6(a)(4)(iii) which require:

> *Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and* ***continuously maintained his or her capital investment over the two years of conditional residence****. [emphasis added]*

There is no indication whatsoever in the RIA's framework that with six words, "for not less than 2 years" that Congress meant to unwind the long-enshrined principle of requiring investment throughout the two-year conditional residency period.

Along the same lines, it has also come to our attention that a handful of immigration attorneys, and perhaps USCIS, have questioned whether the RIA's omission of the phrases referencing investors' sustainment "throughout the period of the alien's residence in the United States," from section 1186b eliminates the requirement of sustainment through conditional residency. It doesn't. USCIS should not attempt to interpret language that does not appear in the RIA, but rather focus on the language that does. USCIS should not interpret its absence as Congressional intent to impose the far-reaching consequences of voiding the longstanding regulatory

requirement that investors sustain their investment through the end of the conditional residency period, especially when many other RIA provisions clearly indicate the opposite intent.

For example:

- The RIA contains detailed provisions on how the redeployment of investor capital is to work in the event an investor's initial investment is completed prior to the conclusion of his or her conditional residency period.[1] These provisions were enacted to address the reality that due to the combination of highly lengthy USCIS processing times and visa retrogression for investors from some countries, redeployment is often necessary. The mechanics of these provisions are necessarily detailed and complex. These provisions cannot be squared with the notion that the RIA permits investors to receive a return of their capital in just two years, regardless of where they are in the process; were that the case, the entire concept of redeployment would be meaningless.

- The RIA also allows an investor to take an additional year after completing their conditional residency to create the requisite employment, provided the investor's capital remains invested during such time.[2] Moreover, under the RIA, an investor who has not created the requisite jobs must maintain their investment beyond their conditional residency period.[3] Both provisions are consistent with reading the "not less than 2 years" language as a minimum that is consistent with the two-year conditional residency requirement because both provisions would be superfluous if, as Chief Egan's remarks suggest the agency may believe, the RIA permits an investor to receive its capital back before the conditional residency period even *begins*, let alone ends.[4]

Moreover, even if USCIS is inclined to change the long-standing sustainment policy, given the regulation directly on point, 8 CFR section 216.6(c)(1)(iii), USCIS must follow all the requirements of the Administrative Procedures Act before implementing any policy change or revising any existing regulation.

The policy rationale for rejecting such a view is even more immediate. Virtually all federal programs in the United States that provide investor incentives and benefits require significant investment holding periods. By way of example, to receive the maximum Opportunity Zone benefit, the necessary investment period is ten years; for New Market Tax Credits, the necessary investment period is seven years; for Qualified Small Business Stock treatment at least, a five-year investment is required. Lawful permanent residence in the U.S. is a benefit worthy of a substantial investment of time and funds. Nothing in the RIA suggests that Congress intended to devalue the path to U.S. citizenship by lowering the threshold of investment from the framework

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[1] Subparagraph F (v)(I).

[2] Section 104a (5) c amending "(B) Removal or Extension of Conditional Basis.

[3] Ibid.

[4] Under USCIS's novel interpretation, this outcome is not just possible, but virtually guaranteed, because USCIS routinely takes two years or longer to adjudicate Form I-526 (now Form I-526E under the RIA) petitions, which is just the first step in the immigration process that, if successful, results in the investor receiving conditional residency.

imposed pre-RIA. In fact, uncontroversially, all of the RIA advances the idea that upwardly adjusting the value of residency by investment in the United States was long overdue.
As the RIA also puts EB-5 Program integrity and oversight foremost among its underlying Congressional objectives, we are profoundly concerned about the perverse impacts that devaluing EB-5 investment duration will have on the market. We fear that regional centers will respond to investor pressure to create "fast and easy" pathways touting short-term investment timelines uncoupled from the investment's merits. Rather than encouraging high-quality projects and protecting investors as the RIA is intended to do, a two-year investment minimum interpretation will likely flood the EB-5 market with short-term, high-risk projects that do not fulfill the key economic development and job creation goals that are the foundation of the EB-5 Program.

In fact, we regrettably report that the market has already responded to the possibility of a two-year minimum investment. Projects are currently being offered in the market with claims that the sustainment period is now just two years. We also observe that quick returns may neutralize the RIA's new incentives for rural and infrastructure developments because these projects, on average, require significantly longer hold periods for construction and stabilization.

