

# PUBLICATION

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## Recent EB-5 Developments Weigh Heavily on Participants

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**USCIS has issued meaningful new guidance about some important topics relating to the EB-5 Reform and Integrity Act of 2022 (RIA): the new \$20,000 or \$10,000 per year regional center integrity fee, USCIS registration of investment "promoters," written disclosures of promoter compensation, identification of persons "involved with" EB-5 related entities, and the period through which investors are required to sustain their investment before return of their capital. All of these topics provide a gloss on my original summary<sup>1</sup> of the RIA. The stakes for compliance with USCIS positions are high, as the consequences for noncompliance are severe.**

The primary channels for USCIS guidance to date have included: the settlement agreement resolving a lawsuit against USCIS by a host of regional centers that were designated before RIA enactment; Forms I-526, I-526E, I-956, I-956F, I-956G, and I-956K and the instructions accompanying each; a 90-page set of USCIS "responses" to the many comments submitted by the public about those forms as requested by USCIS (Forms Responses); and a few USCIS EB-5 stakeholder "engagements" the latest of which occurred April 25, 2023 (Stakeholder Meeting).

### Pre-RIA Regional Centers

Initially, USCIS declared on its website that all regional centers that had been designated by USCIS before RIA enactment were automatically terminated by the RIA, but investors who filed I-526 petitions before RIA enactment would be able to proceed with their immigration process despite such termination. A host of pre-RIA regional centers sued USCIS presenting a different interpretation, and USCIS entered a settlement agreement acknowledging that pre-RIA regional centers could continue as long as they file before December 29, 2022, an "amended" RIA regional center application using new Form I-956 with \$17,795 fee.

Importantly, USCIS agreed in the settlement that termination of a regional center for failing to make that filing would not adversely affect investors who had been sponsored by such regional centers. The agreement did not explain this phenomenon or clarify whether failure of a regional center to file the new annual report Form I-956G with a \$3,035 fee, or the new integrity fee (discussed below), would be treated any differently. Thus, it remains unclear whether and how a pre-RIA regional center that does not wish to sponsor new investors can "wind down" without adverse consequences to the investors it sponsored pre-RIA. It seems that USCIS has concluded that such a regional center can quit paying any fees and simply honor its other contractual obligations to investors (including managing the new commercial enterprise if that was the regional center entity's contractual role), but USCIS needs to make this, or any other interpretation, much clearer.

Amazingly, USCIS explicitly refrained from providing any guidance about "winding down" in its latest Stakeholder Meeting.

### Integrity Fee

The RIA requires each designated regional center (RC), including a regional center designated before RIA enactment and wanting to remain designated, to pay an annual "integrity fee" of \$20,000 or, if the RC has "20 or fewer total investors in the preceding fiscal year in its new commercial enterprises," \$10,000. USCIS has

issued a Federal Register notice<sup>2</sup>, without soliciting any comment, interpreting this statutory language in the following ways:

1. **Amount:** The amount of the fee for a particular fiscal year just ended depends on the difference between the numbers of two kinds of filings by EB-5 investors filed anytime (including in prior years) up to the end of the latest fiscal year: I-526 filings minus I-829 filings (not including I-829 filings by family members separate from the investor's filing). We had expected the calculation to be based only on new I-526E filings made during the latest fiscal year, and USCIS' interpretation will require \$20,000 payments far more often. Justifying the lower level fee will require complex historical analyses by longstanding RCs and even for new RCs will be possible far less often over time. USCIS stated that its adjudicators have the discretion to evaluate the number of investors under "the totality of the circumstances," which would seem to include evidence that post-RIA investors have been repaid their investment before I-829 filing (which USCIS implicitly recognized is possible). If an RC pays only \$10,000 and then USCIS calculates more than 20 investors from its own records of I-526 and I-829 filings, it appears that USCIS may issue a notice of intent to terminate, making the stakes for miscalculation exceedingly high.
2. **Mechanism:** The fee must be paid at pay.gov either by credit card or ACH Debit transaction. Enter "USCIS" to find the option to pay the RC integrity fee. Note that U.S. Department of Treasury guidelines permits USCIS to accept a maximum payment amount of \$24,999 from one credit card in one day, and a single obligation cannot be split into multiple credit card payments over multiple days in order to evade this limit. So to pay more than \$20,000, ACH must be used.
3. **Normal Timing:** Starting October 1, 2023, the fee will be due October 1 to October 31, late fees will be due on payments made November 1 to December 31, and termination will result from nonpayment by January 1. Failure to pay within 90 days after the end of the fiscal year will result in termination, but USCIS will issue a notice to terminate allowing the RC to respond showing that it had paid the fee on time.
4. **Last Year:** Because USCIS was not ready to accept the fee in 2022, for the year ending September 30, 2022, **the fee will be due by April 1, 2023**, and nonpayment by May 31, 2023, will result in RC termination.

