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VIA U.S. MAIL

U.S. Department of Homeland Security
Office of the General Counsel
Mail Stop 0485
Attn: Regulatory Affairs Law Division
245 Murray Lane SW
Washington, DC 20528–0485

Re: Petition for Rulemaking to Promulgate Regulations to Revise 8 C.F.R. § 216.6 in Light of the EB-5 Reform and Integrity Act of 2022

The undersigned, on behalf of Invest in the USA (IIUSA), submits this petition for rulemaking pursuant to 5 U.S.C. § 553(e) and 6 C.F.R. §§ 3.1–3.7 to request that the Secretary of Homeland Security amend the regulations governing an immigrant investor's investment sustainment period under the EB-5 Immigrant Investor Program. *See* 8 U.S.C. § 1153(b)(5)(A)(i); 8 C.F.R. § 216.6(c)(1)(iii).

IIUSA submits this petition for rulemaking to protect the interests of all EB-5 stakeholders. In particular, IIUSA believes that any policy requiring investors to sustain their investment for indefinite periods of time—caused by the lack of visa availability—fails to properly calibrate the program and properly protect investors. What is more, it is imperative that USCIS impose safeguards to ensure that investment is placed into high-quality projects, promoting job creation, encouraging economic growth, and best positioning investors to receive a return of their invested capital and any profit thereon.

IIUSA thus submits that the current prevailing rules require updating to protect the interests of investors and EB-5 regional centers alike. Only through a public rulemaking procedure—which IIUSA hereby formally requests—can these interests be appropriately addressed.

* * *

On March 15, 2022, as part of the Consolidated Appropriations Act of 2022, Congress enacted the EB-5 Reform and Integrity Act of 2022 (Integrity Act or RIA). *See* Consolidated Appropriations Act 2022, Pub. L. No. 117-103, 136 Stat 49, 1070, § 102, div. BB (Mar. 15, 2022). In that Act, Congress added language that an immigrant investor's investment under the EB-5 program "is expected to remain invested for not less than 2 years." *Id.* This language is consistent with USCIS's longstanding regulation requiring investors to sustain their investments "over the two years of conditional residence." 8 C.F.R. § 216.6(c)(1)(iii). This regulation remains in force.

On October 11, 2023, USCIS issued a new rule via email re-interpreting this requirement. USCIS stated that the Integrity Act "removed the requirement that the investor must sustain their investment throughout their conditional residence" and "add[ed] new language that the investment required by [the Act] must be expected to remain invested for at least two years." USCIS interpreted this two-year period to begin on "the date the requisite amount of qualifying investment is made to the new commercial enterprise and placed at risk under applicable requirements, including being made available to the job creating entity."

Petitioners respectfully submit that this interpretation is contrary to the text of the RIA, the existing regulations that continue to govern, and the goals of the EB-5 Program.

Reducing the sustainment period to a two-year minimum will thwart the job-creating goals of the program and ultimately harm investors. First, all other federal economic development programs that provide investor incentives have investment holding periods that are longer than two years. Nothing in the RIA suggests that Congress intended to lower the investment holding period below the five to seven years that has been the industry standard for at least two decades.[1] Second, a shorter sustainment period may counteract the Integrity Act's newly added incentives for infrastructure development projects, which, on average, require longer hold periods for construction and stabilization. Importantly, even if a shorter sustainment period is appropriate, USCIS should adopt it via notice-and-comment rulemaking, so that all considerations from relevant stakeholders may be considered.

Moreover, notice-and-comment rulemaking is the appropriate vehicle for revising USCIS's sustainment regulation, given there is an existing, in-force regulation governing the sustainment period—one that directly conflicts with USCIS's new rule. *See Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Through a proper notice-and-comment process, all stakeholders will be empowered to present the full range of issues and ensure that USCIS appropriately implements the Integrity Act. This would enable USCIS to arrive at a balanced EB-5 policy to facilitate investment projects that both promote U.S. job creation and economic growth while simultaneously advantaging and protecting those investors who invest considerable capital in this country through this program.

