UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Invest in the USA; **First Pathway Partners;** **CMB Export LLC;** **EB-5 New York State, LLC**; **EB5 Capital;** **American Dream Fund;** **Pine State Regional Center**; **Civitas Capital Group**; **EB5 United**; **American Life Inc**;. **Houston EB-5**; ***Plaintiffs*** **v.** **Antony Blinken**, Secretary of State; **United States Department of State**; **Alejandro Mayorkas,** Secretary of Homeland Security; **Ur Jaddou,** Director, USCIS **United States Citizenship and Immigration Services**; ***Defendants.***	**Docket # 24-cv-992** **PLAINTIFFS' FIRST AMENDED COMPLAINT**

PLAINTIFFS' COMPLAINT FOR DECLARATORY AMD INJUNCTIVE RELIEF

Plaintiffs, by and through the undersigned attorneys, commence this action against the above-named Defendants and states as follows:

1. Plaintiffs' First Amended Complaint is being filed pursuant to FRCP 15(1)(A) and (B).

2. Defendants have not yet appeared in this action and have not served an answer to Plaintiffs' complaint of August 6, 2024.

3. Plaintiffs are regional centers or owners of regional centers, and the trade association for regional centers, designated by USCIS to sponsor investment opportunities and EB-5 investors for the purposes of the EB-5 visa program.

4. Plaintiffs bring this action to prevent Defendants from implementing an unlawful and erroneous interpretation of the Regional Center Reform and Integrity Act of 2022 ("RIA") which would cause the permanent loss of EB-5 visas and increased visa wait times for Legacy Investors and the accelerated creation of a backlog and visa-waiting time for new investors, to the detriment of Plaintiffs, their Legacy investors, their new investors, and the purposes of the EB-5 program.

5. Defendants' implementation of the RIA has been disastrous, resulting in the issuance of roughly one-tenth of one percent of the visas Congress set aside for investors in rural, high unemployment, and infrastructure projects, and resulting in the loss of thousands of visas that could have and should have been allocated to Plaintiffs' Legacy Investors who invested prior to the RIA, and more that should have been allocated to new Set-Aside investors. DHS Defendants, in particular, have failed in a most spectacular way in their implementation of the program, creating obstacles and delays at nearly every turn.

6. Plaintiffs and their investors will suffer irreparable harm if Defendants' unlawful and erroneous interpretation is allowed to stand.

THE PARTIES

7. Plaintiff, Invest in the USA is the national membership-based 501(c)(6) non-profit trade association for the EB-5 Regional Center Program. IIUSA's members are comprised of over a hundred regional centers serving forty-seven states and territories. IIUSA's members have raised billions in foreign investment capital and developed hundreds of projects in the United States responsible for creating hundreds of thousands of jobs.

8. Plaintiff, First Pathway Partners, owns and operates regional centers in Wisconsin, Illinois, California and Utah. It has sponsored numerous EB-5 projects and many EB-5 investors since its founding in 2008. Plaintiff, First Pathway Partners, is headquartered in Milwaukee , Wisconsin

9. Plaintiff, CMB Export LLC and its affiliates (dba CMB Regional Centers), operate nineteen (19) regional centers covering the following geographic areas: all US states, excluding Alaska, Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont, but including Washington DC and the Boston CSA. To date, CMB Regional Centers have sponsored approximately 105 EB-5 projects, with approximately

6,500 investors, and have raised approximately $3,500,000,000 through the EB-5 program. Our projects have created, or will create approximately 210,000 new jobs for U.S. Workers.

10. Plaintiff, EB-5 New York State, LLC, is Regional Center with a geographic coverage comprising the entire state of New York. EB-5 New York State, LLC was first designated as a regional center in 2009 and since that time has sponsored numerous EB-5 investment projects which have created thousands of new jobs for U.S. workers.

11. Plaintiff, USA EB5 Immigration, LLC (dba EB5 Capital), is a Regional Center operator of 8 Regional Centers with geographic coverage comprising all states except Alaska and Hawaii. To date, EB5 Capital has sponsored 41 EB-5 projects, with approximately 2200 investors, and has raised approximately $1.2 Billion through the EB-5 program. EB5 Capital's 41 projects have created or will create approximately 43,600 new jobs for U.S. workers.

12. Plaintiff, American Dream Fund, owns three (3) Regional Centers covering the roughly 13 counties that entail following geographic areas: the greater Los Angeles metropolitan area, the greater Las Vegas metropolitan area, and the greater Portland, Oregon metropolitan area. To date, it has sponsored approximately 13 EB-5 projects, with approximately 1,327 investors, and has raised approximately $663.5 million through the EB-5 program. Its projects have created, or will create, approximately 17,000 new jobs for U.S. Workers.

13. Plaintiff, Pine State Regional Center, is a USCIS approved regional center covering all of Arkansas and parts of Missouri and Tennessee. Pine State Regional Center focuses on manufacturing and infrastructure projects in rural areas, and has sponsored several EB-5 projects and numerous EB-5 investors.

14. Plaintiff, Civitas Capital Group owns or manages thirteen (13) Regional Centers covering a significant portion of the United States, and has sponsored approximately 47 EB-5 new commercial enterprises with approximately 1,400 investors and has raised approximately $700 million through the EB-5 program. Its projects have created approximately 26,008 new jobs for U.S. Workers.

15. Plaintiff, EB5 United, owns and manages 3 Regional Centers covering all of California, Florida, and counties in Montana, and has submitted applications to cover the continental US. EB5 United has utilized the regional center program extensively and its principals have sponsored 13 EB-5 new commercial enterprises with approximately 1,300 investors and has raised approximately $1 billion through the EB-5 program. Its projects have created approximately 20,000 new jobs for U.S. Workers.

16. Plaintiff, American Life Inc. owns several regional centers around the United States and has sponsored more than 45 EB-5 projects and 3,000 EB-5 investors, and has raised more than $1.5 billion of EB-5 funds and deployed them to job creating enterprises around the United States.

17. Plaintiff, Houston EB-5, is USCIS approved regional center covering portions of Texas. It has sponsored more than 20 EB-5 projects with 600 EB-5 investors and has raised more than $300 million in EB-5 funds and deployed them to job creating projects in the United States.

18. Defendant Antony Blinken is the U.S. Secretary of State, and is responsible for the administration of the Department of State, which includes, among other things, administration of the National Visa Center and U.S. consulates which are responsible for processing visa applications for foreign nationals and administering and interpreting the laws related to immigrant visa numbers and allocations.

19. Defendant, U.S. Department of State is an agency of the federal government with responsibility for, among other things, calculating and allocating available immigrant visa numbers each fiscal year, processing immigrant visa applications, and interpreting and applying the laws and regulations related to immigrant visas and visa numbers and allocations.

20. Defendant, Alejandro Mayorkas, is the Secretary of the United States Department of Homeland Security, with responsibility for the administration of applicable laws and statutes governing immigration and naturalization. He is generally charged with enforcement of the Immigration and Nationality Act and is further authorized to delegate such powers and authority to subordinate employees of the Department of Homeland Security. More specifically, the Secretary is responsible for the adjudication of petitions for EB-5 visas and adjustments of status.

21. Defendant, Ur Jaddou, is the Director of USCIS, and is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. These functions include: adjudication of immigrant and nonimmigrant visa petitions and applications for adjustment of status; adjudication of naturalization petitions; adjudication of asylum and refugee applications; adjudications performed at the service centers, and all other adjudications performed by USCIS.

