Questions and Comments for USCIS

Re: April 29 "USCIS EB–5 Reform and Integrity Act of 2022 Listening Session"

About commenter:

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Unless otherwise specified below, statutory references refer to subsections of INA § 203(b)(5). The EB–5 Reform and Integrity Act of 2022 is referred to as "RIA."

1. **Does USCIS need to issue regulations to implement RIA?**

Suggested answer: Only on the specific issues for which RIA refers to regulations:

- Municipal bonds, (E)(v)(II)(bb)
- Parameters for Redeployment, (F)(v)
- Foreign involvement, (H)(ii)(II) (due 270 days after enactment)
- Increases to Integrity Fund fees, (J)(ii)(III)
- Guidelines for promoter representations and fee arrangements, (K)(i) [not necessarily requiring regulations, but this should be done by notice and comment because it is not within USCIS' inherent expertise]
- Fund administration waivers for NCE or affiliated JCE under control of IA or BD, (Q)(v)(I) [not necessarily regulation, but it might be best]

2. **Must a post-enactment RC be adjudicated by USCIS before sponsoring projects and investors under the new law?**

Suggested answer: (E)(i) authorizes an RC "which has been *designated* by [DHS] on the basis of a proposal … ." There is an argument (which is likely to fuel litigation if USCIS confirms otherwise) that pre-enactment designations survive enactment, because RIA does not explicitly eliminate prior designations, but whether prior RCs must be "re-designated" or apply anew under RIA does not really matter, because the law seems clearly enough to require USCIS to find an RC qualified under the new RIA requirements of compliant policies and procedures (and certification about same) and certification (and post-designation vetting) about involved persons before an RC can file a project request and sponsor investors under RIA. The key here is how to streamline the new designation process, especially for previously approved RCs, so that RCs can begin to sponsor investors and create jobs.

3. What is required for initial RC designation?

Suggested answer: Here is what (E) and (I) require and what RC applicants must show in their proposals to become designated:

- Description of a proposed "defined, contiguous, and limited geographic area" within which to "concentrate pooled investment" for "substantive economic impact." The claim of area needs to be supported by "reasonable predictions, supported by economically and statistically valid and transparent forecasting tools, concerning the amount of investment that will be pooled, the kinds of commercial enterprises that will receive such investments, details of the jobs that will be created directly or indirectly as a result of such investments, and other positive economic effects such investments will have."

  This statutory language is *essentially the same as 610* (prior RC law). Pre-enactment RCs already made this showing. While they need to submit a new proposal under RIA, USCIS can and should allow an applicant that is the same entity previously designated (and not previously terminated) to submit its most recent pre-enactment designation letter to establish the geographic area approved therein, with no further evidence required. This will serve to greatly simplify the application and adjudication efforts needed under intense time pressure to get the RIA implemented for actual investment. USCIS needs to publish clarification about this immediately.

  For new applicants or for pre-enactment RCs that want to expand their territory, if USCIS will apply the same requirements as under prior identical language of the law, they should submit actual or hypothetical business plans that provide a basic description of the types and volume of activity that could be generated along with economic analysis showing the number of jobs that would be created directly and indirectly and the geographic area economically impacted. The plans and analysis need to show a fundamental understanding of which types of jobs can be claimed under reasonable methodology.

- "a description of the policies and procedures in place reasonably designed to monitor new commercial enterprises and any associated job-creating entity to seek to ensure compliance with [federal and state immigration, criminal, and securities] laws" and "a description of the policies and procedures in place that are reasonably designed to ensure program compliance"

  USCIS needs to clarify now what level of detail is required here. The statute requires a "description." How much description is enough? If USCIS does not clarify this, then prudent applicants will err on the side of detail by providing the actual policies and procedures, which will be voluminous and potentially time-consuming to review. The more time-consuming the review, the longer it takes to get RCs designated, and the slower the congressional purpose of stimulating investment can be accomplished in the limited time of 4.5 years. USCIS should consider announcing that it is ready to approve RCs based on a high-level description without supporting evidence, especially since audits will be required over time anyway. The most important thing seems to be that the RC confirms it will require third party fund administration.

- [per (I)(ii)] "the regional center certifies that, to the best of the certifier's knowledge, after a due diligence investigation, the regional center is in compliance with and has policies and procedures, including those related to internal and external due diligence, reasonably designed

to confirm, as applicable, that all parties associated with the regional center are and will remain in compliance with the securities laws of the United States and of any State in which the offer, purchase, or sale of securities was conducted; the issuer of securities was located; or the investment advice was provided by the regional center or parties associated with the regional center."

The quoted language should be part of the application/proposal form with a signature line under it in addition to the signature line for the entire submission, as is done at Form I-129 page 14 for H-1B employers.

