AMERICAN IMMIGRATION LAWYERS ASSOCIATION

November 9, 2022

Alissa Emmel
Chief, Immigrant Investor Program Office
U.S. Citizenship and Immigration Services
131 M Street NE
Washington, D.C. 20529

RE: Urgent Request for Policy Guidance Consistent with Settlement Agreement Regarding Regional Center Election To File/Not File Form I-956 By December 29, 2022 and Guidance Regarding the Filing of Form I-956G by Regional Centers Seeking to "Retire"; AILA Proposal for New "Retired Regional Centers" Classification

Dear Ms. Emmel:

On behalf of the American Immigration Lawyers Association, we respectfully seek urgent clarification and policy guidance related to those previously approved Regional Centers electing to wind-down pursuant to the Settlement Agreement issued in the Behring Regional Center LLC, et al. v. Mayorkas[1] litigation (the "Settlement Agreement").[2] This matter is highly time-sensitive given that the Form I-956 filing deadline is December 29, 2022, less than 60 days away. Moreover, the Form I-956G filing deadline is also December 29, 2022. Urgent guidance is needed from USCIS because previously approved Regional Centers are unable to make informed decisions about the need to file Form I-956 and Form I-956G in the absence of timely additional guidance from USCIS.

In summary, USCIS must urgently issue guidance to regional centers approved before the passage of the EB-5 Reform and Integrity Act of 2022 (RIA) for the following reasons.

1. USCIS needs to issue guidance and update the USCIS Policy Manual (the "PM") to recognize the protections afforded to non-conditional lawful permanent resident investors affiliated with a regional center electing to wind-down pursuant to the Settlement Agreement. At a minimum, USCIS must immediately issue policy guidance that specifically incorporates the Settlement Agreement's RC "retirement" provision and eliminates the "Material Change" language of Volume 6, Part G, Chapter 4(C) of the PM. hbc

[1] The settlement affects two cases: Behring Regional Center LLC, et al. v. Mayorkas, et al., No. 3:22-cv-2487-VC (N.D. Cal.) and EB5 Capital, et al. v. DHS, et al., No. 3:22-cv-3948-VC (N.D. Cal.).
[2] https://behringeb5.com/wp-content/uploads/2022/08/Signed-SETTLEMENT-AGREEMENT-DOJ-Signed.pdf

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2. Based on the recent EB-5 Stakeholder call on October 19, 2022 and the corresponding published Talking Points from USCIS,[3] it appears that USCIS will require "retiring" regional centers (who elect not to file Form I-956 to sponsor future projects and investors) to file Form I-956G on or before December 29, 2022, or they could face "termination." This is inconsistent with the RIA and the Settlement Agreement. Accordingly, we request that USCIS issue immediate guidance confirming that "retiring" regional centers need not file Form I-956G by December 29, 2022 and that Form I-956G should be used only be regional centers that will continue to operate under the RIA and who will file Form I-956 by December 29, 2022.

I. USCIS Should Recognize "Retiring" Regional Centers

As background, on August 24, 2022, USCIS entered into a Federal Court-approved Settlement Agreement with several EB-5 stakeholders significantly impacting the operations of existing and future Regional Centers pursuant to the RIA in Behring Regional Center LLC v. Mayorkas. The Settlement Agreement includes a specific provision related to the orderly "wind-down" of existing regional centers not seeking to sponsor new projects or investors under the RIA, which reads in relevant part as follows:

> *If a Previously Approved Regional Center fails to file a Form I-956 application or amendment by December 29, 2022, it may no longer engage in any activities under the Integrity Act, including sponsoring I-526E visa petitions or the development of new projects.*
>
> *a. USCIS will continue to process and adjudicate I-526 and I-829 petitions from investors filed prior to the Integrity Act (as well as future I-829 petitions based upon I-526 petitions filed prior to Integrity Act), even if the regional center with which their project was approved does not file a Form I-965 application or amendment by December 29, 2022. The failure of a Previously Approved Regional Center to file a Form I-956 application or amendment will not, standing alone, be a basis for USCIS to deny a petition described by the preceding sentence. Investors are still subject to the provisions and protections of INA 203(b)(5)(m) should they become applicable.*