In summary, it is a poor construction of the RIA to adopt a two-year floor on the EB-5 investment duration. We submit that such an interpretation would stand the thrust of the RIA's purpose on its head. The RIA is intended to bring an even greater boost to the U.S. economy than the prior iteration of the EB-5 Program and at the same time imposes a higher hurdle to achieve U.S. residency by investment. Adopting a two-year floor on investment would thwart both objectives. We urge USCIS to forego this errant interpretation of the RIA, if it is indeed considering its adoption.

Senator Cornyn has recently addressed this issue with USCIS through a letter dated January 24, 2023, which is attached for reference. We fully agree with the points raised in the Senator's letter.

JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510–4305

January 24, 2023

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Washington, DC 20528

Dear Secretary Mayorkas:

I am writing with regard to U.S. Citizenship and Immigration Services' (USCIS's) ongoing efforts to implement the *EB-5 Reform and Integrity Act of 2022* (RIA). The RIA is a significant legislative accomplishment, and I appreciate USCIS's engagement with my office both leading up to its enactment, as well as during the implementation phase. However, I am concerned about remarks made during a recent stakeholder engagement meeting, which suggest that USCIS is considering new sustainment requirements for new investors that would effectively decouple the time frame foreign investors must sustain their investment in the United States from their conditional permanent residence period. Such requirements would be inconsistent with the text and intent of the RIA, and I would encourage USCIS to consult carefully with the EB-5 stakeholder community on this and other issues that arise during implementation.

The RIA adds a new requirement to the EB-5 provisions of the *Immigration & Nationality Act* (INA), specifically that an alien's capital investment be "expected to remain invested for not less than 2 years." (hereinafter, the "sustainment provision").[1] During a recent EB-5 National Stakeholder Engagement, the Immigration Investor Program Office stated that "[t]hese modifications relieve the burden on new investors of maintaining their investment at-risk for long timeframes well beyond the scope of the investment project."[2] Stakeholders have expressed to me their concerns that USCIS may interpret this provision of the RIA to permit an investor to receive a return of their capital after it has been invested for two years, even if that period elapses prior to the end (or, for that matter, the beginning) of the investor's conditional permanent residency. Such a reading would be inconsistent with the text and purpose of the RIA.

Under its most natural reading, the sustainment provision requires that the alien's capital investment remain invested at least through his or her period of conditional permanent residence. Current USCIS policy requires an alien investor to submit evidence that he or she "sustained the investment throughout the period of the immigrant investor's residence in the United States" as part of his or her petition to

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[1] *Consolidated Appropriations Act, 2022*, Pub. L. No. 117-103, 136 Stat. 49, 1070, Div. BB, sec. 102(a)(1) (Mar. 15, 2022) (RIA).

[2] U.S. Citizenship & Immigration Services, *EB-5 National Stakeholder Engagements*, at 5 (Oct. 19, 2022) (remarks by Paul Egan, Acting Policy Division Chief), *available at* https://www.uscis.gov/sites/default/files/document/data/National%20Engagement-EB-5%20Immigrant%20Investor%20Program.pdf.

remove conditions on permanent resident status.[3] That conditional permanent residence period is two years—the same as the minimum two-year sustainment period codified under the RIA.[4]

Under longstanding statutory interpretation jurisprudence, "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates."[5] Congress drafted the RIA to be completely consistent with USCIS's current sustainment policy, rather than abrogate it. First, the RIA establishes new capital redeployment parameters that allow commercial enterprises to redeploy capital that must be maintained at risk for multiple years. Congress was aware of the need for EB-5 visa petitioners who face lengthy backlogs to maintain their capital at risk, and the capital redeployment provisions respond to that need.[6] The redeployment provisions even explicitly decouple the sustainment period from the alien investors' job creation requirement, clarifying that before the capital can be redeployed, the commercial enterprise must have "created a sufficient number of new full time positions to satisfy the job creation requirements of the program for all investors in the new commercial enterprise . . . ."[7] A new two-year sustainment period would be inconsistent with redeployment rules that facilitate longer-term investments, and anticipate capital being redeployed even after the required jobs have been created.

Second, the RIA newly permits the Secretary of Homeland Security to extend an alien investor's conditional permanent resident status by an additional year if the alien invested the requisite capital but did not yet create the required jobs. The extension is contingent upon the alien's capital remaining invested while the alien is actively in the process of creating the required employment prior to the third anniversary of the alien's admission for lawful permanent residence.[8] This provision, which contemplates alien investors' capital remaining at risk for more than two years after admission, would be in tension with a two-year sustainment period that would end for the majority of alien investors prior to admission.[9]

Finally, a two-year sustainment period that could terminate even prior to an alien investor's admission to the United States would be inconsistent with the purpose of the RIA. Sen. Grassley stated that "[t]he EB-5 Reform and Integrity Act of 2022 is the result of years of hard work and negotiation, and it is our hope that it brings meaningful reform to a program badly in need of it and, mostly importantly, much-needed investment capital and the permanent jobs that can come with it, to inner city and rural areas where it is normally difficult, if not impossible, to attract investment capital."[10] I share this understanding of the bill's purpose with my colleagues, and note that limiting the duration of these investments to only two

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[3] U.S. Citizenship & Immigration Services, *Policy Manual*, Vol. 6, Pt. G, Ch. 5 (Dec. 19, 2022), *available at* https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-5.