- "the identities of all natural persons involved in the regional center, as described in subparagraph (H)(v)" and "attestations and information confirming that all persons involved with the regional center meet the requirements under clauses (i) and (ii) of subparagraph (H)"

  Obviously, the RC needs to provide a list of "involved" persons. Do their roles in or for the RC need to be specified? Must any documents about the people be included, such as passport or driver license, to verify identity, and must their SSN be provided to facilitate USCIS checks? The statute does not require that, but ostensibly a new information collection form could request it for context and to facilitate the USCIS background checks.

  What constitutes sufficient "attestations and information" that the "involved" persons are not prohibited under (H)(i) and (ii)? In securities law practice, the common practice is to present a "bad actor questionnaire" to each relevant person to have them attest that they do not fall under prohibited histories, and that makes sense here. The RC application form should provide the exact language of the attestation required, such as the following: "The list of persons in this form or addendum identifies all of the persons "involved with" the regional center applicant as that term is defined at (H)(v), and the regional center applicant has made reasonable inquiry of each such person and has confirmed that none of them are prohibited from such involvement under (H)(i) and (ii)." As with the securities certification above, the form should place a separate signature under this certification, as is done at Form I-129 page 14 for H-1B employers. USCIS should clarify that applicants do NOT need to submit the actual bad actor questionnaires that were completed to enable the RC to make the certification, though the instructions should tell applicants to maintain such completed questionnaires in their files for later audit.

  Aside from the above, is anything else required? It should not be, especially for a previously designated RC. In the past USCIS tended to issue RFEs for evidence of how the RC would support itself before any sponsorship income came in and some other miscellaneous showings. If anything like that is going to be required, even for brand new applicants, USCIS needs to publish something very clear about it immediately. USCIS needs to make the process and requirements as clear and streamlined as possible so that RCs can get designated and doing their work sponsoring projects and investors.

4. **How will record checks and any biometrics intake relate to the timing of issuing RC designations?**

Suggested answer: (E) allows USCIS to designate regional centers based on the certification by the applicant that none of the involved persons are prohibited by (H), and USCIS should do that in order to

accomplish the job creation purposes of RIA. USCIS is required to conduct further background checks on such persons, but this will be done on a routine post-designation audit basis. If USCIS finds through such checks that a person is prohibited (or has not appeared for biometrics intake as scheduled) USCIS will follow the procedures in (H)(iv) for possible termination of the RC if the RC fails to discontinue the prohibited person's involvement.

5. **How will USCIS roll out the registration of "promoters" under (K)?**

Suggested answer: RIA requires USCIS to establish a program of "registration" for promoters, and it requires RC/NCE/JCE parties to have written agreements with promoters that require them to register with USCIS, to accurately represent the visa process, and to use fee arrangements that are permissible under immigration and securities laws. In implementing this USCIS needs to confront an issue of "circularity." Can a promoter only register if it has a written agreement with an RC/NCE/JCE, or would it be enough for the promoter in the registration process to commit to comply with any guidelines that USCIS will publish on these two topics? If an agreement with an RC/NCE/JCE is required, is it enough for the agreement to require the promoter to register as soon as USCIS makes registration available and to comply with whatever "guidelines" USCIS publishes? It should be enough for the promoter, in registering, to attest to not being a prohibited person under (H) (that is, the form for registration should essentially contain a "bad actor questionnaire" on the (H)(i) and (ii) topics for the registrant to complete (saying "no" to each item and explaining any "yes") and a statement for the registrant to commit to follow whatever guidelines USCIS will publish. Once the guidelines are created they can be included in the instructions to the registration form (and can be emailed to existing registrants using contact information obtained in the registration process). But USCIS should not wait to roll out the registration form until it has such guidelines, because that will take too much time.

6. **What needs to be included in the disclosure about compensation required by (K)(iv)?**

Suggested response: USCIS should clarify that this calls for disclosure of any compensation that arises from a particular investor's purchase of an investment interest. It should not require disclosure of the fees of the various professionals who help put an offering and project together as a whole or who advise the issuer about compliance in subscribing each investor, such as business plan writers, economists, attorneys, etc. Those professionals' fees often are paid from the collection of administrative fees obtained from EB-5 investors on top of their minimum capital contribution, but they are not the kind of commission-type compensation per investor that the law was designed to disclose to investors so that they can be aware of conflicts of interest among those selling the investment to the investor.

7. **What jobs can count as "direct" jobs in an RC-sponsored project in light of (E)(iv) and (E)(v)(ii)(cc)?**

Suggested answer: RIA generally limits indirect jobs to 90% of the total jobs claimed. The limits associated with construction activity require interpretational clarification by USCIS.

