PUBLICATION

Comments on USCIS "EB-5 Questions and Answers (updated Oct. 2023)"

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On October 11, 2023, USCIS published on its web site a new Guidance on numerous aspects of the EB-5 program as affected by enactment on March 15, 2022, of the EB-5 Reform and Integrity Act of 2022 (RIA). While the guidance provides clarity in some important respects, it leaves some very serious questions unanswered.

Required Investment Timeframe

The Guidance most importantly articulates that the required "sustainment period" for investors is different depending on whether they filed I-526(E) before or after RIA enactment:

- I-526 before RIA: through the two years of conditional residence, meaning to the expiration date on the investor's conditional permanent resident card. Given long I-526 adjudications and some long waits for visa numbers, this can require successive periods of redeployment.

- I-526(E) after RIA: two years from "investment" (discussed below). This makes redeployment very rarely necessary for immigration compliance.

The Guidance completely validated both our analysis when RIA was enacted, and a separate article on this topic in September 2022.

The Guidance specifically discusses when the new two-year period for sustained investment begins, stating, "we interpret the start date to be the date that the full amount of qualifying investment is made to the new commercial enterprise and placed at risk under applicable requirements, including being made available to the job creating entity, as appropriate." The words "as appropriate" refer to the fairly rare situation where the new commercial enterprise (NCE) and job-creating entity (JCE) are the same entity. Otherwise, the period begins when all the investor's required capital has been actually made available by the NCE to the JCE. Given that the RIA prohibits release to the JCE of capital from the required "separate account" for EB-5 capital except to pay qualifying project expenses, as a practical matter (and for the most immigration safety) this means the two years starts from when an investor's capital has been spent in the project. Unless an NCE makes specific arrangements to spend investors' capital in a particular order, or when the EB-5 capital gets exhausted well before project completion using other capital, in most projects this means the two years begins approximately when the project development is completed. The Guidance specifically notes that the two years could run and thus allow repayment to investors even well before I-526(E) adjudication.

The Guidance appropriately clarifies that the RIA establishes only the earliest point that capital could be repaid to investors. The various documents between the NCE and the JCE and among the NCE investors and manager(s) may prevent EB-5 capital from being repaid to the NCE and distributable to the investors for many years longer, and prospective investors will want to scour offering documents to determine likely and possible timeframes. Issuers of investment opportunities must be careful not to suggest that immigration safety is the reason for tying up capital for longer than the law now requires, to avoid claims of misleading in violation of securities laws. Ongoing offerings may need to be revised in this regard.

The Guidance also discusses the rare situation where an investor may have "invested" meaningfully before filing I-526(E). Without explaining any statutory basis, the Guidance states that "the investment should generally still be maintained at the time the Form I-526 is properly filed, for [USCIS] to appropriately evaluate eligibility." The Guidance also makes clear that post-RIA investors may need to keep their capital invested beyond two years up to the point that the necessary jobs are created.

Process Flow for Regional Center Projects

The Guidance describes and depicts in a diagram the flow of processes for pooled investment that must be sponsored by a USCIS-designated regional center (RC). It confirms that RCs designated before RIA enactment (Pre-RIA RCs) may sponsor projects even before receiving approval of an I-956 amendment showing that the RC complies with RIA requirements including sophisticated policies and procedures. It fails to clarify whether there is now a deadline for such amendments, which is under a settlement agreement from a lawsuit that was set on December 29, 2022, but pursuant to an "Alert" posted by USCIS at its I-956 download page, was indefinitely delayed pending "further guidance" from USCIS. As of October 12, 2023, the "Alert" remains posted.

The Guidance makes clear that an RC must be designated by USCIS (and approved for the area of a project) before it can sponsor projects, which starts with filing an I-956F project application. Upon USCIS receipt for I-956F, investors can file I-526E petitions. The Guidance fails to clarify or depict what only makes sense: that an I-956F must be approved for a project before any I-526E petitions based on that project can be approved. It also fails to depict what happens to I-956F and I-526E petitions if the sponsoring RC gets an I-956 denied or otherwise becomes terminated, but it does mention that new "innocent investor protections" under RIA could serve to salvage them, such as associating with a different approved regional center after notice of the RC termination.

Impact of Pre-RIA RCs "Winding Down" and Innocent Investor Protection

The Guidance recognizes that a meaningful number of pre-RIA RCs have not filed I-956 amendments or paid integrity fees to comply with RIA. (The Guidance does not mention I-956G annual reports in this regard). The Guidance makes clear that it will terminate any RCs – including Pre-RIA RCs – that do not comply with RIA requirements, but very importantly it states that termination of a pre-RIA RC purely for failure to comply with RIA "administrative" requirements will not prevent USCIS from approving pre-RIA investors' I-526 and I-829 petitions, as long as those petitions meet the other pre-RIA substantive EB-5 requirements. Without being as explicit as it could be, the Guidance seems to say that the RIA's grandfathering provision (Section 105(c)) and the RIA's requirement that USCIS adjudicate petitions based on the law in effect when an I-526 petition was filed (INA 204(a)(1)(H)(ii)) work together to prevent USCIS from denying a pre-RIA investor's I-526 or I-829 petition on the basis of the sponsoring RC's noncompliance with RIA requirements for RCs that were enacted after the I-526 filing.