For discussion purposes, we will call those Previously Approved Regional Centers which seek to wind-down pursuant to the protections of the Settlement Agreement as "**Retired Regional Centers**." A Retired Regional Center is one which (a) elects to not file Form I-956 by December 29, 2022 and thereby may not sponsor any new projects or investors under the RIA, ***BUT ALSO*** (b) is not terminated and continues to exist for purposes of the requirement of continuing regional center affiliation of new commercial enterprises with EB-5 investors who have not yet acquired

[3] USCIS EB-5 National Stakeholder Engagement, October 19, 2022, published here: https://www.uscis.gov/sites/default/files/document/data/National%20Engagement-EB-5%20Immigrant%20Investor%20Program.pdf.

conditional permanent residence and remain vulnerable to a material change finding should the regional center be terminated.

A. USCIS Should Not Classify a Retiring Regional Center as a Terminated Regional Center as this Would Conflict with the Plain Language of the Settlement Agreement.

In order to clarify the continuing eligibility of EB-5 investors still vulnerable to a material change determination, USCIS urgently needs to issue guidance and update the PM to recognize the protections afforded to non-conditional lawful permanent resident investors affiliated with a regional center electing to wind-down pursuant to the Settlement Agreement. We request that USCIS immediately issue policy guidance that specifically incorporates the Settlement Agreement's RC "Retirement" provision and eliminates the "Material Change" language of Chapter 4(C) of the PM that conflicts with the Settlement Agreement's treatment of EB-5 investors filed prior to the passage of the RIA.

USCIS also needs to define a new classification for the Retired Regional Centers pursuant to the Settlement Agreement. Currently, the USCIS web site page titled "EB-5 Immigrant Investor Regional Centers" only lists two types of recognized regional centers: **Approved Regional Centers** and **Terminated Regional Centers**. We believe USCIS has the authority to designate this new category, as the intent of the legislation is to protect good faith investors from expiring legislation (in effect a global termination of all RCs) and good faith investor protections that allow investors to continue with their petitions under Section M of the RIA.

Our grave concern is that in the absence of a separate classification, USCIS would instead classify a Retired Regional Center as a Terminated Regional Center. That would also entail posting to the **Terminated Regional Centers Page**[4] which provides a "list of EB-5 regional centers that USCIS has removed from the Immigrant Investor Program." That web page also contains the following language:

> *A regional center that USCIS has terminated from the EB-5 program may not solicit, generate, or promote investors or investments or otherwise participate as a designated regional center in connection with the Immigrant Investor Program.*
>
> *An EB-5 investor's conditional permanent resident status,* ***if already obtained****, does not automatically end if that individual has invested in a new commercial enterprise associated with a regional center that USCIS has removed from the program. The investor will still have the opportunity to demonstrate compliance with EB-5 program requirements.*

[4] *See* https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers/regional-center-terminations

This matches the current Policy Manual (PM) at Volume 6, Part G, Chapter 5(C) titled "Material Change" which provides, in pertinent part:

> *Further, with respect to the* ***impact of regional center termination****,* ***an immigrant investor's conditional permanent resident status, if already obtained, is not automatically terminated if he or she has invested in a new commercial enterprise associated with a regional center that USCIS terminates****. The conditional permanent resident investor will continue to have the opportunity to demonstrate compliance with EB-5 program requirements, including through reliance on indirect job creation.*

In other words, the Retired Regional Center's earlier investors who obtained conditional lawful permanent resident status will not be prejudiced by the Retired Regional Center's designation by USCIS as a Terminated Regional Center. They are protected by the "if already obtained" language in Chapter 5(C). But the non-conditional lawful permanent resident investors would be vulnerable to a material change finding, and USCIS designation of a Retired Regional Center as a Terminated Regional Center would be catastrophic for them under the current PM language.