22. Defendant, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, is an agency of the federal government within the Department of Homeland Security and is responsible for the administration of laws and statutes governing immigration and naturalization and the adjudication of petitions for immigration benefits, including EB-5 petitions and applications for adjustment of status.

JURISDICTION

23. Jurisdiction in this case is proper under 28 U.S.C. § 1331, 5 U.S.C. §§ 701 and 702 *et. seq.*, and 28 U.S.C. § 2201 *et. seq.* Relief is requested pursuant to said statutes. Specifically, this Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Further, the Declaratory Judgment Act, 28 U.S.C. § 2201, provides that: "[i]n a case of actual controversy within its jurisdiction… any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Review is also warranted and relief sought under the Administrative Procedure Act 5 U.S.C. §§ 701, 702 et seq., and § 706(1), pursuant to 28 U.S.C.

§ 1331 (federal question jurisdiction).

VENUE

24. Venue properly lies within the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1391(e), in that this is an action against officers and agencies of the United States in their official capacity and Plaintiff, First Pathway Partners is headquartered at 311 E. Chicago St., Suite 510, Milwaukee, WI 53202.

EXHAUSTION OF REMEDIES

25. No administrative remedies exist for Plaintiffs to exhaust in this matter.

BACKGROUND ON THE EB-5 VISA CATEGORY

26. In 1990, Congress amended the Immigration and Nationality Act of 1965 ("INA"), allocating, inter alia, 10,000 immigrant visas per year to foreign nationals seeking Lawful Permanent Resident ("LPR") status on the basis of their capital investments in the United States. *See generally* Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(5), 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1153(b)(5)). Pursuant to the so-called "Immigrant Investor Program," foreign nationals may be eligible for an employment-based, fifth preference ("EB-5") immigrant visa if they have invested, or are actively in the process of investing, $1 million (or $500,000 in a high unemployment or rural area)[1] in a qualifying New Commercial Enterprise ("NCE"), and that investment results in the creation of at least ten jobs for U.S. workers.

27. Note that the law, from the very beginning, set aside 3,000 visas to be reserved for investors in a targeted employment area ("TEA"), which was defined as a rural area or high unemployment area.

28. This proved not to be an issue, as initial demand for the program was slow.

29. In 1992, Congress created the Immigrant Investor Pilot Program ("Pilot Program") through the enactment of various provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act. See Pub. L. No. 102-395, § 601, 106 Stat. 1828, 1874 (1992). The Pilot Program allows foreign investors who invest in a new commercial enterprises (NCE) affiliated with a USCIS' designated regional centers to meet the 10-jobs-per-investor requirement by counting indirect jobs—i.e. jobs that are created outside of the NCE. Further, in addition to not being restricted to only counting employees of the NCE, investors under the Pilot Program are allowed to use any valid statistical forecasting model to demonstrate job creation. See §§601(a)-(c) of Pub. L. No. 102-395; see also 8 C.F.R. §§204.6(e), (j)(4)(iii), (m)(7)(ii). The intent of these reforms was, again, to incentivize and promote foreign investment into, and job creation within, the U.S. and to hopefully increase usage of this visa category.

30. In order to become an LPR of the United States through both the standard and regional center program, a foreign national must initially file with USCIS a Form I-526, Immigrant Petition

[1] Now $1,050,000 or $800,000 in a high-unemployment area, rural area, or infrastructure project.

by Alien Entrepreneur, which, if approved, makes the foreign national eligible to receive an EB-5 immigrant visa. See generally 8 U.S.C. §1153(b)(5). Upon approval of the I-526 Petition, the foreign national must file a Form I-485, Application to Register Permanent Residence or Adjust Status[2] (if he or she is located in the United States), or a Form DS-260, Application for Immigrant Visa and Alien Registration (if he or she is located outside the United States). See generally 8 U.S.C. §1201 (provisions relating to the issuance of entry documents); 8 U.S.C. §1255 (provisions relating to adjustment of status). USCIS is responsible for transferring approved EB-5 visa petitions to the National Visa Center ("NVC") of the department of State. Upon adjustment of status or admission on an EB-5 immigrant visa, the foreign national is granted two years of conditional permanent resident status, provided that the foreign national is not otherwise ineligible for admission into the United States. *See generally* 8 U.S.C. §1182 (provisions relating to excludable aliens). Finally, in the 90 day period immediately preceding the second anniversary of the investor being granted conditional resident status, the foreign national must file a Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status. If the foreign national has fulfilled the EB-5 requirements—i.e. has invested, sustained the investment at risk, and the investment has resulted in the creation of at least ten jobs for U.S. workers—then the conditions will be removed and the foreign national will become a lawful permanent resident. See generally 8 U.S.C. § 1186b.

31. The INA limits both the overall number of EB-5 visas available in any year, and the number available to aliens born in any one country. The cap includes the spouses and children of EB-5 investors who immigrate with them. While the overall number is typically around 10,000, the per-country cap- which only takes effect if the overall quota is reached for a country across all family and employment based categories[3]- is set at 7% of the number of total available EB-5 visas. The overall number is not static, and may increase in times when there are unused visas in other categories. Assuming a normal year, the per-country cap has been around 697-699 visas per country.

32. However, for nationals of China, the per-country cap was reduced by the provisions of the Chinese Student Protection Act of 1992, Pub. Law 102-44, 106 Stat. 1969 (Oct. 9, 1992), which reduced the number of EB-5 visa available to natives of China under the per-country cap by up to 700. Essentially, the only way natives of China were able to be allocated an EB-5 visa is if the total demand from the rest of the world was insufficient to use all available visas, in which case, the remaining visas are allocated first-in-first-out without reference to the per-country cap.

33. China, for many years, was the leading country for demand for EB-5 visas.

34. Fortunately, all the numbers from the Chinese Student Protection Act of 1992 had been recouped by the end of FY 2020, and numbers are no longer deducted from the quota for China, however there is still a cumulative effect as a result of the reduction in numbers for many years.

[2] Under the RIA, an investor can file the I-485 concurrently with the I-526 or I-526E as long as a visa is available at the time of filing.

[3] Realistically, there is only a per-country cap for natives of China, India, Mexico and the Philippines.

35. An alien's place in line for a visa is determined by his or her "priority date," the date on which he or she filed his or her EB-5 petition with USCIS.

36. To complicate matters further, an EB-5 investor's children are only able to immigrate with him or her until they turn 21. In calculating the age of a child, the time USCIS spent processing the petition is subtracted from the child's age at the time a visa becomes available. If the calculated age is 21 or more, the child is ineligible to immigrate with his or her parent.

37. Time spent waiting for the visa backlog to become current is NOT deducted from the child's age.

38. To qualify for an EB-5 visa, the investor must place his or her investment at risk, and must maintain this at-risk investment throughout the applicable period, which for Legacy Investors is the two-year conditional residence period.

39. Both DOS and DHS play critical roles in the program.

40. Although DOS is the agency principally responsible for calculating and allocating visa numbers, USCIS plays a critical role in that it requests and assigns visa numbers to individuals granted adjustment of status in the United States.

41. USCIS is also responsible for adjudicating the visa petitions that allow investors and their families to use the visas. DOS cannot act on an immigrant visa petition until USCIS approves it and transfers it to NVC.

