



AMERICAN
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March 16, 2023

Ur M. Jaddou, Director
U.S. Citizenship and Immigration Services
5900 Capital Gateway Dr.
Camp Springs, MD 20746

RE: Urgent request to correct policy guidance implementing the EB-5 Integrity Fund and USCIS-imposed payment deadline of April 3, 2023

Dear Director Jaddou:

On behalf of the American Immigration Lawyers Association (AILA) and Invest in the USA (IIUSA), we respectfully seek urgent action to correct or clarify USCIS guidance announcing a required payment of a FY2023 Annual Integrity Fund Fee by each designated regional center pursuant to the EB-5 Reform and Integrity Act of 2022 (RIA).

On March 2, 2023, the Federal Register published a notice implementing the requirement states “USCIS must collect a fee of \$20,000 or \$10,000, depending on certain factors [established by the RIA] to finance the EB-5 Integrity Fund **from each designated regional center.**” That broad statement, which essentially asserts that all regional centers must now pay the Integrity Fund fee, is legally ambiguous and contrary to the plain language of the RIA and USCIS obligations under the Behring Settlement Agreement, the latter of which mandates payment obligations only for those regional centers designated under INA 203(b) (5) (E).

AILA and IIUSA urge USCIS to immediately issue guidance clarifying the fee payment obligation as follows:

Payment of the FY2023 Annual Integrity Fund Fee is required only by those regional centers “designated under subparagraph (E)” defined as, either:

- 1. New regional centers that filed a Form I-956 and received a USCIS designation approval notice between May 14, 2022 and September 31, 2022, and*
- 2. Previously Approved Regional Centers (pre-RIA) that filed a Form I-956 and received a USCIS designation approval on or before September 31, 2022.*

This matter is highly time-sensitive given the notice by USCIS that any regional center that fails to pay the fee within 90 days of the due date of April 1, 2023 will be terminated. If this policy is not corrected, we believe this USCIS mischaracterization will result in hundreds of pre-RIA regional centers being forced to pay millions of fees in error for fear of termination.

Background

On March 15, 2022, President Biden signed the EB-5 Reform and Integrity Act of 2022 (“RIA”), Div. BB of the Consolidated Appropriations Act, 2022 (Pub. L. 117-103) into law, which revised INA 203(b)(5). The law reauthorized a substantially reformed EB-5 Regional Center (RC) Program which became effective on May 14, 2022.

The RIA establishes a special fund known as the [EB-5 Integrity Fund](#) which requires USCIS to collect an annual fee “from each regional center designated under INA 203(b)(5)(E)” of either \$10,000 or \$20,000 - depending on the number of participating investors.

It is important to note that INA 203(b)(5)(E) did not exist prior to the enactment of RIA on March 15, 2022, and therefore no previously existing regional center could have been designated under INA 203(b)(5)(E) at the time the law was enacted.

USCIS issued an [alert](#) on March 1, 2023, that it was implementing the statutorily required annual fee or Integrity Fund Fee (“IFee”) to fund the “EB-5 Integrity Fund.” On March 2, 2023, USCIS [published](#) a notification in the Federal Register explaining how USCIS will calculate the number of investors a regional center has in its new commercial enterprises for purposes of determining which level of annual integrity fund fee is owed.

In that Federal Register notice, USCIS stated it “**must terminate the designation of any regional center that does not pay the fee within 90 days after the date on which such fee is due.**”

- **The USCIS assertion that all Regional Centers must pay the IFee has no legal basis. The language of the RIA is clear and unambiguous in requiring USCIS to collect the IFee only from those regional centers *designated under Subparagraph E*.**

Pursuant to the RIA, USCIS is required to collect the Integrity Fund Fee on an annual basis, and INA 203(b)(5)(J)(ii) clearly defines exactly who must pay the IFee. It states:

(I) **ANNUAL FEE.** —On October 1, 2022, and each October 1 thereafter, the Secretary of Homeland Security shall collect for the Fund an annual fee—

(aa) except as provided in item (bb), of \$20,000 ***from each regional center designated under subparagraph (E); and***

(bb) of \$10,000 from ***each such regional center*** with 20 or fewer total investors in the preceding fiscal year in its new commercial enterprises.

USCIS writes in the Federal Register notice implementing the IFee that this statutory provision “*contains little ambiguity for USCIS to resolve or explain.*”

We agree – the statutory language is clear and unambiguous. The RIA specifically states that the IFee is to be paid ONLY by “each regional center ***designated under subparagraph (E)***.¹” That is entirely different from the USCIS’ apparent assertion that all regional centers must pay the IFee or face termination. To reach that conclusion, USCIS ignores the text’s qualifying language limiting the fee obligations to those regional centers “designated under subparagraph (E).”

USCIS also fails to recognize the nuanced distinctions between legally different regional center groups, which are as follows:

¹ INA Section 203(b)(5)(J)(ii)(I)(aa).