In its April 25, 2023, EB-5 Stakeholder Meeting, USCIS noticeably failed to clarify whether a regional center considering not complying with RIA requirements and winding down is expected to pay the integrity fee.

### Promoter Registration

RIA requires "direct and third-party promoters (including migration agents)" to register with USCIS, providing their identity and contact information and confirming the written agreements they are required to have with EB-5 securities issuers. The RIA did not define "promoters," but in the latest Stakeholder Meeting USCIS suggested a "plain English" working definition as someone who helps raise money for some investment activity. USCIS suggested some working definitions of types of promoters without explaining why the distinctions would make a difference.

USCIS initially proposed a new Form I-956K to be completed online, but in December 2022 it published in final form a revised Form I-956K that must be submitted on paper and must include a copy of all of the promoter's full written agreements with EB-5 securities issuers.

In its Forms Responses and the latest Stakeholder Meeting USCIS cast the broadest net imaginable as to who must register, stating that primary promoters, subagents, and employees of either must submit their own

independent registration. A subagent should refer to its primary agent's registration and include a copy of its own agreement with the primary agent. While an employee should refer to their employer's registration (and ostensibly need not submit their employment agreement). USCIS offered executive officers, operations managers, investment development managers, and salespeople as examples of those required to register while providing narrow negative examples of human resources and facilities managers.

USCIS clarified that a promoter must register *before* engaging in any promotion of EB-5 investments. USCIS also stated that a Form I-956K that gets rejected for being improperly completed does not count as registration. This new requirement could stifle EB-5 subscriptions for months while issuers amend their broker/agent agreements, promoters file registrations and wait for receipts, and regional centers require proof of compliance. The stakes are high, as USCIS confirmed that violating promoters and the issuers using them could be debarred from the EB-5 program, and overseeing regional centers could be terminated.

### **Promoter Fee Written Disclosures**

The RIA specifically requires that each I-526E petition by an investor shall include a disclosure, signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person that the regional center or new commercial enterprise knows has received or will receive, in connection with the investment, including compensation to agents, finders, or broker-dealers involved in the offering, to the extent not already specifically identified in the business plan.

In its responses to public comments about new EB-5 information collection forms including I-526E, USCIS surprisingly suggested that it does not actually expect investor-specific disclosures, stating that it expects the issuer's I-956F project application to include the promoter compensation disclosure, which then is incorporated by reference in the I-526E form's pre-printed attestation by the investor that the project application is incorporated by reference. This seems to reflect a frightening lack of understanding by USCIS that issuers don't know ahead of time which promoters they will end up using and how much they will end up having to pay different promoters.

It may be prudent for regional centers to require issuers to continue to use a specific disclosure document that is signed by the investor at the time of subscription and required to be filed by the investor. USCIS did say that I-526E filings should include any investor-specific agreements and signature pages of common agreements. But even if this is done, project applications may be challenged if they lack at least a recitation of the maximum fees that may be paid. Regional centers face important challenges in deciding what to require from participating issuers in light of this USCIS guidance.

### **"Involved Persons" and I-956H Filings**

The RIA prohibits any person who is not a U.S. national or permanent resident to be "involved with" a regional center, and it requires USCIS to make sure that no one with various indications of prior bad conduct is "involved with" a regional center, new commercial enterprise, or job creating entity. USCIS now requires with any regional center or project application a Form I-956H questionnaire completed by each "person" (which includes both individuals and organizations) "involved with" the regional center, new commercial enterprise, or affiliated job creating entity, plus an \$85 fee per person. Each individual person must attend a biometrics appointment at a USCIS office for further vetting.

The statute says a person is "involved with" an entity (the RC, NCE, or JCE) if he or she "directly or indirectly is in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the [EB-5 regional center] program." The statute also says, "An individual may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner, an officer, a board member, a

manager, an executive, a general partner, a fiduciary, an agent, or in a similar position at the new commercial enterprise or job-creating entity, respectively."