The 2022 Amendments

42. On March 15, 2022, the President signed into law the FY 2022 Consolidated Appropriations Bill (Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 1070) (the "Omnibus Act") and EB-5 Reform and Integrity Act of 2022 (the "RIA").

43. The RIA made numerous changes to the EB-5 Program.

44. First, and most relevant here, the RIA created new visa set-asides with 20% of EB-5 visas allocated to investors in rural projects; 10% to investors in high-unemployment areas; and 2% for investors in infrastructure projects.

45. Importantly, these set-aside visas are only available to post-RIA investors.

46. "Infrastructure" is a new category, created entirely by the RIA.

47. The RIA maintained the high-unemployment category, but changed the way a high-unemployment area is calculated.

48. The RIA left the definition of "rural" essentially and substantively unchanged.

49. Despite the optical similarity to the previous a 30% set-aide for TEA investors,[4] the new 32% set-asides for TEA and infrastructure investors the have the effect of reducing the number of visas available every year to Legacy Investors by 32%.

50. The remaining 68%, of EB-5 visas- now dubbed "unreserved, -are shared by Legacy Investors, and new non-set-aside investors.

51. Indeed, Defendants are treating the set-asides as a separate visa category for the purposes of the per-country cap.

52. This means that an investor from a country that is currently backlogged in the unreserved category would face no backlog in a set-aside category.

53. The RIA also provides that the set-aside visas not used at the end of the year roll over into the same set-aside category in the following fiscal year, and after that, roll over again into the unreserved category.

54. This is unprecedented and unique in the INA. In no other category do visas remain past the end of the fiscal year.

55. Ordinarily, unused visas in certain employment-based categories would be made available to other employment-based visa categories prior to the end of the fiscal year, or "roll up," or, at the end of the fiscal year would "roll across" to the Family Based visa categories in the following fiscal year. The Family Based categories have a similar "roll across" function where unused Family-Based visas at the end of the fiscal year roll across to the employment-based categories in the next fiscal year.

56. Underutilization of Family-Based visas in a fiscal year results in more visas being available in the Employment-Based categories in the next fiscal year, and vice versa.

57. Except for the EB-5 set-aside visas.

58. Under the RIA, any of the 32% of the visas available in a fiscal year for the set-asides that go unused roll over into the same set-aside category in the next fiscal year, and then, if still unused at the end of the second fiscal year, roll over into the unreserved category, where they stay until used.

59. They do <u>not</u> roll out of the unreserved category.

60. The RIA made a number of changes to the regional center program enhancing the compliance and integrity aspects of the program.

61. The RIA further incentivizes investment in rural areas by providing for priority processing of investor petitions for investors who invest in a rural area.

62. The RIA establishes an annual "integrity fee" to be paid by regional centers each fiscal year

[4] Nearly all Legacy Investors invested in a TEA, making the prior 30% set-aside basically irrelevant.

in the amount of $10,000 if a regional center has 20 or fewer investors during the fiscal year or $20,000 if the regional center has more than 20 investors during the year.

63. The RIA requires a regional center to file an application for approval of an EB-5 investment (I-956F) with USCIS before investors can file a petition based on an investment in that project. Regional center investors now file an I-526E petition instead of an I-526, which continues to be used by non-regional center investors.
64. The RIA provides for concurrent filing of the I-526/526E petition and an application for adjustment of status by investors and their family members if there is a visa available on the day they file, which allows them to remain in the U.S. and obtain work and travel authorization while the petition and applications are pending, and also places the applications in USCIS inventory for adjudication upon approval of the I-526/526E, thereby eliminating additional delays in filing and processing the applications for adjustment of status.

65. The RIA now defines the investment period as "at least two years." For Legacy Investors, this "sustainment period" is the two years of conditional residence- which does not begin until an investor becomes a conditional resident.

66. In the case of an investor from China who invested and filed a petition after December 15, 2015 and who is still awaiting a visa, this sustainment period has not begun almost 9 years after he or she made the investment.

67. The RIA requires Defendants to take certain actions.

68. The DHS Defendants were required to issue various regulations implementing the RIA:

    a) Regulations to disallow investor capital to be used to purchase publicly available bonds, Pub. L. No. 117-103, 136 Stat. 1070,1077, no deadline;
    b) Regulations limiting the circumstances in which investor capital can be redeployed (*Id*., at 1081), no deadline;
    c) Regulations prohibiting certain foreign involvement in the regional center program (*Id*., at1086), within 270 days of enactment of the RIA.

69. The RIA requires Defendants to report to the Judiciary Committees of the House and Senate on how the integrity fee funds were spent in the prior fiscal year. *Id*., at 1091-92.

70. Section 106 of the RIA requires the DHS Defendants to complete a fee study within one year of enactment to determine the fees required to process regional center applications within 180 days; project applications within 180 days; project applications for TEA projects within 90 days; non-TEA investor I-526E petitions within 240 days; TEA investor I-526E petitions in 120 days; and condition removal petitions within 240 days. The RIA requires Defendants to implement the new fees not later than 60 days after completing the fee study. *Id*., at 1103-04.

71. In order to facilitate Defendants quick implementation of the RIA, Congress waived the application of the Paperwork Reduction Act for the first year after enactment for any information collection or rule promulgated by Defendants in implementing the RIA. *Id*., at 1104-05.

72. Finally, the RIA required DHS Defendants to create official communications channels with the public within 40 days of enactment by designating an email address for the purpose. *Id*., at 1107.

73. We do not know if Defendants filed the required report on their use of the integrity fee with Congress.

74. DHS Defendants have, in fact, designated email addresses (which already existed) for communication with the public.

75. DHS Defendants have failed to complete any of the other tasks or meet any of the other deadlines set by the RIA.

Additional Factual Allegations

76. Plaintiffs, other than Plaintiff IIUSA, are regional centers or regional center owners.

77. Plaintiff, IIUSA, is the regional center industry trade association representing more than 100 regional centers, who in turn have sponsored tens of thousands of EB-5 investors.

78. Plaintiffs' businesses involve the sponsoring of investment opportunities for the purposes of the EB-5 program.

79. Plaintiffs typically affiliate with an NCE, which recruits EB-5 investors and uses the proceeds of the investment to fund job-creating projects or businesses in the U.S.

80. The investors are reliant on the regional center for their ability to count indirect jobs and pool their investments with other EB-5 investors.

81. The termination of a regional center may result in the denial of an investor petition.

82. Plaintiffs or their regional centers may or may not be the manager or general partner of the NCE, and they may or may not be involved in the fund raising.

83. They nevertheless play a critical role in the immigration process of their EB-5 investors and have a substantial interest in the outcome of the immigration process for their investors.

84. The RIA sets forth extensive annual compliance and reporting requirements for regional centers, including the payment of an annual integrity fee in the amount of $20,000 each year ($10,000 if the regional center has 20 or fewer investors).

85. Under USCIS policy, a regional center's compliance obligations in relation to an investor continue until that investor files an I-829 petition during the 90 day window preceding the end of the investor's two-year conditional residence period.

86. According to USCIS policy, once an investor files his or her I-829 petition (which can only happen after he or she is granted a visa or adjustment of status), he or she no longer "counts" as an investor of the regional center.

87. Nevertheless, the regional center has an obligation to maintain records for an additional five years after any transaction or action supporting an investor petition. As a result, a regional center has compliance obligations for minimally 5 years after its investors file I-829 petitions.

