



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

April 28, 2022

USCIS
Office of Public Engagement
public.engagement@uscis.dhs.gov

Re: AILA Questions and Comments in Advance of USCIS EB-5 Public Engagement on April 29, 2022

Dear Office of Public Engagement:

On behalf of the American Immigration Lawyers Association (AILA) and AILA's EB-5 Investor Committee, we write to submit questions and comments to USCIS and the Immigrant Investor Program Office (IPO) in advance of the USCIS engagement "*USCIS EB-5 Reform and Integrity Act of 2022 Listening Session*" scheduled for April 29, 2022.

We would like to start by expressing our appreciation that USCIS and the IPO have scheduled this Listening Session. However, a "listening session" falls far short of the urgent need for a substantive and meaningful two-way engagement. As you are aware, AILA made this exact request in our recent letters to the IPO Director on February 9, 2022¹ and then again on March 16, 2022.²

As you know, we have been in an unprecedented dynamic phase of EB-5 policy development on all fronts – legislative and regulatory. Now more than ever, dialogue between IPO and EB-5 stakeholders is necessary to engender predictability and trust in the EB-5 program. The stakeholder community, including importantly the IPO, unquestionably benefits from the efficient and fair administration of the EB-5 program. As such, we encourage USCIS and IPO to schedule additional stakeholder engagements on the EB-5 program that are substantive in nature and not Listening Sessions. The EB-5 stakeholder community previously found those engagements very helpful, particularly when IPO would prepare presentations and present statistics and guidance to stakeholders.

We will now present comments and questions to USCIS and the IPO for the April 29, 2022 Listening Session.

¹ [AILA Sends Letter to Immigration Investor Program Office \(IPO\) Requesting Reestablishment of Stakeholder Engagement](#) On 2/9/22, the AILA EB-5 Committee sent a letter to Alissa Emmel, Chief of the Immigrant Investor Program Office (IPO) to request the resumption of stakeholder engagements between the IPO and EB-5 stakeholders, including AILA, EB-5 trade associations, and industry groups. AILA Doc. No. 22020908.

² [AILA Sends Letter to USCIS on EB-5 Reform and Integrity Act of 2022](#)

On 3/16/2022, AILA sent a letter to USCIS requesting public engagement as soon as possible on the implementation of the EB-5 Reform and Integrity Act of 2022 that was recently enacted. AILA Doc. No. 22031707.

I. USCIS Policy Requiring “Redesignation” of Previously-Approved Regional Centers.

It is incumbent upon USCIS to guide the EB-5 Regional Center Community and pending and prospective investors on the reactivation of the regional center program. AILA fully agrees that regional centers should be required to comply with the new integrity measures enacted by the EB-5 Reform and Integrity Act of 2022. However, there should be a smooth transition between the previously enacted legislation and the new legislation to avoid unnecessary redundancies and additional administrative burdens for the agency and to avoid unnecessary burdens to designated regional centers who have remained in good standing with USCIS, and which complied with the rules even during the regional center program’s lapse.

USCIS recently updated its website to state that “*regional centers previously designated under section 610 are no longer authorized. The EB-5 Reform and Integrity Act of 2022 requires all entities seeking regional center designation to provide a proposal in compliance with the new program requirements, which will be effective on May 14, 2022.*”

Requiring all regional centers to go through a process to be redesignated will put immense burden on the agency. Instead, the agency currently has the tools to confirm compliance with the new integrity measures without the need for a full-scale redesignation of existing regional centers. These tools provided in the new statute include:

1. A designated regional center is required to file an amendment application under INA 203(b)(5)(E)(vi) 120 days in advance of any changes to its organizational structure, ownership or administrative changes that would result in any new individuals being subject to the requirements in INA 203(b)(5)(H).
2. A designated regional center is required to file immediately preserve all existing records and all new records moving forward in compliance with INA 203(b)(5)(E)(vii), which are subject to USCIS audit.³ Regional centers are subject to termination for failure to comply.
3. A designated regional center shall file an application for approval of an investment in a new commercial enterprise where no such prior approval of the business plan exists. Therefore, for new projects and new commercial enterprises seeking to raise new funds under the new law where no prior approval exists, the regional center must go through a pre-approval process with all required certifications under INA 203(b)(5)(F). This would encompass almost all regional centers raising new funds from EB-5 investors under the INA 203(b)(5).
4. Importantly, all designated regional centers must go through the annual compliance certification under INA 203(b)(5)(G). This would encompass all of the certifications required in the same fiscal year, while also reducing the burden to the agency and to regional centers to file multiple applications in the same fiscal year to make identical certifications.

Taken together, existing regional centers under the prior law must recertify to all integrity measures under the new INA 203(b)(5)(E)-(G) during this fiscal year. This will occur either through a business plan approval application and/or any amendment application, *and* through the annual certification requirements found in INA 203(b)(5)(G), which will be mandatory for all existing regional centers at the end of the year.

³ Its critical to remember, however, that USCIS has never issued guidance on the policies and procedures of a “audit” of a Regional Center, including what records or documents are required for compliance purposes.

We believe that USCIS should engage with the stakeholder holder community and should also take into consideration the legal points below, which establish that regional centers need not be redesignated by USCIS:

1. **Statutory Language Indicates existing regional centers remain designated.** INA 203(b)(5)(F)(ii), EFFECT OF APPROVAL OF A BUSINESS PLAN FOR AN INVESTMENT IN A REGIONAL CENTER'S COMMERCIAL ENTERPRISE, explicitly recognizes that a business plan approved prior to the date of the enactment of the reauthorization legislation remains binding for purposes of adjudication of subsequent petitions seeking classification under INA 203(b)(5)(F). Interpreting this law as nullifying the existing regional center designations would directly contravene this language recognizing previously approved business plans submitted by existing regional centers.
2. **An interpretation requiring new regional center designations will result in unintended adverse consequences.** The application of the USCIS interpretation would lead to consequences that were not, and could not have been, intended by the drafters, as evidenced by provisions that require USCIS to continue adjudications, grant deference to prior project approvals, and grandfather petitions.
 - a. **Continued Adjudications of Existing Investors.** Subparagraph (S) of the EB-5 Reform and Integrity Act of 2022 does not protect investors from an administration decision to decertify all existing regional centers, as this provision only protects from lapses of legislation.
 - b. As a result, if a pre-enactment regional center fails to refile a designation application under INA 203(b)(5)(F), many investors may be harmed by this interpretation. If USCIS seeks for the regional center to complete the required certifications for integrity and compliance purposes, this can be achieved through the new requirements outlined above and required by INA 203(b)(5)(E)-(G).
3. **Retroactive application of law is unlawful.** An interpretation or action by the agency to apply and existing statute retroactively without the explicit authorization by Congress is unlawful under the APA and likely violates Due Process principles under existing case law.
4. **Regional centers still need to make all required compliance certifications at the end of this fiscal year.** As described above, the new certifications and compliance requirements under INA 203(b)(5)(E)-(G) remain applicable to existing regional centers without the need for redesignation. Each regional center seeking to take in new EB-5 investor capital without prior approval of the business plan by USCIS will require a project pre-approval application under INA 203(b)(5)(F), which requires the integrity measure certifications. Each regional center modifying its ownership or administration must file an amendment application under INA 203(b)(5)(E), which requires the integrity measure certifications. Finally, each existing regional center will need to file an annual compliance on Form I-924A, or such new form as USCIS will prescribe through notice and comment rulemaking, which contains all of the same certifications required under subparagraph(F) for new regional centers. To the extent existing regional centers are not able to satisfy those certifications or compliance checks, the agency will have valid authority to terminate them.