The current Policy Manual (PM) at Volume 6, Part G, Chapter 4 (C) entitled "Material Change" is in direct conflict with the Settlement Agreement provision described above. The PM provides, in pertinent part, as follows:

> " . . . the **termination of a regional center** associated with a regional center immigrant investor's Form I-526 petition **constitutes a material change to the petition**.[9] "

That language in the PM clarifies that a Material Change that occurs "after the filing of an immigrant investor petition will result in the investor's ineligibility if the investor has not obtained conditional permanent resident status."[5] Further, that same Chapter directs that:

> If material changes occur after the approval of the immigrant petition, but before the investor has obtained conditional permanent residence, **such changes would constitute good and sufficient cause to issue a notice of intent to revoke** and, if not overcome, would constitute good cause to revoke the approval of the petition.

If a regional center elects to wind-down as of December 29, 2022 pursuant to the "Retirement" opportunity in the Settlement Agreement, the language cited above suggests that USCIS could still, in the absence of other guidance, apply the PM Chapter 4(C) "Material Change" directives to thereby deny or revoke the I-526 Petitions filed by the regional center's sponsored investors that did not obtain conditional lawful permanent resident status as of the election date.

[5] Which cites as its authority "See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). See 8 CFR 103.2(b)(1)."

As USCIS has failed to affirm or clarify these essential protections, stakeholders have legitimate legal concerns given that USCIS published a policy alert on October 6, 2022 ("PM Update") announcing expansive updates to the PM to incorporate changes resulting from the RIA. Most notably, however, **the PM update did not provide any protections to non-conditional lawful permanent resident investors in the case of a regional center electing to wind-down pursuant to the Settlement Agreement.** It should be noted that the PM Update occurred 43 days AFTER the Settlement Agreement was approved by the federal court and made effective.

To reiterate, we request that USCIS immediately issue policy guidance that specifically incorporates the Settlement Agreement's RC "Retirement" provision and eliminates the relevant "Material Change" language of Chapter 4(C).

B. New "Retired Regional Center" Classification Solves the Vermont Dilemma

Since the creation of the Pilot Program, regional centers have had no clear path to an orderly wind-down. Stakeholders, including AILA, have asked USCIS on multiple occasions without success for guidance on how an existing regional center can announce an intention not to commence any new EB-5 projects without endangering the immigration process of non-conditional lawful permanent resident investors in new commercial enterprises affiliated with the regional center.

To date, the only USCIS option has been to issue a Notice of Intent to Terminate (NOIT) to any such regional center claiming the "failure to promote economic growth" as the legal basis. As stated above, a regional center's termination would result in the denial or revocation of I-526 Petitions filed by sponsored investors that failed to obtain conditional lawful permanent resident status as of the date of termination.

This policy creates an absurd result. Regional centers are forced to start new projects for the sole purpose of ensuring prior investors can complete their immigrant visa processing. This unbreakable viscous circle can be called the Vermont Dilemma. It could, however, be solved by the creation of a new Retired Regional Center classification.

In 2018, the Vermont Agency of Commerce and Community Development Regional Center ("VRC") requested in its response to a Notice of Intent to Terminate (NOIT) the opportunity to wind-down its operations. In simplest terms, VRC proposed a wind-down plan that would include no new projects in exchange for USCIS allowing investors in existing projects to complete their immigration processing.[6]

[6] VRC's orderly wind-down strategy is best summarized in its appeal brief to the Administrative Appeals Office, dated September 4, 2018, as follows:

> *The VRC merely seeks to wind down its oversight of the few remaining associated EB-5 projects in a gradual yet timely manner, as outlined in the VRC Wind-Down. See NOIT Response, Exh. 1. The regulation cited as the basis*