USCIS's failure to engage in notice-and-comment rulemaking before issuing this policy is also causing significant uncertainty for investors and the EB-5 community generally. At present, USCIS's new policy on the sustainment period conflicts with applicable, on-the-book regulations, leading to significant investor confusion about what rule applies. USCIS should take this opportunity to issue regulations that will provide adequate notice, explanation, and certainty for EB-5 investors and regional centers.

[1] Indeed, an IIUSA survey of 171 pre-RIA projects showed the average investment term was 5.5 years. IIUSA, *IIUSA's Recent Survey Sheds Light on the Average Sustainment Period of Pre-RIA EB-5 Projects* (Feb. 29, 2024), perma.cc/9ZRQ-E2PQ

A. Requested Rulemaking

Petitioners request that USCIS amend 8 C.F.R. § 216.6 to conform with Congress's intent in passing the Integrity Act and the goals of the EB-5 Program.

21 C.F.R. § 216.6 currently provides (in relevant part):

> (a) ***Filing the petition*.**
>
> . . .
>
> (4) **Documentation**. The petition for removal of conditions must be accompanied by the following evidence:
>
> (i) [Reserved]
>
> (ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and
>
> (iii) 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. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.
>
> . . .
>
> (c) ***Adjudication of petition.***
>
> (1) The decision on the petition shall be made within 90 days of the date of filing or within 90 days of the interview, whichever is later. In adjudicating the petition, the director shall determine whether:
>
> (i) [Reserved]
>
> (ii) The alien invested or was actively in the process of investing the requisite capital; and
>
> (iii) The alien sustained the actions described in paragraphs (c)(1)(i) and (c)(1)(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.

As amended, § 216.6 will provide: [2]

(a) ***Filing the petition*.**

. . .

(4) **Documentation**. The petition for removal of conditions must be accompanied by the following evidence:

(i) [Reserved]

(ii) Evidence that the alien invested ~~or was actively in the process of investing~~[3] the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and

(iii) 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~~ <u>at risk for five years from the date the investment is fully contributed to a project's job creating entity or the date of the filing of the investor's I-526E petition, whichever is later</u>. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.

. . .

(c) ***Adjudication of petition.***

(1) The decision on the petition shall be made within 90 days of the date of filing or within 90 days of the interview, whichever is later. In adjudicating the petition, the director shall determine whether:

(i) [Reserved]

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[2] Strikethrough indicates deleted text; underline indicates added text.

[3] IIUSA proposes this conforming amendment to the rule as well, given the RIA removed language allowing an investor to be "actively in the process of investing" the requisite capital. *See* Pub. L. No. 117-103, 136 Stat 49, 1100, 1102, sec. 104, div. BB (Mar. 15, 2022).

(ii) The alien invested ~~or was actively in the process of investing~~ the requisite capital; and

(iii) The alien sustained the actions described in paragraphs (c)(1)(i) and (c)(1)(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~~ at risk for five years from the date the investment is fully contributed to a project's job creating entity or the date of the filing of the investor's I-526E petition, whichever is later.

B. Reasons for the Proposal

a. USCIS should undertake full notice and comment rulemaking to amend the sustainment rule.

USCIS's new rule, discussed above, was promulgated without following the necessary notice-and-comment procedures for amending an existing regulation, as required by the Administrative Procedure Act (APA). Under the APA, agencies must make legislative rules though notice and comment, which requires publication of the proposed rules in the Federal Register and acceptance of public comments on those rules. 5 U.S.C. § 553.

It is well established that when an agency seeks to amend or repeal a legislative rule, it must do so via notice and comment rulemaking. *See Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014) (guidance that "effects a substantive change in existing law or policy," and "effectively amend[s] a prior legislative rule," is "necessarily" a legislative rule). "[I]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and of course, an amendment to a legislative rule must itself be legislative." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Because the existing sustainment regulation, 8 C.F.R. § 216.6, is a legislative rule and is still in force, USCIS should engage in notice-and-comment rulemaking to amend it.

b. USCIS's rule is contrary to the text of the RIA, Congress's intent and the goals of the EB-5 Program.