Importantly, should USCIS want to “re-certify” regional centers under the EB-5 Reform and Integrity Act of 2022, USCIS can accept certifications from regional centers meeting the new law’s requirements and it can do so without a new form and fee. USCIS need not publish new forms to “redesignate” existing regional centers. Instead, if USCIS wishes to have existing regional centers redesignate through a process that confirms the regional center is in compliance with the new integrity measures, USCIS can accept these certifications directly from existing regional centers. Prior to USCIS publishing Form I-924 and Form I-924A in November 2010, USCIS accepted general proposals and certifications from regional centers without a form and fee. USCIS could accomplish this “redesignation” process by allowing regional centers to file certifications that comply with the EB-5 Reform and Integrity Act of 2022, and then USCIS can “redesignate” upon receiving the certification from the regional center.

This process would be efficient for both USCIS and regional centers. Moving forward, the regional center will continue to certify to compliance through new “project pre-approval” applications and again at the end of the fiscal year during the annual compliance period.

In advance of the Listening Session, the AILA EB-5 Committee would like to send the following questions to USCIS and the IPO:

1. If USCIS takes the position that each Regional Center must be “redesignated,” will USCIS issue a new Form for this process? AILA urges USCIS to allow regional centers that were designated prior to the enactment of the EB-5 Reform Act to send USCIS a certification after May 14, 2022 regarding its ongoing compliance with the integrity measures, and once the certification is received by USCIS, the regional center should be considered “designated.”
2. If USCIS publishes a new form for this process, will USCIS go through Notice and Comment Rulemaking for this new form? What is the timeline for this process?
3. If USCIS publishes a new form and requires an application by all existing regional centers, will the “proposal” need to be approved by USCIS prior to the filing of any new Form I-526 Petitions? What will be the processing time goal? Given that processing times for I-924 Applications were 62-115 months, it would not seem possible for USCIS to adjudicate these applications in a timely manner to allow for redesignations so new I-526 Petitions can be filed.
4. How does USCIS align this new process with the statutory language stating that a prior regional center project pre-approval (i.e. an exemplar application) remains valid for all continuing I-526 Petitions under the new INA 2013(b)(5)(F)?
5. What staffing requirements and allocations will be made so that this process can be completed timely? AILA urges USCIS to start issuing data regarding processing of applications and staffing at the IPO as it did previously, to give stakeholders transparency into the adjudications timelines at IPO.
6. The legislation also states that only “regional centers” can file an application for approval of an investment in a commercial enterprise. If USCIS interprets the legislation to require regional centers to be “redesignated,” will USCIS allow an entity wishing to be an RC to file for project approval at same time, or will USCIS require the entity to get designated first?

II. Implementation of New Forms and Regulations.

It is critical for EB-5 stakeholders to understand how the agency will implement the changes under EB-5 Reform and Integrity Act of 2022. To that end, we submit the following questions:

1. What is the agency’s timeline for preparing and publishing for Notice and Comment Rulemaking new regulations to implement the EB-5 Reform and Integrity Act of 2022?
2. What is the agency’s timeline for preparing new Forms and Instructions for new I-526 Petitions and new Regional Center project pre-approvals under the EB-5 Reform and Integrity Act of 2022?

The AILA EB-5 Committee understands that it will take USCIS some time to review and prepare new regulations and forms for the Notice and Comment Rulemaking process. We urge USCIS to work with the EB-5 Stakeholder community who can assist with this process. **Specifically, this Committee remains willing to provide USCIS and the IPO with draft regulations and a draft update to the USCIS Policy Manual to assist USCIS with this process. We remain ready and willing to work with USCIS and IPO on this process.**

III. USCIS and State Department Policy Regarding Visa Set Asides.

The EB-5 Reform and Integrity Act of 2022 created a series of new visa set asides for visa allocation purposes. Specifically, twenty (20) percent of visas are set aside for EB-5 projects located in a rural area, ten (10) percent of visas are set aside for EB-5 projects located in an area of high unemployment, and two (2) percent of visas are set aside for EB-5 infrastructure projects. The **May 2022 Visa Bulletin** published by the State Department reflects the following visa availability chart:

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	01MAR19	C	01SEP13	C	C
3rd	C	22MAR18	C	15JAN12	C	C
Other Workers	C	01JUN12	C	15JAN12	C	C
4th	C	C	01MAY17	C	01APR20	C
Certain Religious Workers	C	C	01MAY17	C	01APR20	C
5th Unreserved (C5, T5, and all others)	C	C	C	C	C	C
5th Unreserved (I5 and R5)	C	22NOV15	C	C	C	C
5th Set Aside: Rural (20%)	C	C	C	C	C	C
5th Set Aside: High Unemployment (10%)	C	C	C	C	C	C
5th Set Aside: Infrastructure (2%)	C	C	C	C	C	C

It is critical for USCIS and the State Department jointly to clarify if the new set asides are only allocated to new investors who file new I-526 Petitions following the enactment of EB-5 Reform and Integrity Act of 2022. The Visa Bulletin does not contain any notes or guidance regarding the set-asides listed above, which in turn has caused confusion among the EB-5 investor community about whether investors who filed prior to the enactment of EB-5 Reform and Integrity Act of 2022 are entitled to the visa set asides. To that end, we submit the following questions:

1. Does DHS interpret the set-aside provisions to allocate visas to pre-enactment investors who meet the new rural/HUA requirements? If so, how will DHS work with DOS to carry out this interpretation?
2. Has USCIS liaised with the State Department regarding the visa set asides?
3. Will USCIS and the State Department publish joint guidelines on the visa set asides created by the EB-5 Reform and Integrity Act of 2022?
4. When will USCIS and the State Department publish this guidance?
5. What process will USCIS put in place to designate clearly I-526 Petitions that fall into a set aside category, so that the State Department can clearly distinguish which petitions receive the set asides?

IV. IPO Staffing and Adjudication Timelines.

USCIS has stated on its website that “we have resumed processing of regional center-based Form I-526 Petition, Immigrant Petition by Alien Entrepreneur, filed on or before the sunset of the previous regional center program on June 30, 2021.” Please see below questions regarding I-526 Petition processing times:

1. What is the current staffing level at IPO?

2. The current processing time for I-526 Petitions is 47 to 71 months. What plan is in place to reduce the backlog of pending I-526 Petitions at USCIS?
3. Can IPO please update the public reporting of EB-5 case processing statistics by USCIS to separately track the various new types of I-526 cases, to include Direct (Non-RC) as well as all RC classifications as now being reported in the May 2022 Visa Bulletin?

V. I-829 Processing Times and Issues.

USCIS stated on its website, “we will continue to adjudicate Form I-829, Petition by Investor to Remove Conditions on Permanent Resident Status.” During the regional center program lapse, USCIS continued to process Form I-829; however, the processing time for Form I-829 continues to increase. Please see below questions affecting Form I-829 by investors:

1. The current processing time for I-829 Petitions is 44 to 68 months. What plan is in place to reduce the backlog of pending I-829 Petitions at USCIS?
2. During the lapse of the Program, USCIS indicated that it would continue to adjudicate Form I-829. Why was the backlog not reduced when USCIS could not decide pending I-526 Petitions?
3. What is the current status of the revisions to Form I-829: Docket ID USCIS-2006-0009) (hereinafter “Proposed Form I-829”) published in the Federal Register on May 13, 2021, along with a substantive discussion of AILA’s submitted suggestions and comments for processing⁴?

In light of our mutual interest in ensuring the integrity of our nation’s immigration system and the efficient and fair administration of the EB-5 program, we would like to propose an engagement in the coming weeks between AILA, EB-5 trade associations and industry groups, and the IPO focused on these issues, as these items are of pressing priority.

We look forward to your response and to coordinating a mutually convenient time. To arrange a date and time, or if you have any questions, please contact Sharvari Dalal-Dheini, Director of Government Relations at (202) 507-7621 or by email at SDalal-Dheini@aila.org.

Thank you for your time and consideration.

Sincerely,

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cc: Kathryn Rexrode, Associate Director, External Affairs Directorate
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⁴ 86 Fed. Reg. 26230 (May 13, 2021).

