American Immigrant Investor Alliance

Subject: Question: EB-5 Engagement March 20, 2023

Hello,

These questions are submitted by the American Immigrant Investor Alliance ("AIIA"), a 501(c)(4) organization formed to advocate for EB-5 investors. We look forward to a productive engagement with USCIS and welcome the opportunity to have a dialogue with you about the concerns of tens of thousands of immigrant investors.

With regards to Direct and Third-Party Promoters -

1) Are Registered Investment Advisors as well as their associated Broker-Dealers required to file form I-956K, despite being located in the US and already following strict FINRA compliance measures?
2) Can a third-party promoter file an amendment to his I-956K if he signs an agreement to sell a new offering? Or does the promoter need to file a new I-956K?
3) Will USCIS publish a list of registered direct and third-party promoters for immigrant investors to consult in order to avoid fraudulent and under-the-counter deals?
4) How many I-956K forms have you received and when will you issue receipt notices?

With regards to Investment Period -

This is our belief: Given that RIA section 104(a) deleted the line

(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United States; and …

The ‘sustainment period’ has to be changed from what it was before. That has also been acknowledged on USCIS’s last public engagement call in October, when Paul Egan, Acting Policy Division Chief for the government agency, discussed USCIS’s “at risk requirements” for investor funds, specifically pertaining to sustainment requirements for new investors which are codified in the RIA. He stated: “[these] modifications relieve the burden on new investors of maintaining their investment at risk for long timeframes well beyond the scope of the new investment project.”

We submit here a few key points for USCIS to consider, in contemplating the investment period and policy to implement RIA:

Principles

The EB in EB-5 stands for “Employment Based,” not “Investment Based.” The founding principle of EB-5 is that it’s about creating jobs for a green card – not about buying a green card, not about boosting corporate profits or creating investment returns for a green card, but about “benefitting the United States by creating full-time employment.” All policy around the EB-5 investment requirement should keep that core employment-based principle in focus. The investment period question cannot be considered in a vacuum.

Redeployment Implications

Must EB-5 investment be sustained “throughout the period of the alien’s residence in the United States” (as INA 216A(d)(1) said before RIA struck that clause in the requirements for I-829), or can it simply be “expected to remain invested for not less than 2 years” (as INA 203(b)(5)(A) now says since RIA added that clause to a section on visa eligibility)? The answer to the timing question is important (and should be considered in context of requirements that apply to each phase of an investor’s immigration process), but less consequential than the question of what “remain invested” means, and whether it involves a deployment requirement unmoored from the job creation requirement.

The investment period – however long it may be -- is a concern primarily as implicated in redeployment. But note that this connection – and redeployment policy in general -- has a tenuous foundation: the notion that an “at risk” requirement is baked into the sustainment requirement. The statute and regulations have justified no such notion, as explained for example in “EB-5 Investment “at risk” and Sustaining Investment” by Carolyn Lee and “The Draft EB-5 Policy Memorandum: Some New Policy Created, Some Old Policy Sustained” by Ron Klasko. All the contortions and heartache since 2015 around how practically to redeploy to satisfy a requirement for “maintaining investors capital at risk” throughout the investment period were and remain needless, if indeed – as top EB-5 lawyers have contended -- there never actually was a technical requirement to “remain at risk” decoupled from job creation and from I-526 eligibility.

The task of drafting new regulations for redeployment parameters should start by considering the basis for redeployment. RIA introduced practical parameters for redeployment if needed for

the purpose of maintaining the investors' capital at risk, but RIA did not address the primary theoretical question: whether/when/why there exists a purpose to "maintain capital at-risk" as opposed to "remain invested". This question has urgently needed to be addressed since 2015, when USCIS invented a "remain at risk" requirement in the 2015 Draft EB-5 Policy Memo with a bald assertion – immediately challenged by immigration lawyers as unsupported -- that "the statute and regulations, when read together, require [it]."

A "remain at-risk" notion is not only lacking in legal authority, but also problematic as a public policy matter.

The EB-5 Reform and Integrity Act – and decades of discussion in Congress leading up to RIA – show that Congress has had two overriding concerns for EB-5: to promote economic growth and to prevent fraud and abuse.

Redeployment is, by policy, separated from the economic goals of EB-5: job creation and pooling investment in defined areas.

Redeployment policy has effectively forced fraud, to the extent that fraud includes deploying investor funds for purposes which were not contemplated in the investment agreements, with or without the investor's consent.