First, (E)(iv)(II) says if construction activity lasts less than 2 years, only up to 75% of jobs counted can be indirect. But does that mean that only 75% can be indirect jobs *from construction*? A typical project involving construction might also generate operational jobs that themselves generate indirect jobs, often referred to as "indirect jobs from operations." Could those jobs count on top of the 75% limit on indirect construction jobs, up to the overall 90% limit? (E)(iv)(II) seems intended to limit counting

indirect construction impact jobs, not the overall limit, so the 75% limit should apply only to indirect jobs arising *from construction*.

Second, what can count as direct jobs to make up at least the 10%? (E)(iv)(I) says "An employee of the new commercial enterprise or job-creating entity may be considered to hold a job that has been directly created." (E)(v)(ii)(cc) says "direct jobs" can be counted based on economic methodology but only by the fraction of two years that the construction lasts. Can the direct jobs that must constitute at least 10% of the total include the "direct" jobs that an economist says arise from construction? We know that almost zero construction jobs are ever employed by the NCE or JCE, and the economist's estimation of direct jobs represents the number of jobs that are on the job site as opposed to the "indirect" jobs that upstream and downstream from the jobs site. The proper reading of (E)(iv) and (E)(v)(ii)(cc) together seems to be that the economist's assessment of "direct" jobs arising from construction can count for the 10%, so that especially with construction lasting for two years all of the necessary jobs could be claimed from the construction activity without regard to operational activity after construction. But before projects are geared up to take investors USCIS should clarify its acceptance of this notion or any opposition to it, to instill confidence and to avoid unnecessary disasters arising from a different interpretation.

8. **What level of accounting of the expenditure of an investor's capital is required by (G)(i)(V)?**

Suggested answer: (G)(i) requires an RC annual statement to include "(V) an accounting of all individual alien investor capital invested in the [RC, NCE, and JCE]." The word "individual" could have problematic implications if USCIS does not clarify. Money is inherently fungible. Obviously each investor's capital needs to be individually tracked into the NCE. But especially now with the requirement that before any transfer from a "separate account" (in NCE going to unaffiliated JCE, or in JCE separate account going into JCE expenditures) a third party fund administrator must sign off and verify that the transfer complies with all governing documents (i.e., is being spent properly on the project) the transfers from the separate account to the JCE for expenditures will be irregular amounts and not easily tied to any specific investor. USCIS should clarify that these transfers do not need to be tied to any specific EB-5 investor's capital but instead can be tracked against the EB-5 capital collectively, with each investor's capital being deemed to be used proportionately in each transfer. It would be essentially impossible to track each such transfer with an accounting assigned to each investor individually.

9. **Could an NCE that in turn sends the EB-5 capital to a separate JCE and that obtains an annual audited financial statement enjoy the mandatory waiver of the requirement of a third-party fund administrator without getting annual audited financial statements for the JCE as well?**

Suggested answer: No, the JCE would need to undergo annual audited financial statements as well to fit the waiver in that situation. The possible confusion that USCIS needs to avoid through a Q&A arises from the word "or" in (Q)(v)(II), which states, "The Secretary of Homeland Security shall waive the requirements under clause (iv) for any new commercial enterprise that commissions an annual independent financial audit of such new commercial enterprise *or* job creating entity conducted in accordance with Generally Accepted Auditing Standards, which audit shall be provided to the Secretary and all investors in the new commercial enterprise." It seems that "or" was used because of the possibility that an NCE subscribing multiple investors in a project and thus needing to use regional center sponsorship and compliance but not involving a separate JCE. In that instance, of course only the NCE would need audited financial statements, as there would be no separate JCE. But if there will be a

separate JCE where the money will get used, then also the JCE must be annually audited to enjoy the waiver. It would make no sense only to track the EB-5 capital going in and out of the NCE through an audit but then have no accountability as it goes into and through the JCE.

10. Do (H), (K), (M), and (Q) apply to solo direct investors?

Suggested answer: Solo direct investors do not need sponsorship of a regional center and thus avoid much of the integrity provisions. But for certain new subsections this is a close call.

The heading for (H) says "Bona fides of persons involved *with regional center program,*" but the text refers to "any regional center, new commercial enterprise, or job-creating entity." RIA provides no mechanism for the NCE for a solo direct project to file anything to establish that the people involved with the NCE are not prohibited persons, but conceivably USCIS could determine through I-526 adjudication or through audits or site visits that prohibited persons were involved and debar the NCE. It seems most likely that Congress did not intend to apply (H) to solo directs projects.

(K) does not mention RCs in the heading, and it applies to promoters "of … any new commercial enterprise." By the literal terms, this could be found to apply even to solo direct NCEs.