88. Regional centers can be terminated for non-compliance or failing to pay the integrity fee.

89. The RIA also allows for fines of up to 10% of the amount of investor funding sponsored by the regional center for certain violations.

90. Operating a regional center is increasingly expensive, and the potential liabilities are significant.

91. Plaintiffs earn fees for sponsoring the NCEs and allowing the NCEs' investors to use the regional center to claim indirect job creation.

92. The fees are generally tied to what the NCE earns on the EB-5 capital it has deployed- i.e. interest income from loaning the money to a job creating entity ("JCE"), or distributions from making an equity investment into the JCE.

93. The more investors affiliated with a regional center, the more capital is deployed by its NCEs, and the more revenue that regional center stands to earn.

94. Note, though, that this revenue is finite. When the NCE stops earning income on the EB-5 funds, there is no more revenue for the regional center.

95. The regional center's compliance obligations do not necessarily stop when the revenue stops.

96. Pursuant to the RIA's new definition of the sustainment period, an investor may be entitled to a return of capital long before he or she gets a green card or files an I-829 petition.

97. Thus, Plaintiffs may have compliance and reporting obligations, and the associated costs, substantially longer than they are making revenue from the NCE's deployment of capital.

98. Plaintiffs' businesses are therefore substantially dependent on investor demand for the EB-5 program.

99. Without EB-5 investors, they simply have no way of generating revenue.

100. Without revenue, they may not be able to continue to pay the Integrity Fee or continue the required compliance activities.

101. Plaintiffs are dependent on their investors, and their investors are dependent on Plaintiffs.

102. Plaintiffs have a substantial interest in the availability and usage of EB-5 visas, both directly, and as representatives of their investors.

Visa Backlogs and Demand for EB-5 Visas

103. Investors and their families typically choose to immigrate through the EB-5 program for one of two reasons: it is the only option they have to immigrate to the U.S., or it is the only one fast enough.

104. The first reason is simple. The investors lack a qualifying family relationship, job offer from a U.S. employer, or they are not eligible for a diversity visa.

105. EB-5 is their only option to immigrate to the U.S.

106. For the second set of investors, timing is the key issue.

107. Many investors from India and China are in the U.S. on temporary work visas. Their ability to remain here expires when their status expires, and is tied to their continued employment for a U.S. employer.

108. Many of these have had employment-based immigrant petitions filed on their behalf by their employers.

109. Unfortunately, the wait for an EB-2 or EB-3 visa can be many years. Some estimates for an Indian native waiting for an EB-2 or EB-3 visa are as long as 40-50 years.

110. Some of these people would have to continue working- and continue to have a job offer- into their 80s or 90s in order to ever get a green card.

111. Many investors are in the U.S. on student visas. They make an investment and file an EB-5 petition with the hopes of having a green card by the time they finish school.

112. Others are nearing retirement age, and live in countries where their residence is tied to work, and there is no mechanism for them to remain there after retirement.

113. Whether EB-5 is the only option, or is the fastest option, the longer the wait for a visa, the less attractive an option it becomes.

114. The less attractive EB-5 is as a route to immigrate to the U.S., the fewer investors are motivated to invest.

115. Thus, quite simply, processing delays and visa backlogs hurt demand for EB-5 investments.

116. This, in turn, is detrimental to Plaintiffs' businesses.

117. History has shown that longer visa wait times severely impact demand.

118. From the inception of the program in 1990 through 2007, demand for EB-5 visas was historically low. Demand for EB-5 visas substantially increased during the 2008 financial crisis, and grew through 2015.

119. In 2014, a cutoff date was established for the first time for natives of China, who were the single largest group of EB-5 investors for many years, accounting for 80% or more of EB-5 investors in some years.

120. The announcement of a backlog, and increasing estimates of the wait time, soon chilled demand.

121. In 2014, 10,928 I-526 petitions were filed. In 2015, a record of 14,298 were filed. In 2016, the number remained about the same, with 14,147 filed. However, as news of a possible visa backlog for China began to spread, demand began to dip. 12,165 I-526 petitions were filed in 2017.

122. By 2018, news was out in the China market that the wait for a visa would be many years.

123. I-526 filings dropped by nearly half to 6,424.

124. By 2019, I-526 filings reached a record low of 1,131.

125. The cause was primarily the visa backlog, which made the wait for a green card longer.

126. By 2019 an investor from China faced a 10 or more year wait for an EB-5 visa.

127. An investor planning to have his or her children attend college in the U.S. would have to start the process before the children entered middle school.

128. For someone looking at the EB-5 program as a way to retire in the U.S., the backlog was simply too long.

129. A cutoff date for natives of India was established in July 2019, but had been anticipated since mid-2018, further impacting demand.

130. With the set-aside visas created by the RIA, new investors who are natives of India and China currently do not face a backlog in the EB-5 category.

131. This has reinvigorated demand. There were more I-526E petitions filed in Q2 of FY 2024 than there were I-526 petitions filed in all of FY 2019.

132. Ironically, it may take less time for an investor from China who makes an EB-5 investment today in a set-aide to get a green card than a native of China who invested in

2016.

133. This has sparked renewed interest in the EB-5 program from natives of China and India- the two largest markets for EB-5 investors.

134. History has shown, however, that this demand will end if the backlog becomes too long.

135. The more visas squandered by Defendants over time, the sooner this backlog will hit.

136. Because there are new visas available each year, issuing visas to currently eligible investors in this fiscal year rather than next fiscal year puts less pressure on next-year's numbers. The more visas that are wasted, the bigger the bottleneck becomes later, and the longer the wait.

137. Wasting visas through failure to timely issue them or failure to timely adjudicate post RIA petitions and applications is detrimental to Plaintiffs' businesses and to the purpose of the EB-5 program.

138. Visa backlogs not only harm demand for EB-5 visas, but have caused- and continue to cause- other hardships to Plaintiffs.

139. Plaintiffs (except Plaintiff IIUSA) have had investors seek to withdraw their investments due to visa backlogs.

140. Despite contractual provisions and the EB-5 rules preventing an investor from having a right to withdraw, investors have threatened lawsuits against Plaintiffs when they have declined to or been unable to return investor funds in such cases.

141. Other regional centers have been sued by their investors.

142. A combination of long visa backlogs and USCIS policy has resulted in Plaintiffs and/or their NCEs to have to redeploy investor capital into subsequent investments in order to maintain the investment at risk.

143. This redeployment has been controversial and generally unwelcome by investors.

144. Plaintiffs have been stuck in the middle, with USCIS saying redeployment is required, and the investors frustrated about having their money reinvested into additional investments long after they made their initial investments and all necessary jobs have been created.

145. Anger and resentment among Legacy Investors, who feel duped by the long backlog which they never expected when they made their investment, and frustrated by USCIS redeployment policy, has caused mistrust of the program in general, and impacts demand from new investors.

146. Plaintiffs face ongoing (and often changing) compliance obligations that are tied to how long it takes their investors to get through the process.

147. If Legacy Investors face longer visa wait times, the time horizon for Plaintiffs' compliance obligations extends. For new investors, that means that Plaintiffs' compliance obligations- and costs- may outlast the revenue earned by Plaintiffs from their participation in the program.

Congress' Intent for the RIA

148. The purpose of the EB-5 Program has always been to encourage job creation and economic development in the U.S. through foreign direct investment.