As noted above, five to seven years has become the industry standard for investment sustainment, based in part on USCIS's existing sustainment regulations, and nothing in the RIA suggests that Congress's intent was to create a truncated two-year sustainment period. "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates." *United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002). Given that Congress's new statutory language is consistent with USCIS's existing sustainment regulation, it is unlikely that Congress intended USCIS to enact such a significant change to the sustainment period.

In addition, all other federal economic development programs that provide investor incentives have investment holding periods that are longer than two years. For instance, to receive the maximum Opportunity Zone benefit the necessary investment period is ten years; for New Market Tax Credits the necessary sustainment period is seven years; and for Qualified Small Business Stock treatment at least five years. Thus, a longer sustainment period is consistent with the essential job-creating purpose of the EB-5 Program. *See* 168 Cong. Rec. S1105-01 (daily ed. Mar. 10, 2022) (statement of Sen. Grassley) (Congress passed the RIA to revitalize the Regional Center Program and bring "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.").

c. A five-year sustainment period better comports with the provisions in the statute.

USCIS's new sustainment period is also unworkable with, and would render superfluous, other statutory provisions that Congress added to the statute when it enacted the RIA.

First, Congress added a provision to allow an investor to take an additional year after the two-year conditional residency period to create the required employment, "provided that such alien's capital will remain invested during such time." Consolidated Appropriations Act 2022, Pub. L. No. 117-103, 136 Stat 49, 1102, § 104, div. BB (Mar. 15, 2022) (amending § 1186b(d)(1)(A)). Under USCIS's new rule, however, an investor's required sustainment period could begin and end before the investor begins his or her conditional residence period. It makes no sense to describe an investor's capital as "remaining invested" during a third year of conditional residency if conditional residency is irrelevant to the required sustainment period, and especially so if that capital had already been returned to the investor, possibly many years earlier.

Second, Congress also added detailed provisions governing the redeployment of investors' funds. Redeployment of an investor's capital is allowed only if the new commercial enterprise has already "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." *Id.* § 103, 49 Stat. at 1081 (amending 8 U.S.C. § 1153(b)(5)) If, as USCIS's new rule suggests, there is no independent need for an investor to sustain his or her investment longer than two years, there would be no need for redeployment at all. Congress's new redeployment provisions would be superfluous in practice. *Cf. Cares Community Health v. U.S. Dep't of Health & Human Services*, 944 F.3d 950, 960 (D.C. Cir. 2019) ("[T]he canon against surplusage ensures that effect is given to all statutory provisions, so that no part will be inoperative or superfluous, void or insignificant.").

Third, while it is unclear under the rule exactly when the two-year period commences (*i.e.*, either the date of contribution to the NCE or funding to the JCE), a two-year sustainment requirement that begins when the "investment is made to the new commercial enterprise" has the potential to undermine the RIA's critical integrity reforms, as investors' capital may be returned before the approval of an investor's I-526E petition and in many cases not sustained through the *beginning* of the conditional residence period. Under USCIS's new interpretation, EB-5 investors could conceivably have their capital contribution returned to them before there is an adjudication of the

lawfulness of the source of their funds—a situation Congress would not have likely intended given the RIA's emphasis on the integrity of the funds entering the United States.

Thus, a five-year sustainment requirement that begins when the funds are fully transferred to the job creating entity (JCE) or when the investors' I-526E petition is filed (whichever is later) would harmonize USCIS's regulations with the statute and better serve Congress's job creating goals.

d. A rulemaking to adopt a five-year sustainment period will protect immigrant investors and better serve their interests.

First, the fact that USCIS chose to change the sustainment period in a document labeled as a guidance memo rather than by regulation is harmful to the investor community, regardless of the ultimate sustainment period USCIS selects. At present, USCIS's new rule on the sustainment period conflicts with applicable, on-the-book regulations, leading to significant investor confusion about what rule applies. In addition, USCIS's own policy manual has not been fully updated to reflect its new rule. *See* USCIS Policy Manual, Vol. 6, Pt. G-Investors, Ch. 7, "Removal of Conditions," § A.2, available at https://www.uscis.gov/policy-manual (stating that the sustainment period is "the investor's 2 years of conditional permanent resident status," citing 8 C.F.R. § 216.6(c)(1)(iii)). Investors deserve clear and concrete rules governing the program, not rules announced in "guidance memos" that are inconsistent and may change at any time.

