IIUSA Member Perspective:

Recent EB-5 Developments Weigh Heavily on Participants

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USCIS has issued meaningful new guidance about some important topics: the new $20,000 or $10,000 per year regional center integrity fee, USCIS registration of investment "promoters", written disclosures of promoter compensation, identification of persons "involved with" EB-5 related entities, and the period through which investors are required to sustain their investment before return of their capital. All of these topics provide a gloss on my original summary of the EB-5 Reform and Integrity Act of 2022 ("RIA"). The stakes for compliance with USCIS positions are high, as the consequences for noncompliance are severe. At least three of the topics are on the agenda for USCIS' March 20, 2023 EB-5 stakeholder engagement.

Integrity Fee

The RIA requires each designated regional center ("RC") to pay an annual "integrity fee" of $20,000 or, if the RC has "20 or fewer total investors in the preceding fiscal year in its new commercial enterprises," $10,000. USCIS has issued a Federal Register notice, without soliciting any comment, interpreting this statutory language in the following ways:

1. **Amount:** The amount of the fee for a particular fiscal year just ended depends on the difference between the numbers of two kinds of filings by EB-5 investors filed anytime (including in prior years) up to the end of the latest fiscal year: I-526 filings minus I-829 filings (not including I-829 filings by family members separate from the investor's filing). We had expected the calculation to be based only on new I-526E filings made during the latest fiscal year, and USCIS' interpretation will require $20,000 payments far more often. Justifying the lower level fee will require complex historical analyses by longstanding RCs and even for new RCs will be possible far less often over time. USCIS stated that its adjudicators have discretion to evaluate the number of investors under "the totality of

the circumstances," which would seem to include evidence that post-RIA investors have been repaid their investment before I-829 filing (which USCIS implicitly recognized is possible). If a RC pays only $10,000 and then USCIS calculates more than 20 investors from its own records of I-526 and I-829 filings, it appears that USCIS may issue a notice of intent to terminate, making the stakes for miscalculation exceedingly high.

2. **Mechanism:** The fee must be paid at pay.gov either by credit card or ACH Debit transaction. Enter "USCIS" to find the option to pay the RC integrity fee. Note that U.S. Department of Treasury guidelines permit USCIS to accept a maximum payment amount of $24,999 from one credit card in one day, and a single obligation cannot be split into multiple credit card payments over multiple days in order to evade this limit. So to pay more than $20,000, ACH must be used.

3. **Normal Timing:** Starting October 1, 2023, the fee will be due October 1 to October 31, late fees will be due on payments made November 1 to December 31, and termination will result from nonpayment by January 1. Failure to pay within 90 days after the end of the fiscal year will result in termination, but USCIS will issue a notice to terminate allowing the RC to respond showing that it had paid the fee on time.

4. **Last Year:** Because USCIS was not ready to accept the fee in 2022, for the year ending September 30, 2022, **the fee will be due by April 1, 2023**, and nonpayment by May 31, 2023 will result in RC termination.

A regional center considering not complying with RIA requirements and winding down should consider attending the USCIS March 20, 2023 stakeholder engagement session, which is slated to address that topic.

Promoter Registration

RIA requires "direct and third-party promoters (including migration agents)" to register with USCIS, providing their identify and contact information and confirming the written agreements they are required to have with EB-5 securities issuers. The RIA did not define "promoters."

USCIS initially proposed a new Form I-956K to be completed online, but in December it published in final form a revised Form I-956K that must be submitted on paper and must include a copy of all of the promoter's written agreements with EB-5 securities issuers.

Public comments had requested clarity about whether the registration requirement really extended to sub-agents and their individual employees. In its attached 90-page response to the public comments on the various new EB-5 forms USCIS seems to have cast the broadest net imaginable as to who must register, stating:

> **Response:** Any person acting as a direct or third-party promoter (including migration agents) of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors in connection with a particular capital investment project *must submit Form I-956K before operating* on behalf of any of the specified entities or promoting any offering under the EB-5 Regional Center Program. *This includes employees of entities* with agreements in place to promote a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors. USCIS has added clarifications to the Form I-956K instructions regarding what evidence of written agreement should be submitted by employee or sub-agent promoters of a primary promoter.

USCIS also stated that a Form I-956K that gets rejected for being improperly completed does not count as registration. This new requirement could stifle EB-5 subscriptions for months while issuers amend their broker/agent agreements, promoters file registrations and wait for receipts, and regional centers require proof of compliance.

This is another of three topics to be addressed in USCIS' March 20 stakeholder meeting.

Promoter Fee Written Disclosures

The RIA says this in its section about promoters:

> Each [I-526E investor] petition shall include a disclosure, signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person that the regional center or new commercial enterprise knows has received, or will receive, in connection with the investment, including compensation to agents, finders, or broker dealers involved in the offering, to the extent not already specifically identified in the business plan … .