Opt-In Group 1	Pre-RIA regional centers plus newcomers that filed Form I-956 Application for Regional Center Designation seeking designation under subparagraph (E) <u>and received a USCIS Notice of Decision recognizing the applicant's status as a regional center "designated under subparagraph (E)"</u>
Opt-In Group 2	Pre-RIA regional centers that filed Form I-956 Application for Regional Center Designation as an amendment pursuant to the Behring Settlement where the application remains pending, and Pre-RIA regional centers that plan to file Form I-956 as an amendment when further guidance is published by USCIS on filing requirements.
Opt-Out Group	Pre-RIA regional centers that did <u>NOT</u> file Form I-956 Application for Regional Center Designation as an amendment or otherwise, do not plan to file Form I-956 Application for Regional Center Designation as an amendment or otherwise, and are <u>NOT</u> seeking designation under subparagraph (E).

We agree with the USCIS assertion that those entities in *Opt-In Group 1* are subject to IFee payment obligations pursuant to the RIA. This is because those entities applied for and received designation under subparagraph (E) by filing Form I-956 Application for Regional Center Designation and, upon receiving the approval, were formally recognized by USCIS as "designated under subparagraph (E)."

However, USCIS has no legal basis to also claim Pre-RIA regional centers in *Opt-In Group 2* and the *Opt-Out Group* must likewise pay the IFee. This is because those entities either did not seek and/or have not received designation under subparagraph (E). In short, there has been no USCIS adjudication designating them as regional centers under INA 203(b)(5)(E). As such, the RIA does not require them to pay the IFee.

- ***Filing Form I-956 and paying the \$17,795 filing fee is a required first step to seek status as a regional center designated under subparagraph (E). But according to USCIS rules, an entity is not designated until the Form I-956 is approved.***

Following the RIA's enactment, USCIS published new Form I-956 Application for Regional Center Designation with accompanying Instructions. As USCIS is aware, forms and instructions carry the weight of regulations.

The [Form I-956 Instructions](#) begin with the question "What is the purpose of filing the I-956?" and then proceeds to supply the following answer:

"Form I-956 is used to 1. ***Request USCIS designation as a regional center under INA 203(b)(5) (E)*** that will pool investments and promote economic growth . . . in a particular geographic area" and also to "2. Request an amendment to ***an approved regional center designated under INA 203(b)(5)(E).***"

Moreover, the instructions state as follows:

NOTE: *An "approved" regional center is an entity designated as a regional center under INA 203(b)(5)(E), effective 60 days after the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act, 2022 (Pub. L. No. 117-103), was enacted on March 15, 2022. (emphasis in the original)*

The subsequent instructions clarify the possible outcomes of the Form I-956 adjudication as follows:

Decision. *The decision on Form I-956 involves a determination of whether you have established eligibility for the requested designation, or an amendment to a previously approved designation. USCIS will notify you of the decision in writing.*

Approval. If you have established that you qualify for the benefit sought, USCIS will approve your application. The approval notice will provide information about the responsibilities and obligations of your USCIS designated regional center. It will also list the evidence to submit in support of regional center-associated individual EB-5 petitions, as well as details on the reporting and oversight requirements for regional centers.

Denial. If you have not established eligibility for the benefit sought, USCIS will deny this application.

An entity that filed Form I-956 asserted its clear intention to seek USCIS designation as a regional center under INA 203(b)(5)(E). That desired classification, however, is not achieved unless and until USCIS approves the Form I-956 Application - as the form and instructions make clear. A pre-RIA regional center whose Form I-956 Application remains pending or that does not file the Form I-956, is not a designated or "approved" regional center under INA 203(b)(5)(E).

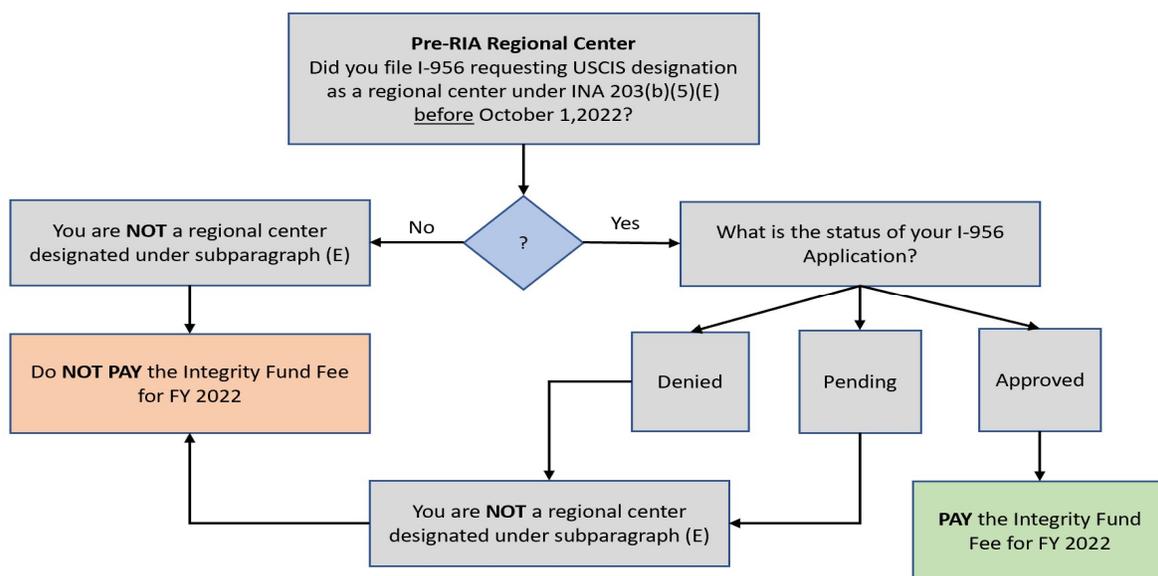
USCIS initially set a deadline of December 29, 2022 for all pre-RIA regional centers to file Form I-956 **if** they sought designation as a regional center under INA 203(b)(5)(E). USCIS subsequently withdrew that deadline and posted the following notice:

ALERT: Dec. 29, 2022, is no longer the deadline to file Form I-956, Application for Regional Center Designation, amendments, as required by the Behring Settlement, and Form I-956G, Regional Center Annual Statement. USCIS is extending this deadline until we publish guidance that clarifies the requirements of these forms.

To date, the required guidance has not been published by USCIS.

Accordingly, USCIS is only legally justified to require the payment of the IFee from those pre-RIA entities that filed Form I-956 requesting USCIS designation as a regional center under INA 203(b)(5)(E) **AND** received an approval of that application. USCIS has no statutory authority to require pre-RIA regional centers that have yet to file Form I-965 to pay the IFee - especially when the deadline to make such election was withdrawn by USCIS on December 29, 2022 and no new date has been established.

Below is a flowchart illustrating whether a **Pre-RIA Regional Center** is required to pay the IFee pursuant to the RIA:



- ***Pre-RIA Regional Centers that did not file Form I-956 are not designated under subparagraph (E) but are protected by the Behring Settlement Agreement from termination.***

On June 24, 2022, the U.S. District Court for the Northern District of California preliminarily enjoined USCIS from “treating as deauthorized the previously designated regional centers” including “processing new Form I-526 petitions from immigrants investing through previously authorized regional centers . . . just as the agency would do for a newly approved regional center.” *Behring v. Mayorkas*, Order Granting Plaintiff’s Motion for a Preliminary Injunction, Case No. 22-cv-02487-VC (N.D. Cal. Jun 24, 2022).

On September 1, 2022, the U.S. District Court in *Behring* approved a Settlement Agreement between the parties. As stated in the Federal Register, “under the terms of the settlement, **previously designated regional centers did not lose their designation** as a result of the EB-5 Reform and Integrity Act of 2022.”

Moreover, the Settlement Agreement clearly outlined a specific step that Previously Approved Regional Centers must take in order to be designated under the RIA. It states that in order for Previously Approved Regional Centers to provisionally do business under the RIA, they must file a Form I-956 in order to “maintain their status as an approved regional center.”²

However, the mere filing of Form I-956 does not equate to having received an adjudication recognizing the entity as a regional center “designated under subparagraph (E).” As the Form I-956 Instructions clearly provide, designation only comes upon USCIS approval of the application and USCIS determination the applicant has “established that you qualify for the benefit sought.”

The Settlement Agreement was clear that upon filing of Form I-956 – not upon adjudication - a Previously Approved Regional Center would be able to operate under the RIA. Consistent with this requirement, the Settlement Agreement clearly noted that Previously Approved Regional Centers that took this step were required to comply with all requirements of the RIA;³ and conversely, any Previously Approved Regional Center that failed to take this specific step “may no longer engage in any activities under the (RIA).”⁴

The effect of the Behring litigation and the Settlement Agreement is clear that as of Oct. 1, 2022, the only regional centers “designated under subparagraph (E)” are (1) new regional centers with a filed and approved Form I-956 between the passage of the RIA and Oct. 1, 2022 and (2) Previously Approved Regional Centers who filed and received an approved Form I-956 on or before Oct. 1, 2022.

Therefore, USCIS has no legal authority to require that all pre-RIA regional centers pay the IFee as stated in their announcement and March 2, 2023 Federal Register notice and we urgently request that USCIS issue clarifying guidance as soon as possible.

Conclusion

In conclusion, we thank you for your prompt attention to this urgent and time-sensitive matter. If you have any questions, please contact Sharvari Dalal-Dheini, Director of Government Relations at (202) 507-7621 or by email at SDalal-Dheini@aila.org. Thank you for your time and consideration.

² See Settlement Section at Section B.

³ See Settlement Section at Section at D.1.

⁴ See Settlement Section at Section D.2, (clarification added).

Sincerely,

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