[4] Immigration & Nationality Act, § 216A(d)(2)(A) (8 U.S.C. § 1186b(d)(2)(A)).

[5] *U.S. v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002).

[6] RIA sec. 103(b)(1) (codified at 8 U.S.C. § 1153(b)(5)(F)(v)).

[7] RIA sec. 103(b)(1) (codified at 8 U.S.C. § 1153(b)(5)(F)(v)(bb)).

[8] RIA sec. 104(a)(6) (codified at 8 U.S.C. § 1186b(d)(1)(B)(ii)).

[9] Even as approximately half of EB-5 visas are issued to nationals of mainland China and India, these two countries face lengthy backlogs. *See* U.S. Department of State, *Report of the Visa Office 2021*, Table VI (Part IV), *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableVI_partIV.pdf (showing that of 2,023 EB-5 visas issued in FY 2021, 975 were issued to alien investors from mainland China, and 47 to alien investors from India); *see also* U.S. Department of State, *Visa Bulletin for January 2023*, No. 73, Vol X (Dec. 19, 2022), *available at* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-january-2023.html (final action dates for EB-5 preference classes are Mar. 22, 2015 for mainland China and Nov. 8, 2019 for India).

[10] 168 CONG. REC. S1105 (daily ed. Mar. 10, 2022) (statement of Sen. Grassley).

years would be inconsistent with Congress's goal of bringing investment capital to inner city and rural areas.

Thank you for your attention to this issue, and I encourage the Immigrant Investor Program Office to continue to consult carefully with the stakeholder community in implementing the RIA.

Sincerely,

John Cornyn
United States Senator

Cc: Ur Jaddou, Director, USCIS
Alissa Emmel, Chief, Immigrant Investor Program Office, USCIS
Karen Karas, Deputy Chief, Immigrant Investor Program Office, USCIS
Paul Egan, Acting Policy Division Chief, Immigrant Investor Program Office, USCIS

To: Alissa Emmel, Chief, Immigrant Investor Program Office
From: Invest in the USA (IIUSA)
Re: March 20, 2023 IPO EB-5 Stakeholder Engagement | Regional Center Operations
Date: February 10, 2023

As USCIS's prudent recent postponement of the I-956 and I-956G deadline displays, treatment of pre-RIA regional centers no longer promoting new projects is of critical importance to the thousands of investors and family members associated with those regional centers.

The RIA's new rubric of investor protections, terminations, debarments, sanctions and remedies have no precedent. Accordingly, our urgent request on this highly impactful topic is to engage substantively with the stakeholder community, in particular the experts we offer, consistent with Section 107 integrity provisions of the RIA.

IIUSA and other EB-5 stakeholders have long been seeking avenues for in-depth bilateral discussion of complex interpretive issues concerning the RIA. The topic of regional center operations involving "retiring" regional centers is the perfect candidate for such discussion.

We respectfully request this item as the first topic of substantive engagement to arrive at the best interpretation of the RIA for this vast class of EB-5 constituents.

Until such time, we suggest the following implementation of the RIA. In short, both regional centers who wish to promote new projects under the RIA and regional centers who have investors but presently do not have an intention to promote new projects under the RIA should file the Form I-956G.

The revised Form I-956G and instructions should clarify the reporting requirements and bifurcate the form to allow for (1) reporting on I-956F projects and RIA compliance, and (2) reporting on pre-RIA projects not subject to RIA compliance. The latter would encompass both regional centers that do not intend to promote new projects but want to maintain their designation to protect their current investors and regional centers continuing under RIA but also reporting on pre-RIA projects. By way of example, Form I-956G should be revised to allow regional centers to respond "not applicable" with respect to questions regarding fund administration, separate accounts and the like with respect to pre-RIA projects.

Regarding the postponement of the Form I-956 and Form I-956G filing deadlines USCIS announced on December 23, 2022, we take this opportunity to suggest clarifications to avoid unintended confusion arising therefrom.