149. It is the only visa category that requires a direct showing of a tangible benefit to the U.S.

150. It is the only visa category that requires a substantial investment, or job creation.

151. EB-5 investors typically do not take jobs from other Americans- they create more of them.

152. It is clear both from the legislative history and from the statute itself that Congress not only desired to stimulate and encourage foreign investment and job creation in the U.S., but intended to specifically incentivize investments in rural and high unemployment areas.

153. The minimum required investment has always been lower in TEA areas than non-TEA areas.

154. From the beginning of the program in 1990, approximately 30% of available visas have been reserved for investors in a TEA. However, there was no distinction between rural and high-unemployment for the purposes of the prior set-aside, and as a practical matter, more than 90% of investments were made in a TEA.

155. The RIA altered the balance between rural and high-unemployment when creating the new set-asides by allocating more visas to rural and providing for priority processing of investor petitions for rural investors, but nevertheless clearly seeks to incentivize both types of investments, with a preference towards rural areas.

156. The RIA is unique, in that while all other immigrant visa categories have a numerical limit, Congress demonstrated an intent that all available EB-5 visas be used up.

157. Congress did this through the set-asides and rollover provisions.

158. Congress indicated that it wanted the RIA implemented quickly by suspending the application of the Paperwork Reduction Act for one year and setting various implementation deadlines for Defendants.

159. Congress indicated that it wanted EB-5 applications and petitions adjudicated quickly by ordering Defendants to conduct a fee study and set fees at a level suitable to meet the processing goals set by Congress, which vary from three to nine months in length.

160. At the same time, Congress was aware that its actions incentivizing rural and high unemployment investments through the creation of the set-asides would have retroactive and adverse consequences for Legacy Investors, many of whom have been waiting nearly 10 years for a visa.

161. Suddenly, there would be 32% fewer visas available each year for Legacy Investors, making their wait longer, rather than shorter.

162. For families that have put a significant amount of money at risk for the opportunity to move to the U.S., this additional wait time can be disastrous.

163. If the investor dies, his or her family members cannot continue the immigration process (except under extremely limited and uncommon circumstances).

164. Families who invested so that their children could be educated in the U.S. may find that their kids aged out and can no longer immigrate with their parents, or have already gone through college.

165. Legacy Investors must maintain their investments at-risk until the end of the conditional residence period. With every year that passes, the chances of losing their life savings increases.

166. Decreasing the pool of available visas undeniably makes the wait longer for these investors.

167. This is, of course, not what Legacy Investors signed up for.

168. Due largely to a lack of transparency in USCIS and Department of State data, many investors were surprised when a cutoff date was first implemented for China in 2014.

169. Many investors were further surprised when the backlog jumped from a year or two to possibly 10 years or more in a short time.

170. For those investors to now face another surprise, in the form of a 32% reduction in the number of available visas as the result of the new set-asides is substantially unfair. However, that is the unavoidable result of the RIA.

171. The effect of the RIA in this manner is clearly and unambiguously retroactive in its effect on legacy investors.

172. To ameliorate this impact, Congress created the rollover concept.

173. The RIA was enacted on March 15, 2022. Congress made the new regional center program provisions effective 60 days later, or May 15, 2022. The Fiscal year ends on

September 30.

174. Under the RIA, a regional center must file an I-9565F project application before any investor can file an I-526E petition.

175. The I-956F application has to be approved before any investor I-526E petition can be approved.

176. Thus, between May 15 and September 30, a regional center would have to file an I-956F, recruit investors, the investors would have to file an I-526E petition, the I-956F would have to be approved, the I-526Es would have to be approved, and then USCIS would have to transfer the approved petitions to NVC, and the Department of State would have to adjudicate visa applications and issue visas (or USCIS to grant an adjustment of status) for the numbers to be used.

177. Congress was well aware of current USCIS processing times in EB-5 (which is why the RIA includes processing time goals), and undoubtedly expected all of the FY 2022 set-aside visas to go unused.

178. Indeed, immigrant visa processing typically takes about 6 months, so Congress likely did not expect many of the set-aside visas to be used in the first half of FY 2023 either.

179. Based on the processing time goals set by Congress in the RIA, a TEA (rural or high-unemployment) I-956F should be processed in 90 days (180 for non-TEA), and a TEA investor I-526E petition should be processed in 120 days. In other words, it should take 7 or 8 months between the filing of the I-956F and investor petitions to investor petition approval. After that, it should take another 6 months for the Department of State to issue a visa or USCIS to grant an adjustment of status.

180. Congress likely would have expected the first set-aside visas to be used in the 3rd or 4th quarter of FY 2023, as by then, there would be a large number of new investor petitions adjudicated by USCIS and transferred to the NVC, or USCIS would adjudicate a large number of concurrently filed applications for adjustment of status.

181. Conversely, Congress would have expected all of FY 2022 set-aside visas to roll over into FY 2023, and potentially half or more of set-aside visas from FY 2023 to roll over into FY 2024 meaning no roll over visas would be used in FY 2023, and all leftover FY 2022 visas would roll over to unreserved in FY 2024, and be available to legacy investors.

182. With respect to the FY 2022 numbers, this is exactly what happened.

183. 6,396 set-aside visas from FY 2022 rolled over to the same set-asides in FY 2023, and went unused in FY 2023. They then rolled over to unreserved in FY 2024.

184. Through a number of factors discussed below, Congress could not possibly have anticipated, **no set-aside visas were issued** in FY 2023 either.

185. Historical use of the rural category has been low. The majority of EB-5 investors prior

to the RIA invested in high unemployment TEAs.

186. Although Congress used the rural set-aside and priority processing for rural petitions to incentivize investment in rural areas, Congress could not have known whether all rural visas would be used in any given fiscal year, leaving the possibility that rural visas would remain available and roll over to the unreserved category, where they would be available for Legacy Investors.

187. Thus, if the program was successful in incentivizing rural investments, more visas would be available for rural investors. On the other hand, if the program was not successful in incentivizing rural investments, then more visas would be given back to Legacy Investors.

188. The same is true of the Infrastructure category. Because the statutory definition of an infrastructure project is extremely limiting (it requires, among other things, a government entity to be both the job creating entity and the party contracting (borrowing etc.) with the regional center or NCE to receive the EB-5 money), it is possible that the infrastructure Set-Aside will go unused in many fiscal years. On the other hand, with only around 200 visas, all of the visas for this category could be used up by a single project.

189. But that is not all. Congress's scheme for the roll over visas also contemplates that set-aside investors from non-backlogged countries can be allocated either set-aside visas or unreserved visas at the time they apply for a visa.

190. The result is that once the backlog of Legacy Investors has been eliminated, rural investors from non-backlogged countries could use unreserved visas- leaving more rural visas available to backlogged countries, and therefore further incentivizing rural investment through shorter lines.

191. The same is true for high-unemployment and infrastructure visas.

192. This is a carefully crafted and nuanced scheme intended to serve multiple goals.

193. All of this, however, only works if the set-aside visas that roll over to unreserved stay permanently in the unreserved category and do not roll up to the EB-1 category or across to the family-based categories at the end of the fiscal year.

194. And that is exactly what Congress intended.

195. Congress made the EB-5 category different than all other categories in that 32% of the EB-5 visas made available each fiscal year either get used in the set-aside categories, or ultimately roll into the EB-5 unreserved category and remain in the EB-5 unreserved category until used.