In its responses to public comments about new EB-5 information collection forms including I-526E, USCIS surprisingly suggested that it does not actually expect investor-specific disclosures, stating:

> USCIS is requesting regional centers to submit the written disclosure of all fees, ongoing interest, and other compensation paid to any promoter with their Form I-956F, Application for Approval of an Investment in a Commercial Enterprise. See Part 6., Question 6., asking the applicant to identify any documents containing information related to fees paid to promoters. USCIS expects a regional center will disclose these fees in its offering documents for a particular investment offering. Since USCIS is collecting this information in connection with the regional center's project application, there is no need for individual petitioners to provide a duplicate copy of that information.
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> However, to ensure regional center investors are aware of the requirement of a regional center to disclose all fees, ongoing interest, and any other compensation paid to any

promoter with their Form I-956F, USCIS is adding an acknowledgement question to the Form I-526E to ensure the investors have been provided a copy of the disclosure the regional center has already submitted to USCIS.

The Form I-526E certification above the investor's signature only says the following, without any specific recognition of any disclosure about compensation to promoters or others:

> I further understand that my petition includes any records previously filed by the regional center with its Form I-956F, Application for Approval of an Investment in a Commercial Enterprise, identified in Part 4, Item Number 1. I certify that such records are incorporated by reference into my petition, as are any changes submitted by the regional center to amend that prior approval, and will be considered when determining my eligibility.

It may be prudent to continue to use a specific disclosure document that is signed by the investor at the time of subscription. Regional centers face important challenges in deciding what to require from participating issuers in light of this USCIS guidance, which is not on the March 20 agenda.

"Involved Persons" and I-956H Filings

The RIA prohibits any person who is not a U.S. national or permanent resident to be "involved with" a regional center, and it requires USCIS to make sure that no one with various indications of prior bad conduct is "involved with" a regional center, new commercial enterprise, or job creating entity. USCIS now requires with any regional center or project application a Form I-956H questionnaire completed by each "person" (which includes both individuals and organizations) "involved with" the regional center, new commercial enterprise, or affiliated job creating entity, plus an $85 fee per person. Each individual person must attend a biometrics appointment at a USCIS office for further vetting.

The statute says a person is "involved with" an entity (the RC, NCE, or JCE) if he or she fits these words:

> … directly or indirectly is in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the [EB-5 regional center] program … . An individual may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner, an officer, a board member, a manager, an executive, a general partner, a fiduciary, an agent, or in a similar position at the new commercial enterprise or job-creating entity, respectively.

In the recent USCIS responses to the public comments on the new EB-5 forms, USCIS included these statements in response to arguments by commenters that "involved with" should be interpreted narrowly:

> "USCIS notes that the statutory definition includes any person directly or indirectly in a position of substantive authority. In addition, the definition also provides broad authority to the Secretary to "otherwise determine" who may or may not be a person involved for purposes of compliance with the new provisions of INA 203(b)(5)(H)."
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> "All owners of the regional center must submit a Form I-956H to demonstrate eligibility under INA §§ 203(b)(5)(H)(i) and (ii)."

So far we have only seen USCIS actually adjudicate this in relation to I-956 applications for (re)designation of a regional center. In those contexts, USCIS has scoured web sites and other public information and essentially taken the position that everyone up the chain of ownership of an entity and just about any principal, representative, administrator, officer, board member, manager, executive, or general partner is "involved," and any employee, fiduciary, or agent who holds or is presented to the public as having anything to do with procuring EB-5 investors or handling their capital down the chain of hands is "involved." USCIS RFEs have conflated people in related entities. We have seen a few RC applicants push back in responses saying that some people who have even managerial roles but nothing to do with procuring or handling EB-5 capital are not involved, but USCIS has not ruled on any of those responses yet. We have not seen or heard of any I-956F adjudication that would parse whether people are actually involved in the NCE or JCE, but they will be coming.

USCIS has made clear that if someone is involved in the sponsoring RC (and has done I-956H for the I-956) they still must complete a separate I-956H for the I-956F project application if they are involved with the NCE or JCE or both. If an individual is involved with more than one entity among the NCE, JCE, and other entities that are involved with the NCE or JCE, the individual can complete one I-956H for the I-956F filing and in that H form indicate his or her different roles in the different entities. If someone is outside of the NCE and JCE serving as a broker or promoter to EB-5 investors, that person should submit to USCIS a Form I-956K for promoter registration.

The consequence of disagreement with USCIS about who is involved could be denial of regional center and project applications, with the consequence of possible denial of investor petitions that hang on those applications. This topic is not on the March 20 agenda.

Sustainment Period

As set forth in Robert Divine's article in EB5 Investors Magazine, investors who filed prior to March 15, 2022 will remain required to "sustain their investment" in their NCE through the expiration date on their initial green card, but investors who filed I-526 after March 15, 2022 only have the requirement that their capital is "expected to remain invested for not less than two years." Some industry associations have advocated to USCIS that RIA does not actually change the old requirement, while an association of investors has argued the contrary. But in its Federal Register notice about the RC Integrity Fee USCIS implicitly recognized the severe truncating of the sustainment period under the RIA, stating as to the calculation of investors for purposes of the amount of the Integrity Fee, "USCIS considered generally counting only the Forms I-526 that

were filed within two years of the applicable period used for determining the EB-5 Integrity Fund fee given the expected two-year minimum timeframe for the investment, or sustainment period, under the 2022 Act. INA section 203(b)(5)(A)(i); 8 U.S.C. 1153(b)(5)(A)(i)."

Perhaps more clarity will come from USCIS' March 20 EB-5 stakeholder engagement, where this topic is on the agenda.