Congress designed an elaborate new system in RIA to avoid fraud by ensuring that 100% of EB-5 funds were deployed to the capital investment projects for which they were intended, and that USCIS would review those projects in I-956F and track the progress of those projects and on-going use of investment in I-956G. All these safeguards are worthless from a fraud/abuse-prevention perspective, if they apply to an initial deployment that will then be followed by an unknown series of further deployments for which regional centers do not get USCIS review or approval, do not have fund administration requirements, do not have limits on persons involved in the unspecified projects, and do not even have to provide any accounting in annual reports on projects after the initial deployment.

Already, the media and litigation tell stories of millions of dollars in EB-5 capital redeployed without investor consent in high-risk projects, and lost in the further deployment. Our organization has written a blog post on why redeployment is a nightmare. Good actor regional centers have tried to redeploy responsibly, but the very fact of redeployment compounds investment risk even in the best-intentioned hands. And what's it all for? The initial deployment already created the jobs required for EB-5 eligibility: further deployment – at best – pads a developer's profit by decreasing the capital costs for further uses whose identity, integrity, and economic benefit will never be reviewed by USCIS. Even the best outcome is not a Congressional objective for EB-5. And the door is wide open for fraud and abuse. In connection with the investment period, redeployment policy is overdue for urgent scrutiny of its notional legal authority and problematic practical results.

Below are our questions on this:

1) As a result of new INA §203(b)(5)(A)(i), which says that an investor "is expected to remain invested for not less than 2 years…" and with the changes to INA §216A(b)(1)(B) which removed the requirement that termination of LPR status can occur if an investor "was not sustaining the actions described in clause (1) throughout the ***period*** of the alien's residence in the United States" (Emphasis added.). INA §216A(b)(1)(B) now only provides that if "the alien did not invest the requisite capital" can their residence status be terminated.

   Hence, with respect to an investor who filed their I-526 or I-526E petition on/after March 15, 2022 is required under the INA to have their capital contribution "invested for not less than 2 years", if they comply with the requirements under INA §203(b)(5) then when is the exact date when sustainment periods will begin for immigrant investors who have filed their I-526E after March 2022? What conditions must be fulfilled before the sustainment period can end?
2) If the sustainment period ends before the I-526E is approved, will the investor be eligible to reclaim their investment funds without affecting their immigrant petition (assuming job creation and all other project requirements have been completed)?
3) How much deference is given to investment issuers to retain an investor's capital beyond the sustainment period? Is there a limit on how long the capital can be retained before it must be returned to the investor?
5) Our website analyzes the negative impact sustainment rules currently have on Pre-RIA investors. We invite you to review the blog post at this link: https://goaiia.org/the-nightmare-that-is-eb5-redeployment/

   Knowing how the Reform and Integrity Act affects investors who have filed before the bill's passage, is there an opportunity for USCIS to apply the new sustainment period rules to pre-RIA investors?
   a) If so, how? Does USCIS have a plan to grandfather these investors into the new requirements?
   b) If not, how does USCIS seek to rectify the redeployment crisis that pre-RIA investors have continually and historically been subjected to by investment issuers? Is there an opportunity in the future for such an application?

6) For pre-RIA investors, the sustainment period has become longer than ever due to slow application processing. How does USCIS seek to rectify this backlog of applications to curb the common practice of redeployment? Is there a plan in place to greatly expand the share of the agency's budget towards adjudicating EB-5 applications? Has the IPO increased its staffing levels to adjudicate EB-5 petitions within a reasonable time? How can pre-RIA investors expect the sustainment period to change in the near future?
7) How do pre-RIA direct/standalone investors sustain their investment if they are in a position to get their funds back but have not yet finished their conditional Green Card period? On that topic - At what point does USCIS consider job creation requirements to be fulfilled for Direct investors?

Regional Center Operations

1) Will USCIS still adjudicate and approve PRE-RIA I-526 petitions of investors whose Regional Centers no longer renew their designation?
2) Will USCIS provide leniency to investors whose Regional Center owners are no longer operational and cannot provide necessary documentation?
3) If leniency will not be provided to investors whose Regional Centers have suspended operations, is there any way for the investors to sustain their investment through another investment opportunity? What paths exist for investors in this situation?
4) Does USCIS have any clarifying constraints on where investment issuers can redeploy investor funds if they opt for redeployment? Can the investor choose to reinvest their money elsewhere other than where their issuer/Regional Center chooses?
5) What procedures are in place to monitor these redeployed funds and the business plans of the projects in which they are invested?

Thank you for your attention to our questions and feedback.

Sincerely,

Ishaan Khanna
President
American Immigrant Investor Alliance