196. However, in order to maintain balance with the other immigrant visa categories, the unreserved (i.e. non-roll over) 68% of visas are either used during the fiscal year or roll up or roll across.

197. The timing of the enactment of the RIA lends further support to Congress' intent for the roll over visas to stay in EB-5.

198. Congress was aware that there was a larger than normal number of EB-5 visas available in FY 2022, and they would be lost if not reserved.

Defendants' Interpretation of the RIA and INA

199. Despite Congress' intent, Defendant Department of State has adopted an interpretation of the statute that is contrary to the plain meaning of the statute, and has determined that the unreserved roll over visas do not stay in the unreserved category until used, but roll up to the EB-1 category or across to the family based categories if not used within the fiscal year.

200. Although Defendants have not published regulations to this effect, they have announced this interpretation publicly and privately, including at an October 5, 2023 meeting with the American Immigration Lawyers Association and various private meetings.

201. Defendants have already made a decision on this interpretation, and, on information and belief, it is final.

202. Defendants did not engage in notice and comment rulemaking, or otherwise seek public input in reaching this interpretation.

Defendants' Processing and Visa Usage

203. Through a confluence of circumstances, worldwide immigrant visa usage was low in FY 2021.

204. The result was an unusually large number of EB-5 visas available in FY 2022.

205. Instead of approximately 10,000 visas, 19,987 were available in FY 2022 for EB-5, including 6,396 set-aside visas- all of which went unused and rolled over.

206. In FY 2023, there were again more than 10,000 EB-5 visas available, with 13,993 total, and 4,478 reserved and 9,515 unreserved available. Added to that were all of the FY 2022 roll over visas, leaving a total of 20,389 EB-5 visas available, with 10,874 of those in the set-asidecategories.

207. None of the set-aside visas were used in FY 2023, and all of FY 2022's set-aside visas rolled over to unreserved in FY 2024

208. In FY 2024, there were 7,773 unreserved visas available and 3,658 set-aside visas available, for a total of 11,431 new EB-5 visas available.

209. However, there were an additional 4,478 set-aside visas from FY 2023, for a total of 8,136 set-aside visas available.

210. Unreserved in FY 2024 got a boost from FY 2022, with a total of 14,169 unreserved visas available, including the 6,396 roll over visas.

211. Once again, this is more than double the approximately 10,000 visas normally available.

212. It also represents about a third of the number of Legacy Investors and their family members waiting for visas.

213. Based on statements from Defendants, as of May 16, 2024, Defendants had issued a total of 8,359 unreserved visas, including 1,993 adjustments of status and 6,366 at the consulates abroad.

214. As of May 16, 2024, on information and belief, there were **at least 5,810 unreserved visas** still available.

215. In contrast, as of May 16, 2024, on information and belief, there were approximately 39,775 applicants awaiting unreserved EB-5 visas at the Department of State, and some 3,500 to 4,500 awaiting adjustment of status at USCIS.

216. The 5,810 remaining visas represents approximately 11-12% of the backlog.

217. In FY 2022, 2,706 unreserved visas went unused and were lost.

218. They could have reduced the backlog by nearly 5% had they been used.

219. In FY 2024, there are more unreserved visas available than in FY 2022.

220. As of May 16, 2024, Defendants had a backlog of applicants sufficient to use up all of the available visas, 5,810 visas left to issue, and only 137 days left in the fiscal year.

221. It is highly unlikely Defendants will issue all of the available visas, and many will be lost if the unused roll-over visas are allowed to roll up to EB-1 or across to the Family Based categories.

222. On August 16, 2024, Defendant, DOS, issued an alert on its website claiming that all unreserved EB-5 visas for FY 2024 had been used. See https://travel.state.gov/content/travel/en/News/visas-news/annual-limit-eb5.html (last visited August 25, 2024).

223. It states: "The State Department, working in close collaboration with U.S. Citizenship and Immigration Services, is pleased to announce the issuance of all legally available visas in the Employment-Based Fifth Preference (EB-5) unreserved category for fiscal year (FY) 2024."

224. The notice further states: "Since all available EB-5 unreserved visas for FY 2024 have been used, embassies and consulates may not issue visas in these categories for the remainder of the fiscal year. The annual limits will reset with the start of the new fiscal year (FY 2025), on October 1, 2024."

225. On information and belief, this is not true.

226. Plaintiffs believe the announcement is a response to this lawsuit.

227. On information and belief, Plaintiffs believe what the notice may have been intended to convey is that all visas had been allocated to the investors and family members scheduled for interviews prior to September 30, 2024.

228. Anecdotal evidence suggests that all of the FY 2024 unreserved visas, including the roll over FY 2022 visas, have not, in fact been issued.

229. None of the Plaintiffs report a large number of their investors getting green cards this year.

230. None of the members of the American Immigration Lawyers Association, the largest trade association for immigration attorneys in the U.S, polled report a large number of their EB-5 investor clients getting visas or green cards this year.

231. Some report a greater than average number of investors being scheduled for visa interviews through September 30, 2024.

232. However, there are reports that the U.S. Consulates abroad are issuing letters to these investors informing them that no visas are available and they will not get visas at their interviews.

233. Defendant USCIS has recently issued letters rescinding or requesting the return of EB-5 green cards because USCIS has granted Set-Aside investors green cards in the unreserved category, thereby miss-allocating unreserved visas.

234. On information and belief, Defendants do not actually know how many unreserved visas have been used as a result of their failure to properly administer the program.

235. Because of this, it is all but impossible for Defendants to actually issue all of the available unreserved visas for FY 2024.

236. The situation is worse with the set-aside visas.

237. As of May 16, 2024, two years and one day after the effective date of the revised regional center program, and two years and 61 days after the creation of the set-aside categories, Defendants had issued a total of **15 set-side visas**- all of which were issued in 2024.

238. None were issued in FY 2022 or FY 2023.

239. Two years and 61 days after the RIA became law, Defendants have only managed to issue **15** out of 14,532 available set-aside visas.

240. This is ***not*** a result of a lack of demand.

241. USCIS published data does not distinguish between I-526 petitions and I-526E petitions until the second quarter of FY 2023, during which there were 495 I-526E petitions filed.

242. On information and belief, all, or very nearly all, I-526E petitions that have been filed are for set-aside projects.

243. By the end of Q2 of FY 2023, there were 1,127 I-526E petitions pending, with zero adjudications.

244. Another 649 were filed in Q3 2023. Still no adjudications, but the backlog grew to 1,761.

245. Another 888 petitions were filed in Q4, 2023. Finally, Defendant USCIS approved 63 of them in Q4 of 2023, with the backlog standing at 2,431 at the end of FY 2023.

246. The first quarter of FY 2024 saw another 581 I-526E petitions filed, and 194 adjudicated, with the backlog growing to 2,667.

247. Finally, in Q2 of FY 2024, the most recent published data available, a whopping 1,810 I-526E petitions were filed. (This was more than all the I-526 petitions filed during FY 2019). The data does not provide approval or denial data for this quarter, but claims 162 total completions, bringing the total completions for the year to 356, and the backlog to 3,672.

248. Estimates for the number of visas per petition vary from 2 to 3. Every petition represents one investor and his or her family members. Assuming a ratio of 2.5 to 1, the 3,672 pending petitions represent approximately 9,180 visas- or about **two thirds** of the available set-aside visas.

249. Despite having sufficient visas available, the set-aside visas are going unused as a result of Defendants' actions and inactions.