1. Status of Forms I-956 and I-956G filed on or before December 29, 2022 - - USCIS should confirm that Regional Centers that complied with the Settlement Agreement and USCIS instructions by properly filing Form I-956 and/or I-956G using forms that were in full effect as of the filing date do not need to refile any new form published after the date that

the forms were properly filed. They should be bound by the instructions to the forms that they filed. Any new forms and new instructions should not be made retroactive to require new filings by such compliant regional centers. In addition, regional centers should not be subject to Requests for Evidence to provide information that was not required by the I-956 and I-956G forms and instructions in effect on the date they were filed.

2. Effective date of new forms and instructions -- Based on a review of the draft Form I-956G for which the comment period expired on January 26, 2023, it appears that USCIS will be seeking a substantially increased amount of information that cannot be compiled in weeks, but rather will take months to complete. We suggest that 60 days is the minimum time that would be reasonable for regional centers to compile this information and submit the forms. Please take this into account when announcing any new due dates.

   In this vein, please consider the fact that the Form I-956G for FY 2023 would be due between October 1 and December 29, 2023, likely merely months after USCIS announces a new deadline for the FY 2022 Forms I-956G. Accordingly, we urge USCIS to require the Form I-956G for FY 2023 only for those regional centers who have not yet filed the Form I-956G but who wish to continue operating. These regional centers, who did not yet file the Form I-956G under the original deadline, will have a full operational year post-RIA to report, which will supply USCIS with more meaningful information.

3. Avoiding duplicative filings of Forms I-956G - - Emphatically, regional centers who have already filed the Forms I-956 and the I-956G by the original deadline should not be penalized by being required to file the new Forms. We sincerely hope that prejudicial outcome is not under USCIS consideration.

To: Alissa Emmel, Chief, Immigrant Investor Program Office
From: Invest in the USA (IIUSA)
Re: March 20, 2023 IPO EB-5 Stakeholder Engagement | Direct and Third-Party Promoters
Date: February 10, 2023

Our fundamental concern regarding the Form I-956K is that essential pertinent terms remain undefined. We have no definition of who is a "promoter," including "direct promoter," "third-party promoter," and "migration agent," fundamental to the question of who is required to file the Form I-956K.

Please furnish the stakeholders with definitions of these terms. In doing so, please clarify how to distinguish one type of party from the others.

Relatedly, we have similar questions regarding the scope of other parties required to file the Form I-956K. USCIS comments indicate an expectation that employees of "promoters" also file the Form I-956K. However, we see no authority in the RIA to permit USCIS to require employees of the "direct and third-party promoters (including migration agents) of a regional center" to file the Form I-956K. Moreover, even under the broadest understanding of the regulated parties, there would be no basis to include all employees, including receptionists, security guards, and other personnel who have no involvement in the sale or marketing of EB-5 investments. Secretaries, greeters, or others that may have interaction with investors but are not doing the selling should not be included. We foresee potential issues with USCIS using integrity funds to conduct overseas investigations of marketing events and erroneously assuming that each person at an event must file a Form I-956K (or not being able to tell based on language or cultural barriers). Support staff and event staff often have no part in the sales. Similarly, people or entities engaged in EB-5 marketing or publicity, distinguished from sales of investments, should not be included in the definition of "promoter." To the extent employees of promoters are required to register, only employees who interact directly with investors for the purpose of selling securities should be expected to register.

Accordingly, please provide the legal justification for including employees and then clarify which employees defined by duties USCIS intends to require filing the Form I-956K.

Another item relates to reporting amendments. As a promoter and regional centers add new agreements or modify existing agreements, it is unrealistic to expect constant new Form I-956K filings creating additional burdens and opportunities for error by both USCIS, regional centers, and registrants. Instead, we recommend that USCIS adopt the annual Form I-956G cycle for any updates to previously filed Forms I-956K to provide USCIS with any amendments to existing agreements and to report new agreements.

Finally, USCIS has asserted by way of instructions to the Form I-956K that a promoter's misrepresentation or fraud in relation to its Form I-956K registration could result in the denial

of an associated investor's petition or immigration benefits. Please confirm that unless a regional center or an investor is a party to the fraud or misrepresentation, that an innocent, good-faith regional center or investor shall not be prejudiced by a promoter's misconduct.

Similarly, please confirm that any defect in the Form I-956K must be material and involve intentional wrongdoing on the part of the party filing the Form I-956K. Regional centers rely on overseas promoters to raise capital for U.S. job creating projects. While without question in the interest of regional centers and investors to work only with compliant promoters, it would be highly disruptive and unnecessarily damaging to regional centers' reputations if USCIS were to sanction Form I-956K registrants without lawful basis and prudence.

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