In the Forms Responses, USCIS took the broadest interpretation imaginable, stating that the definition "includes any person directly or indirectly in a position of substantive authority" and "provides broad authority to the Secretary to 'otherwise determine' who may or may not be a person involved." USCIS also generally declared that all owners are involved, seemingly no matter how tiny the ownership.

So far we have only seen USCIS actually adjudicate this in relation to I-956 applications for (re)designation of a regional center. In those contexts, USCIS has scoured websites and other public information and essentially taken the position that everyone up the chain of ownership of an entity and just about any principal, representative, administrator, officer, board member, manager, executive, or general partner is "involved," and any employee, fiduciary, or agent who holds or is presented to the public as having anything to do with procuring EB-5 investors or handling their capital down the chain of hands is "involved." USCIS RFEs have conflated people into related entities. We have seen a few RC applicants push back in responses saying that some people who have managerial roles but nothing to do with procuring or handling EB-5 capital are not involved, but USCIS has not ruled on any of those responses yet. We have not seen or heard of any I-956F adjudication that would parse whether people are actually involved in the NCE or JCE, but they will be coming.

USCIS has made clear that if someone is involved in the sponsoring RC (and has done I-956H for the I-956) they still must complete a separate I-956H for the I-956F project application if they are involved with the NCE or JCE or both. If an individual is involved with more than one entity among the NCE, JCE, and other entities that are involved with the NCE or JCE, the individual can complete one I-956H for the I-956F filing and in that H form indicate his or her different roles in the different entities. If someone is outside of the NCE and JCE serving as a broker or promoter to EB-5 investors, that person should submit to USCIS a Form I-956K for promoter registration.

The consequence of disagreement with USCIS about who is involved could be a denial of the regional center and project applications, with the consequence of the possible denial of investor petitions that hang on those applications. This topic was not on the March 20 agenda.

### **Sustainment Period**

As set forth in my article in EB5 Investors Magazine<sup>3</sup>, investors who filed prior to March 15, 2022, will remain required to "sustain their investment" in their NCE through the expiration date on their initial green card, but investors who filed I-526 after March 15, 2022, only have the requirement that their capital is "expected to remain invested for not less than two years." The most conservative approach to when that two years of "investment" begins is when the job-creating entity fully spends the EB-5 capital in the project.

Some industry associations have advocated to USCIS<sup>4</sup> that RIA does not actually change the old requirement, while an association of investors has argued the contrary<sup>5</sup>. But in its Federal Register notice about the RC Integrity Fee<sup>6</sup> USCIS implicitly recognized the severe truncating of the sustainment period under the RIA, stating as to the calculation of investors for purposes of the amount of the Integrity Fee, "USCIS considered generally counting only the Forms I-526 that were filed within two years of the applicable period used for determining the EB-5 Integrity Fund fee given the expected two-year minimum timeframe for the investment, or sustainment period, under the 2022 Act. INA section 203(b)(5)(A)(i); 8 U.S.C. 1153(b)(5)(A)(i)."

USCIS mentioned this topic as one of three to receive focus in the latest Stakeholder Meeting, but then at the meeting, it needed more time to consider "all the important feedback" it received "on this complex issue." USCIS did clarify that there is no maximum period an issuer may retain EB-5 capital, but it needs to resolve the developer industry's wishful disbelief that the law has changed. Meanwhile, issuers can make and try to sell

offerings that will involve holding investors' capital more than two years after project completion, but they should be careful not to claim – at least not without disclaimers – that their reason for doing so is to protect investors' immigration prospects.

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<sup>1</sup> <https://www.bakerdonelson.com/analysis-of-new-eb-5-reform-and-integrity-act-of-2022>

<sup>2</sup> <https://public-inspection.federalregister.gov/2023-04295.pdf>

<sup>3</sup> <https://www.eb5investors.com/magazine/article/eb5-ria-change-sustainment-requirement>

<sup>4</sup> <https://iiusa.org/wp-content/uploads/2023/02/EB-5-Stakeholder-Letter-on-Sustainment-for-March-20-Engagement.pdf>

<sup>5</sup> [https://goaiia.org/wp-content/uploads/2023/02/AIIA-Comments\\_IPO-March-20-EB-5-Stakeholder-Engagement-FULL.pdf](https://goaiia.org/wp-content/uploads/2023/02/AIIA-Comments_IPO-March-20-EB-5-Stakeholder-Engagement-FULL.pdf)

<sup>6</sup> <https://public-inspection.federalregister.gov/2023-04295.pdf>