In response, USCIS denied VRC's request for an orderly wind-down to protect existing investors by stating in the Notice of Termination (July 3, 2018) as follows:

> *. . . by these statements, we can conclude that the Regional Center will not continue to promote economic growth in the future. Also, while the regulations do allow a regional center to withdraw from the EB-5 Program, they do not provide for a regional center to withdraw or wind down on its own timeline. The regulations specifically provide that USCIS should terminate a regional center when it determines that it no longer continues to promote economic growth, regardless of any timeline.*

The Administrative Appeals Office (AAO) also rejected VRS's wind-down plan and affirmed the USCIS termination action in a non-precedent decision[7], stating as follows:

> *Appellant has not demonstrated that the applicable statute and regulation permit us to preserve the VRC's regional center designation for the sole purpose of winding down its operations. Rather, the regulation prescribes the steps that USCIS must follow to designate and then terminate, in appropriate cases, an entity's regional center designation.*
>
> *In this case, while the Appellant has communicated the VRC's intent to refrain from soliciting additional EB-5 investment or sponsoring new EB-5 projects, it has not cited to any legal authority that permits us to preserve VRC's regional center designation for wind-down or any other purpose if we find that it "no longer serves the purpose of promoting economic growth.*

AILA continues to believe that this AAO decision is incorrect and advances poor public policy by prohibiting the opportunity for an orderly wind-down to existing regional centers that protects the immigration processing of all sponsored investors. To the investor group seeking protection from the Material Change policy which would be triggered by termination, the AAO stated:

> *The termination of a regional center designation and the adjudication of foreign national investors' petitions are separate proceedings that focus on different facts as applied to their applicable legal frameworks. While we sympathize with the investors' situation, in the instant termination proceeding, we must decide whether the VRC serves the purpose of promoting economic growth.*

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for termination, 8 C.F.R. § 204.6(m), neither prescribes immediate termination upon issuance of a Notice of Termination and resolution of any appeals, nor does it preclude allowance of regional center termination at the conclusion of all outstanding program obligations. USCIS could, and should, resolve this appeal simply by determining that the VRC may continue to exist for the limited purpose of concluding its existing projects. This approach, unlike immediate termination, is administratively efficient, economically beneficial, and will not result in protracted litigation.

[7] Matter of VAOCACDRC / Appeal of IPO Decision (September 25, 2019)

By issuing updated guidance establishing the Retired Regional Center classification consistent with the Settlement Agreement, USCIS can immediately provide an orderly wind-down procedure for those regional centers no longer seeking to promote economic growth while also protecting the immigration processing of all sponsored investors (including those with pending or approved I-526 Petition that have yet to obtain conditional lawful permanent resident status), which is consistent with the Settlement Agreement that is binding upon USCIS.

C. A New "Retired Regional Center" Classification is Consistent with USCIS' Pre-Settlement Agreement Policy

USCIS' original guidance after the passage of the RIA was to deauthorize all previously approved Regional Centers and require all Regional Centers to reapply and be approved again prior to sponsoring Form I-526E Petitions. Under this original guidance, USCIS stated that if a previously approved Regional Center failed to reapply for designation, it would not affect applicants who filed I-526 Petitions prior to the passage of the RIA.

While the Settlement Agreement revised this guidance with respect to previously approved Regional Centers that wished to continue sponsoring Form I-526E Petitions after the passage of the RIA, the section of the Settlement Agreement discussed in this letter does not materially affect USCIS' original guidance as to a previously approved Regional Centers who do not wish to continue sponsoring Form I-526E Petitions after the passage of the RIA.

In this manner, the Settlement Agreement adopted USCIS' original guidance in part and implemented it further by decreeing that any previously approved Regional Center *who does not wish to continue sponsoring Form I-526E Petitions after the passage of the RIA* can elect not to file Form I-956 by December 29, 2022 (i.e. Retired Regional Center). It is therefore consistent, both with USCIS' original guidance and the Settlement Agreement, to treat a Retired Regional Center as automatically deauthorized without any formal termination, as discussed herein.