250. Defendants do not publish data that distinguishes between rural, high unemployment, or infrastructure investors.

251. Defendants similarly do not publish data about whether the petitions are being filed by natives of backlogged countries or non-backlogged countries.

252. After failing for years to process meaningful numbers of I-526 petitions, Defendant USCIS is suddenly processing a large number of I-526 petitions at the same time that it is failing to process I-526E petitions.

253. In contrast to I-526E adjudications, Defendants processed 1,414 I-526 petitions in FY 2022,[5] 3,353 in FY 2023, and 2,954 in the first half of FY 2024.

254. Of course, this is a fraction of historical levels.

255. In FY 2018, USCIS was able to process more than 15,000 I-526 petitions.

256. The RIA instructs DHS Defendants to give priority to the processing of rural investor petitions.

257. Defendants interpret this to mean only rural I-526E petitions and not legacy rural petitions or non-regional center I-526 petitions filed after the RIA.

258. Despite this, Defendant USCIS appears to be processing legacy I-526 petitions at nearly 10 times the rate it is processing I-526E petitions, at least half of which are likely to be from rural investors.

259. This is leading to a waste of set-aside visas.

260. More importantly, by not using the visas that are available now for the investors and their family members that have applied now, Defendants are setting up a future visa backlog.

261. When DHS defendants finally start adjudicating meaningful numbers of I-526E petitions (which we assume they must), the result will be a large number of visa applicants competing for a small number of visas.

262. This will be exacerbated by Defendants' failure to issue a meaningful number of set-aide visas to date.

263. To illustrate, in a normal year there would be approximately 9,940 EB-5 visas available, with 1,988 of those set aside for rural, 994 for high unemployment, and 198 for infrastructure.

264. When the 7% per country cap is applied, that would be **139 rural visas, 69 high unemployment visas, and 13 infrastructure visas** available to natives of backlogged countries.

265. At the rate I-526E petitions are being filed, the 8,136 set-aside visas available in FY 2024 represents one to two years-worth of visa demand.

266. The failure to use those visas in a timely manner is likely catastrophic to the future of the program.

[5] For FY 2022 Defendants' data does not distinguish between I-526 petitions and I-526E petitions. We assume, however, that no I-526E petitions were processed.

Defendants Implementation of the Renewal of the Regional Center Program

267. Congress clearly expected Defendants to ramp up quickly and begin to process EB-5 applications and petitions and begin issuing EB-5 visas rapidly after the effective date of the RIA. This is not what happened.

268. Instead, DHS Defendants have created numerous obstacles to the implementation and utilization of the program, and all Defendants have failed to process EB-5 petitions and applications in a reasonable time.

269. Around April 20, 2022, Defendant USCIS posted a notice on its website declaring that all previously designated regional centers were terminated and would have to file an application for designation under the RIA.

270. With one posting on its website, USCIS shut down indefinitely the entire regional center program, an act described by the U.S. District Court for the Northern District of California as "almost certainly legal error." Behring Reg'l Ctr. LLC v. Mayorkas, No. 22-CV-02487-VC, 2022 WL 2290594, at *1 (N.D. Cal. June 24, 2022).

271. This, of course, led to litigation.

272. On June 24, 2022, the court granted a preliminary injunction prohibiting DHS Defendants from treating all regional centers as terminated.

273. On August 23, 2022, DHS Defendants entered into a settlement agreement with the Behring plaintiffs.

274. Of course, by this time, the first Fiscal Year of the program was nearly over.

275. It provided that all regional centers in good standing prior to the lapse of the program on June 30, 2021, continued to be designated but must file an I-956 application to renew their designation by December 29, 2022, along with an annual I-956G compliance filing for FY 2022.

276. On December 24, 2022, at approximately 5pm eastern time, USCIS suspended the deadline for filing both the I-956 and the I-956G for FY 2022.

277. Almost 300 Regional centers filed the I-956G with the $3,035 filing fee that apparently did not need to. (A total of 313 I-956G forms were filed in FY 2023. It appears that some regional centers filed the I-956G after December 29, 2022, but before September 30, 2023).

278. The settlement agreement also provided that existing regional centers could file I-956F project applications, after which investors could file I-526E petitions.

279. Defendants agreed that investors could file their I-56E petitions with the I-956F receipt for their project, or if the receipt had not been received by the regional center within 10 days, could file with proof that the I-956F had been filed.

280. This was necessary because DHS Defendants had failed to implement a process for issuing I-797 receipt notices for I-956F applications, and were instead issuing "payment receipts," which were supposed to be followed up with official I-797 receipt notices.

281. Many of the I-797 receipt notices never came. To date, they appear to be issued intermittently at best.

282. Some regional centers never even received the payment receipt.

283. This, of course, led to delays and difficulty in filing investor petitions, which were sometimes erroneously rejected and returned by the USCIS mailroom.

284. It was also difficult to explain to prospective investors why one project had a payment receipt and an I-797 receipt, but others did not.

285. This, of course, led to confusion in the market and likely slowed initial investor uptake.

286. In the Settlement Agreement, Defendants agreed to use "best-faith" efforts to develop a mechanism for regional centers to provide a pre-paid return envelope to be used by mailroom contractors to send receipt notices back to the regional center for I-956F filings.

287. This never happened.

288. In the Settlement Agreement, USCIS agreed to provide an electronic copy of the receipt for all I-956Fs filed within the first 16 weeks of the settlement's effective date.

289. On information and belief, this never happened.

290. USCIS agreed in the Settlement Agreement that investor I-526E petitions would not be rejected for failing to include the I-956F receipt notice.

291. Many, in fact, were rejected.

292. The RIA required DHS Defendants to take certain steps and to engage in rulemaking on certain issues.

293. They have not done so.

294. The RIA directed DHS to conduct a fee study within one year to determine the fees necessary to reach the processing time goals set by Congress in the RIA.

295. To date, it has not been completed.

296. Instead, on January 31, 2024, DHS published a final rule adjusting USCIS application and petition fees.

297. This Final Rule raised the EB-5 processing fees dramatically.

298. The I-526/526E fee increased from $3,675 to $11,160, a 204% increase (in addition to the $1,000 petition fee set by the RIA).

299. The I-829 fee increased from $3,750 to $9,525, a 154% increase.

300. The filing fee for a regional center designation application (I-956) went from $17,795 to $47,695, as did the filing fee for an I-956F project application, a 168% increase.

301. The I-956G annual compliance filing fee increased from $3,035 to $4,470, a 47% increase.

302. In the Final Rule, DHS flatly states that it set EB-5 filing fees based on nothing more than its opinion that EB-5 applicants and petitioners **can afford to pay**.

303. DHS admits that the fees have absolutely no relation to the amount of time or resources necessary to adjudicate EB-5 applications and petitions, and that the EB-5 fees are designed to recover the costs of adjudicating non-EB-5 applications and petitions.

304. DHS also implies in the final rule that it has no intention of meeting the RIA's processing time goals.

305. Instead of attempting to meet processing time goals and adjudicate petitions and applications, USCIS has dragged its feet and failed to process a meaningful number of applications and petitions.

306. Even once it has approved a petition, USCIS takes 6 months or more to transfer the approved file to NVC. In some cases, the delay has been measured in years, and not months.

307. In contrast to what USCIS has been doing, DOS has stated that it should take **4 days** to transfer an approved petition from USCIS to NVC, and that it is done by email.