(M) does not mention RCs in the heading. It seems that (M) should apply to solo direct projects if (H) applies to solo direct projects, so that innocent investors can obtain relief from a debarment of the NCE.

(Q) about fund administration does not mention RCs in the heading, and it requires "each new commercial enterprise" to comply.

11. Do any of the provisions of RIA section 103 apply to pre-enactment investors?

Suggested answer: RIA section 105(a) amends INA § 204(a)(1)(H)(ii) to state, "A petitioner described in clause (i) shall establish eligibility at the time he or she files a petition for classification under section 203(b)(5). A petitioner who was eligible for such classification at the time of such filing shall be deemed eligible for such classification at the time such petition is adjudicated, subject to the approval of the petitioner's associated application under section 203(b)(5)(F), if applicable." (Obviously, new subsection (F) is not applicable to pre-enactment investors pursuant to INA § 204(a)(1)(H)(i).) Applying any of the requirements of RIA sections 102 and 103 to pre-enactment investors would violate the language quoted above, so they must not be applied with negative effect.

But do any provisions of RIA sections 102 and 103 apply to the benefit of a pre-enactment investor?

Specifically, RIA § 102(b) amends INA § 203(h) to prevent age-out for children of investors who get I-526 or I-829 denied under certain circumstances. This appears to apply to pre-enactment investors as well as post-enactment investors.

Under RIA § 103, (F)(v) concerning parameters for redeployment provides that redeployment can occur even outside the RC's geographic area, which is in contrast to the policy that USCIS had published pre-enactment. That policy had been questionable anyway, not clearly grounded in the statute and regulations, and so even if (f)(v) is not deemed technically applicable to pre-enactment investors, it should inform USCIS about the intent of Congress on this issue and cause USCIS to revise its policy as to pre-enactment investors and allow redeployment anywhere in the U.S.

(M) protecting good faith investors could be found to provide remedies to pre-enactment investors who had experienced termination of the RC (pre-enactment, since no longer possible post-enactment with all prior designations nullified by repeal) or whose NCE or JCE managers are found debarred or have been otherwise debarred by a court. It is not clear that Congress intended for these protections for innocent investors not to benefit pre-enactment investors, and it is not fair for pre-enactment investors to suffer from others' wrongdoing if the investors' petitions were "otherwise qualified" (which should be interpreted to mean that the investors sustained their investment in the NCE). Thus, (M) should apply to pre-enactment investors.

12. What requirements as to RC maintenance and reporting and as to sustainment of the investment and redeployment apply to pre-enactment investors?

Suggested answer: The expiration and repeal of Section 610 eliminate any obligations of regional centers, and INA § 204(a)(1)(H)(ii) requires pre-enactment investors to be adjudicated under prior law. Thus, pre-enactment investors shall be adjudicated without regard to any continued designation or reporting of the regional center that sponsored their I-526. They will be adjudicated based on their sustainment of the investment and the job creation. RCs have no obligation under immigration law to continue to perform any monitoring of projects and reporting to USCIS. This makes sense from a policy perspective, since much of the reason for prior law reporting by RCs was to allow USCIS to collect information for reports to Congress for its use in deciding whether and under what provisions to renew the RC Program. Congress already has acted by enacting RIA, so further data from pre-enactment investment is irrelevant. Nevertheless, RCs may have entered contractual obligations, especially when they functioned as managers or general partners of NCEs, and of course repeal of 610 does not necessarily end such obligations.

RIA Sections 104(a)(4) and 104(a)(6) deleted the requirement to sustain the investment to the end of conditional residence, leaving only the new "and which is expected to remain invested for not less than 2 years" in (A) as the required "sustainment period." But RIA Section 104(b)(2)(B) provides that such change in RIA 104(a) shall not apply to pre-enactment investors. Thus, pre-enactment investors remain obligated to sustain their investment through the end of their period of conditional residence. It is critical for USCIS to clarify this distinction, which is apparent only to the most careful readers of RIA and the amended statute. This also makes it important for USCIS to resolve the question of what redeployment requirements apply to pre-enactment investors, per above.

Please note that it is not entirely clear what would start the 2-year clock ticking on satisfaction of the sustainment requirement for post-enactment investors. Is it when the capital gets transferred into the NCE (directly from investor or release from escrow)? Is it when the NCE releases it to the JCE? Is it when the JCE finishes spending it? Whichever it is, if the investor's capital is invested at different times, does the two-year clock start when the first or last monies of the investor are transferred? One can imagine a rationale for a later stage, but it is critical for USCIS to clarify what it takes to satisfy the requirement so they don't unwittingly come up short.