II. USCIS Should Not Require Retiring Regional Centers to File Form I-956G

The Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") published its "Agency Information Collection Activities: Form I-956G (USCIS OMB Control No. 1615-NEW; Docket ID USCIS-2022-0010) (hereinafter "Proposed Form I-956G") in the Federal Register on August 29, 2022. The new Form I-956G replaced Form I-924A and is to be used by "*approved regional centers to provide required information, certifications, and evidence to support their continued eligibility for regional center designation.*"[8] The instructions to Form I-956G also state:

[8] *See* Instructions to Form I-956G at: https://www.uscis.gov/sites/default/files/document/forms/i-956ginstr.pdf.

> *Failure to file Form I-956G in a timely manner for each Federal fiscal year in which the regional center has been designated to participate in the Regional Center Program (the "Program") may result in sanctions, including the termination of the regional center's designation*.

Importantly, during the October 19, 2022 USCIS EB-5 Stakeholder Engagement, IPO appeared to state in a series of questions and answers that all regional centers – regardless of whether the regional center had the intention to file Form I-956 before December 29, 2022 – must continue to file Form I-956G each year, or the regional center may be terminated. It was not clear from the Q&A portion of the EB-5 Stakeholder Engagement whether Retiring Regional Centers must file Form I-956G or be subject to a termination, which could negatively impact EB-5 investors who have not yet reached conditional lawful permanent resident status as described above. This failure to provide accurate guidance could harm both regional centers and investors who filed Form I-526 Petitions prior to the passage of the RIA. Moreover, the published Stakeholder Engagement notes are not clear on this point.[9]

As discussed above, the Settlement Agreement provides for the winding down of regional centers that do not wish to continue sponsoring Form I-526E Petitions after the passage of the RIA. A Retiring Regional Center that does not elect to file Form I-956 by December 29, 2022 also should not be required to submit Form I-956G and it is critical that USCIS promptly issue guidance to this effect. Specifically, Retiring Regional Centers should not need to demonstrate their continued eligibility for regional center designation. Instead, the Settlement Agreement states:

> *Previously Approved Regional Centers must file Form I-956 by December 29, 2022, as an amendment, in order to continue to maintain their status as an approved regional center for purposes of sponsoring new projects and new investors under the Integrity Act.*"
>
> "*If a Previously Approved Regional Center fails to file Form I-956 application or amendment by December 29, 2022, it may no longer engage in any activities under the Integrity Act, including sponsoring I-526E Petitions or the development of new projects.*

See Section D.2. of the Settlement Agreement. By the plain terms of the Settlement Agreement, if a Retiring Regional Center does not file Form I-956 by December 29, 2022, it may not engage in activities under the RIA. Form I-956G is specifically used to report on activities of the approved regional center under the RIA. The table below provides examples of information from the Form I-956G, which only relate to reporting under the RIA:

[9] *See* EB-5 National Stakeholder Engagement Notes: https://www.uscis.gov/sites/default/files/document/data/National%20Engagement-EB-5%20Immigrant%20Investor%20Program.pdf.

Form I-956G	
Instructions: "Purpose of Form"	This form is used by approved regional centers to " . . . **evidence to support their continued eligibility for regional center designation"**
Item 4. Information about each new NCE and project	You **must complete** Attachment 1. Information about each NCE and Capital investment Project (**Form I-956F**)
Item A. Receipt Notice of Associated I-956F	
Item 13. Aggregate amount of investor capital invested in NCE	"... since filing I-956F"
Item 16. Progress of capital investment project	"… described in I-956F"
Item 17. Job Creation	" . . . since I-956F was filed"
Item 19. Material Change	"… associated with Form I-956F"
Item 26. Bank Account Information	"whether NCE has set up separate bank accounts for deposit " . . .described in I-956F"
Pg 5 – What evidence **MUST** you submit?	"evidence and **certifications**" "an accounting . . " "**USCIS may impose appropriate sanctions, including fines**, suspension, **or termination** if a regional center **fails to submit the required information** or upon a determination that the regional center is otherwise in violation of applicable requirements "