308. DHS Defendants are well staffed, but appear to be adjudicating an inexplicably low number of EB-5 petitions and applications, and in particular, a shockingly low number of I-526E petitions.

309. For its part, DOS has been inconsistent in processing EB-5 visa applications.

310. Only consulates in India, China, and Vietnam appear to be regularly scheduling visa interview appointments for EB-5 applicants. Other posts appear to only intermittently schedule EB-5 visa appointments, and some appear to have a policy of not scheduling EB-5 interviews at all.

311. The Consulates in India and Vietnam have both experienced periods since the enactment of the RIA where consular officers appear to be re-adjudicating investors' sources of funds, despite the fact that DHS- and not DOS- is charged with adjudicating

visa petitions. This has led to substantial wasted time in processing these applications and utilizing EB-5 visas.

312. The bottom line is that instead of processing and issuing EB-5 visas at the rate intended by Congress, Defendants have caused massive delays.

313. The actions and inactions of the DHS Defendants have been particularly egregious, as they seem to have taken intentional steps to slow the program down, beginning with the termination of all regional centers through a posting on the USCIS website.

314. The result has been squandered visa numbers.

315. This has not only harmed Plaintiffs and their investors, but frustrates the very intent of the program which is to create new U.S. jobs and economic development from the investment of EB-5 investors' capital into the U.S. economy.

Claims

1) Declaratory Judgment

316. Defendants' interpretation of the RIA and corresponding sections of the statute to allow unused set-aside visas which rolled into the unreserved category, to roll from the unreserved category up to EB-1 or roll across to the Family Based immigrant visa categories, is erroneous and unlawful.

317. With the RIA, Congress created a carefully crafted and nuanced scheme to promote rural, high-unemployment and infrastructure investment by new EB-5 investors and to protect Legacy investors from increased waiting times resulting from the retroactive effects of the set-asides.

318. Defendants' interpretation of the RIA is a final action.

319. Defendants' interpretation is arbitrary and capricious and contrary to the statue.

320. Plaintiffs will be substantially, imminently, and irreparably harmed by the application of this interpretation as it will, and must, result in the loss of EB-5 visas that were intended by Congress to remain in the EB-5 category, resulting in the creation of visa backlogs that would either not exist or would arrive later and with less severity without the loss of the visa numbers.

321. Plaintiffs have standing to bring this action pursuant to 5 U.S.C. § 702.

322. Relief is available to Plaintiffs pursuant to the A.P.A. and 28 U.S.C. § 2201.

323. Pursuant to 5 U.S.C. 706, the Court shall:

> decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of

the terms of an agency action. The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be –
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

324. Pursuant to the Declaratory Judgement act, 28 U.S.C. 2201, the Court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

325. Defendants action in interpreting the RIA is unlawful and must be set aside pursuant to the APA.

326. Plaintiffs are entitled to a declaratory judgement as to the correct interpretation of the statute- namely, that unused unreserved roll-over visas remain in the unreserved EB-5 visa category until used and do not roll up or over to other visa categories.

2) Defendants Actions Violate the APA Because they Are Arbitrary and Capricious

327. The APA empowers this Court to "hold unlawful and set aside" agency action that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A).

328. Defendants' interpretation fails to consider an important aspect of the problem, namely the various goals that Congress sought to serve in drafting the roll over provisions.

329. Defendants have similarly failed to consider the impact of their interpretation and administration of the RIA on Plaintiffs' businesses and investors, including the retroactive nature of the effect on Legacy Investors.

3) Injunctive Relief Relating to all EB-5 Visas

330. Defendants miscounting and misallocation of visas violates the INA which requires Defendants to accurately track, allocate, and issue available immigrant visas.

331. In order to prevent the loss of urgently needed Set-Aside and non-Set-Aside visas,

Defendants should be enjoined from allowing any EB-5 visas to roll over to any other category, whether inside or outside of the EB-5 category until Defendants can accurately account for the allocation and issuance of all FY 2024 EB-5 visas, including roll over visas.

4) Injunctive Relief Relating to Roll Over Unreserved Visas

332. Defendants unlawful interpretation of the RIA is likely to cause the loss of a substantial number of unreserved EB-5 visas on October 1, 2024, or in future fiscal years, to the substantial detriment of Plaintiffs and their investors.

333. To prevent such harm, and to ensure the Court's decision has meaningful effect, Plaintiffs are entitled to a preliminary and permanent injunction preventing Defendants from causing or allowing any unreserved roll over visas to roll up or across to any other visa category, and ordering Defendants to preserve any unused unreserved roll over visas at the end of this or any fiscal year for use in subsequent fiscal years by EB-5 investors.

2) Injunctive Relief Relating to FY 2024 Set-Aside Visas

334. Defendants have arbitrarily and capriciously, unreasonably, unlawfully and in clear contravention of the intent of Congress in enacting the RIA, delayed, obstructed, or simply failed to act competently and diligently in implementing the RIA and processing EB-5 applications and petitions and issuing visas to the extent that in more than two years, they have issued barely over one-tenth of one percent of the available set-aside visas, despite having enough applicants to use two-thirds or more of those visas.

335. Plaintiffs and their investors have been, and continue to be harmed by Defendants' utter failure to implement this program as Congress intended and issue rural, high unemployment and infrastructure visas.

336. The loss of thousands of set-aside visas to the unreserved visa category at the end of FY 2024 will hasten a visa backlog in the set-aside categories and chill demand from future investors.

337. Defendants' failure to implement the program in a timely and efficient manner, consistent with the intent of Congress, is detrimental to the EB-5 program itself as it disincentivizes rather than incentivizes investment in rural, high-unemployment and infrastructure projects, and fails to use a substantial number of the available EB-5 visas.

338. To prevent the loss of visas as a result of Defendants' sheer incompetence or malfeasance, an injunction preventing unused FY 2023 set-aside visas from rolling over into the unreserved category during FY 2025 is appropriate to allow Defendants a one-year catch-up period to make up for their implementation of the program and failure to process EB-5 applications and petitions during the first two years of the program.

339. An injunction ordering Defendants to use good faith efforts to implement the regional center program and process EB-5 applications and petitions in accordance with the intent of Congress is also appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a. Grant Plaintiffs relief under the APA and the Declaratory Judgement statute and hold unlawful and set aside Defendants' erroneous interpretation of the RIA, and declare Defendants' interpretation unlawful ;

b. Grant Plaintiffs a preliminary and permanent injunction prohibiting Defendants from causing or allowing unreserved roll over visas to be removed from the number of visas available to EB-5 investors and their families and rolling up or rolling across to other visa categories in this fiscal year or any other;

c. Grant Plaintiffs a preliminary and permanent injunction prohibiting Defendants from causing or allowing any unused FY 2023 set-aside visas from rolling over to the unreserved category at the end of FY 2024 or during FY 2025, and ordering Defendants to use good faith efforts to implement the program and process EB-5 applications and petitions in a timely manner in accordance with the intent of Congress;

d. Grant any other relief the Court deems just; and
e. Maintain Jurisdiction over this action to ensure Defendants' compliance.

Respectfully submitted this 29th day of August, 2024

/s/ Daniel B. Lundy

Daniel B. Lundy
Chiesa Shahinian & Giantomasi PC
11 Times Square, 34th Floor
New York, NY 10036
(212) 324-5991
dlundy@csglaw.com

Attorneys for Plaintiffs