The Guidance confuses this discussion about pre-RIA investors by mentioning within it an interpretation that otherwise is very important and beneficial: that the RIA's protection for innocent investors (INA § 203(b)(5)(M) – "Subsection M") applies to pre-RIA investors. It seems that if the reason for RC termination is simply noncompliance by the RC with new RIA requirements, the investors do not need to make use of Subsection M to qualify for I-526 and I-829 approval. That is important because Subsection M only works if, after USCIS notification of the RC's termination, the NCE "associates with" another approved RC or if the investor makes a qualifying investment in a different NCE (ostensibly an NCE that is sponsored by another approved RC). It seems that investors whose RC is terminated purely for "administrative" noncompliance with the RIA does not need to use Subsection M at all and thus does not need the NCE to associate with another RC. USCIS should clarify this further. If association with another RC is required to save pre-RIA investors whose RCs get terminated, the uncertainty of that scenario could motivate pre-RCs to go ahead and comply with all RIA requirements even if they do not want to sponsor new projects or investors.

Nevertheless, it is critical that USCIS will apply Subsection M to pre-RIA investors who need it if the RC becomes terminated for some other more substantive reason such as the RC's complicity in mishandling of the investors' capital. How that provision will actually work in more substantive situations is not clear yet, but at least we know it applies. And the Guidance says that USCIS intends to allow pre-RIA investors to wait to invoke those protections, if needed, until USCIS issues a request for evidence or notice of intent to deny. Thus, as pre-RIA investors gain public knowledge that USCIS has terminated the RC that sponsored them, they will not need to panic and can instead wait to see if USCIS approves their petition anyway (which seems likely if the termination was purely "administrative") or can react to a USCIS notice about a more substantive issue whenever USCIS issues a notice in the investor's particular case.

Updating of Previously Filed Forms I-956G

Many RCs that had pre-RIA projects have not known how to complete the new annual report Form I-956G in relation to those projects, especially the form's "Attachment 1" for project-specific information, given that many of the RIA requirements inquired about in that form do not apply to pre-RIA projects. The Guidance seems to instruct RCs that already filed Forms I-956G not to worry about trying to amend or update those filings until USCIS issues any request for evidence in relation to such filings.

Interfiling and Amendments to I-956F Project Applications

The Guidance confirms what USCIS already said in response to comments about its forms implementing RIA: RCs may interfile into a pending I-956F project application "nonmaterial updates" without having to file a new I-956 as an amendment. But the guidance does not clarify: (1) whether an I-956F amendment with fee must be filed to reflect a "nonmaterial change" after I-956F approval; (2) what is a material update or material change to a project; (3) what is the consequence of a material change; or (4) what the RC or NCE is supposed to do in the event of a material change to a project. The statute does not define material change, but it provides that an I-956F will not be deferred to and support I-526 approval if "there has been a material change that affects eligibility." Form I-956F is to be used also for "amendments" about a project, but the instructions do not clarify what kind of amendments are appropriate, including amendments about a material change. Form I-956G asks if there has been "any material change during the preceding fiscal year" to any offering documents associated with a project, but that does not clearly ask about a material change to the project itself. Subsection M allows remedial arrangements to include "amendments to the business plan, without such facts underlying the amendment being deemed a material change." The statute provides for sanctions against an RC for "willful, undisclosed, and material deviation by new commercial enterprises from any filed business plan for such new commercial enterprises." It seems clear enough that material changes to a project have consequences, but it is not clear what is material or what the potentially drastic consequences or required actions are. Given how common changes to businesses tend to be, additional guidance on this topic is greatly needed by the EB-5 industry.

Integrity Fees

The Guidance links to other recent guidance on due dates for payment of the prior fiscal year's integrity fees, which we summarized in a prior article.

I-956H Filing Methods

The Guidance awkwardly clarified what many RCs have learned in practice about I-956H forms (H Forms) for persons involved in an RC, NCE, or JCE:

- H Forms are filed with I-956 RC applications only for persons involved with the RC and only referring to the nature of the person's involvement with the RC (not any NCE or JCE).

- H Forms are filed with I-956F project applications only for persons involved with the NCE and any affiliated JCE and only referring to the person's involvement with the NCE or affiliated JCE (not the

RC).

- If an RC needs to supplement a pending I-956 or I-956F with an additional H Form for another involved person, including to respond to a USCIS request for evidence or notice of intent to deny, the H Form must be filed with $85 fee by itself to the USCIS lockbox, and the RFE or NOID response needs to include evidence of that filing (such as receipt notice or proof of delivery to the lockbox).

- H Forms should indicate in Part 3, question 15, the actual residence address of the involved person, because biometrics will be scheduled at the USCIS application support center closest to that address.

Concurrent Filing of I-526(E) and I-485

The Guidance confirms that the RIA's new provision allowing an investor (and family) to file for adjustment of status to conditional residence (if otherwise eligible and a visa number is deemed available) even before I-526(E) approval applies to pre-RIA investors as well as post-RIA investors.

Conclusion

We can commend USCIS for seeking to clarify some critical issues affecting large numbers of regional centers, projects, investors, and family members. But USCIS needs to further clarify some things, and particularly that pre-RIA investors whose RCs become terminated for RIA "administrative" noncompliance will not need to associate with another RC to maintain their eligibility.

If you have any questions regarding these comments on EB-5 questions and answers, please reach out to Robert C. Divine, or any member of Baker Donelson's Immigration Group.