Accordingly, if a regional center becomes a Retiring Regional Center, which does not file Form I-956 as an amendment by December 29, 2022, and which does not sponsor additional projects or

investors in the future, there should be no annual reporting requirement on Form I-956G. We therefore urge USCIS to promptly issue guidance that only those regional centers electing to file Form I-956 as an amendment should be required to file Form I-956G with USCIS on or before December 29, 2022.

III. Recommended Actions

In summary, AILA recommends that USCIS take the following actions to implement the regional center wind-down provisions of the Settlement Agreement:

1. Create a new third class of regional centers titled "Retired Regional Centers." This classification would be reserved exclusively for those previously approved regional centers electing to wind-down pursuant to the Settlement Agreement. When implemented, the USCIS web page would reflect three possible classifications as follows: Approved Regional Centers, Terminated Regional Centers, and Retired Regional Centers.

2. Allow regional centers electing to wind-down pursuant to the Settlement Agreement to issue written notice to USCIS on or before December 29, 2022, documenting its voluntary election.

3. Issue policy guidance recognizing the previously approved regional center's election to wind-down pursuant to the Settlement Agreement and updated classification as a Retired Regional Center. The guidance should affirm the following major points:

    a. the entity may not solicit, generate, or promote investors or investments or otherwise participate as a designated regional center in connection with the Immigrant Investor Program,
    b. the entity's classification as a Retired Regional Center is not a Material Change pursuant to the Policy Manual, and
    c. all previously sponsored immigrant investors will continue to have the opportunity to demonstrate compliance with EB-5 program requirements, including through reliance on indirect job creation.

4. Update the Policy Manual to incorporate all of the above protections.

5. Expand the current web site to add a new Retired Regional Center page to notify stakeholders of a regional center's change of status and to provide basic guidance of the above-noted investor protections. For example:

Retired Regional Centers

A Retired Regional Center, as designated by USCIS, may not solicit, generate, or promote investors or investments or otherwise participate as a designated regional center in connection with the Immigrant Investor Program under the RIA.

Form I-526, both pending and approved, filed by EB-5 investors sponsored by a previously approved regional center now classified as a Retired Regional Center continue to remain valid unless revoked on other grounds. Classification by USCIS as a Retired Regional Center is not a Material Change pursuant to the Policy Manual. The investor will still have the opportunity to demonstrate compliance with EB-5 program requirements, including through reliance on indirect job creation.

Below is a list of Retired Regional Centers that are no longer eligible to sponsor new projects pursuant to the Immigrant Investor Program. The Retired Regional Centers continue to satisfy regional center affiliation requirements for EB-5 investor petitions filed prior to the reclassification of the regional center as a Retired Regional Center

6. USCIS should update its internal training materials and database systems so that future adjudications of investors affiliated with a Retired Regional Center are afforded the appropriate processing and benefits protections. Those investors with pending or approved Form I-526 Petitions should not be mistaken for those sponsored by a terminated regional center and thereby subjected to denial and/or revocation.

7. USCIS should promptly issue guidance clarifying that Retiring Regional Centers need not file Form I-956G with USCIS during any annual compliance period moving forward.

In addition to identifying the need for guidance, we have also recommended what we believe is a common-sense solution.

Conclusion

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

Thank you for your time and consideration.

Sincerely,

Sharvari Dalal-Dheini
Director of Government Relations
American Immigration Lawyers Association

David Morris
Chair, EB-5 Investor Committee
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CC: Michael Valverde, Associate Director of Field Operations
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