Second, USCIS's new definition of the sustainment period is unclear and may give investors the wrong impression about how long their investment will actually need to be sustained. USCIS's rule defines the beginning of the two-year period as "the date the investment was contributed to the new commercial enterprise and placed at risk in accordance with applicable requirements, including being made available to the job-creating entity." USCIS, *USCIS Provides Additional Guidance for EB-5 Required Investment Timeframe and Investors Associated with Terminated Regional Centers* (Oct. 11, 2023) (*October 11 Email*). It is not entirely clear whether the two years begins when the JCE receives the funds, or when the funds become available to the JCE for job creation. Depending on the project, these can be different times—in many cases job creation may not commence until the full amount of EB-5 money is deployed. In addition, funds cannot be returned until the necessary jobs have been created for that particular investor, and it may be difficult to determine the number of jobs created before the project is completed. These unclear terms could lead to even experienced immigration attorneys and Regional Center staff miscalculating the two-year period or jobs created by the project.

A clearly defined five-year sustainment period will be more predictable for investors and the EB-5 community, unlike USCIS's two-year period that might need to be extended (either until the I-526E petition is filed or the job requirements are met) and may be harder to calculate. A five-year period would likely cover the time needed to create the necessary jobs, generate a return on investment, and stabilize a project sufficiently to provide for a potential exit for the EB-5 funds. It

would also give USCIS time to adjudicate the investor's I-526E petition,[4] which would give effect to the additional integrity provisions Congress included in the RIA.

Third, clearly defining a five-year sustainment period that is unconnected with the period of conditional residency is also fairer to investors. IIUSA is well aware that due to USCIS backlogs, slow processing times, and lack of visa availability, many investors' conditional residency period may not begin for several years, resulting in years of capital redeployment that lasts far longer than the initial expected duration of investment, and shares in USCIS's concern about the current state of affairs in that regard. *See October 11 Email* ("Because of these changes made by the RIA, investors filing petitions for classification after enactment of the RIA no longer need to sustain their investment throughout their conditional residence, which may be many years in the future and dependent on factors outside the investor's control such as visa availability."). USCIS need not, however, introduce a new, truncated, and unclear sustainment period to solve this problem—a clearly defined, five-year period would serve the investor community best and avoid requiring endless redeployments by tying the sustainment period to residency.

Finally, a five-year sustainment period is consistent with the economic development goals of the EB-5 Program. As noted above, all other federal economic development programs that provide investor incentives have investment holding periods that are longer than two years. Five years is also consistent with Congress's intent to incentivize public infrastructure projects. In the RIA, Congress specifically reserved visas for immigrants who invest in infrastructure projects, and further incentivized those investments by providing for a lower investment amount. *See* Pub. L. No. 117-103, 136 Stat 49, 1073 div. BB, § 102 (Mar. 15, 2022). The EB-5 Program has also long included incentives for projects in rural and high-unemployment areas. Many of the types of projects Congress incentivized, including infrastructure and industrial projects and projects in urban, high unemployment areas (which tend to be large multifamily residences or commercial projects) usually rely on investments in the range of five to seven years. The five-year sustainment period is thus consistent with Congress's economic development goals.

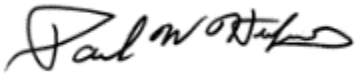
C. Legal Authority for Rulemaking

The Secretary has authority to establish regulations necessary to carry out the provisions of Title 8, Chapter 12 of the United States Code pursuant to 8 U.S.C. § 1103. *See also* 8 C.F.R. § 2.1.

In addition, the proposed rulemaking is consistent with the statute, which requires the investment to have been sustained for "not less than 2 years." 8 U.S.C. § 1153(b)(5)(A)(i). This language necessarily creates a minimum sustainment period but does not preclude USCIS adopting a longer one.

[4] USCIS has historically taken two years or longer to adjudicate most Form I-526 (now Form I-526E under the RIA) petitions, which constitutes the first of many steps in the immigration process under the EB-5 program.

Respectfully submitted,



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