Congress of the United States
Washington, DC 20515

May 9, 2022

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528

Dear Secretary Mayorkas:

As you know, after lengthy deliberations, the EB–5 Reform and Integrity Act of 2022 was included in the Omnibus appropriations bill that was signed into law last month.

The Regional Center Program has been a catalyst for hundreds of thousands of new jobs in the U.S. and for billions of dollars of new investment. The new integrity and transparency provisions are just as important as the new protections for investors and regional centers.

It is incumbent upon U.S. Citizenship and Immigration Services (USCIS) to guide the EB-5 Regional Center Community and the pending and prospective investors on the reactivation of the Program. Regional centers should be required to comply with the new integrity measures. However, there needs to be a transition between the previously approved legislation and the newly passed EB–5 Reform and Integrity Act of 2022 to avoid redundancies and administrative burdens for the agency. Further, a transition will avoid unnecessary complications to designated regional centers who have remained in good standing with USCIS and complied with the rules even during the program's lapse.

Specifically, requiring all regional centers to go through a process to be redesignated is not required under the EB–5 Reform and Integrity Act of 2022 and will put an immense burden on the agency. Instead, the agency currently has the authority and the tools to confirm compliance with the new integrity measures without the need for a full-scale redesignation of existing regional centers. These tools provided in the new statute include:

1. A designated regional center is required to file an amendment application 120 days in advance of any changes to its organizational structure, ownership or administrative changes that would result in new individuals being subject to the requirements for persons involved in the Regional Center Program.
2. A designated regional center is required to immediately preserve all existing records and all new records moving forward, which are subject to USCIS audit. Regional centers are subject to termination for failure to comply.
3. A designated regional center shall file an application for approval of an investment in a new commercial enterprise where no such prior approval of the business plan exists. Therefore, for new projects and new commercial enterprises seeking to raise new funds under the new law where no prior approval exists, the regional center must go through a pre-approval process per the new

certification requirements. This would encompass almost all regional centers raising new funds from EB-5 investors.

4. Importantly, all designated regional centers must go through the annual compliance certification. This would encompass all of the certifications required in the same fiscal year, while also reducing the burden on the agency and the regional centers to file multiple applications in the same fiscal year to make identical certifications.
5. Taken together, existing regional centers under the prior law must recertify to all integrity measures during this fiscal year. This will occur either through a business plan approval application and/or any amendment application, *and* through the annual certification requirements, which will be mandatory for all existing regional centers at the end of the year.

Current guidance on the USCIS website requiring new regional center designations for every existing regional center is confusing and causing great concern in the EB-5 stakeholder community. We believe that there should be stakeholder engagement and then guidance on the implementation of the program.

The original Regional Center Program was authorized in Section 610 of the 1993, Pub. L. 102-395 Departments of Commerce, Justice and State Legislation. The original language is enclosed.

The EB-5 Immigrant Investor Program was originally created in 1990. In 1992, Congress amended the EB-5 Program in two significant ways to increase the usage, improve efficiency, and ultimately expedite job creation. First, in Section 610(a) of the 1993 Appropriations Act, Congress mandated a special EB-5 pilot program operating through regional centers where EB-5 applicants could pool their investment into larger USCIS pre-approved investments, benefit from stronger economies of scale, and simpler job creation reporting requirements utilizing verified econometric methodologies and more. Second, Section 610(b) of the Act initially set aside 300 visas for the Pilot Program (which through amendment has been increased to 3,000 per annum) to attract sponsors and accelerate the adoption of the newly created Pilot Program.

This is an immigration program and authorization more properly lies in the Immigration and Nationality Act (INA). The program is now housed at Section 203(b)(5) of the INA (8 U.S.C. 1153(b)(5)). This doesn't mean that it is a new program. It just means that it is now housed in the INA and that it is time limited for 5 years through September 2027.

We were pleased to see that USCIS has announced an engagement with stakeholders on this issue. It is our hope that the agency will take into consideration the legal points below, which establish that regional centers need not be redesignated by USCIS:

1. **Statutory language indicates existing regional centers remain designated**. The new INA 203(b)(5)(F)(ii) as added by the EB–5 Reform and Integrity Act of 2022 explicitly recognizes that a business plan approved prior to the date of the enactment of the reauthorization legislation remains binding for purposes of adjudication of subsequent petitions seeking classification under INA 203(b)(5)(F). Interpreting this law as nullifying the existing regional center designations would directly contravene this language recognizing previously approved business plans submitted by existing regional centers.

2. **An interpretation requiring new regional center designations will result in all existing investors without approved conditional permanent residency facing denial.** Traditionally, USCIS has interpreted that a regional center must remain in good standing throughout the I-526 Petition adjudication and through to the period of conditional permanent residence for all investors in order for I-526 Petitions to be approved and for immigrant visas to be issued.

    a. **Continued adjudications of existing investors**. Subparagraph (S) does not protect investors from an administration decision to decertify all existing regional centers, as this provision only protects from lapses of legislation.

    b. **Switching regional centers**. If the agency's position is that the law terminated existing regional centers, rather than by action of the agency, section "(M) Treatment Of Good Faith Investors Following Program Noncompliance," does not protect existing investors and they would be unable to reaffiliate with a regional center who obtains designation post-enactment of this legislation. As a result, if a regional center fails to refile a designation application under INA 203(b)(5)(F), many investors may be harmed by this interpretation. If USCIS seeks for the regional center to complete the required certifications for integrity and compliance purposes, this can be achieved through the new requirements outlined above and required by INA 203(b)(5)(E)-(G).

3. **Retroactive application of law is potentially unlawful**. An interpretation or action by the agency to apply an existing statute retroactively without the explicit authorization by Congress has previously been found to be unlawful under the Administrative Procedure Act and would potentially violate Due Process principles under existing case law.

4. **Regional centers still need to make all required compliance certifications at the end of this fiscal year**. As described above, the new certifications and compliance requirements under INA 203(b)(5)(E)-(G) remain applicable to existing regional centers without the need for redesignation. Each regional center seeking to take in new EB-5 investor capital without prior approval of the business plan by USCIS will require a project pre-approval application under INA 203(b)(5)(F), which requires the integrity measure certifications. Each regional center modifying its ownership or administration must file an amendment application under INA 203(b)(5)(E), which requires the integrity measure certifications. Finally, each existing regional center will need to file an annual compliance on Form I-924A, or such new form as USCIS will prescribe through notice and comment rulemaking, which contains all of the same certifications required under subparagraph (F) for new regional centers. To the extent existing regional centers are not able to satisfy those certifications or compliance checks, the agency will have valid authority to terminate them.

We look forward to partnering with you to ensure the EB–5 Reform and Integrity Act of 2022 is implemented in accordance with congressional intent. Thank you for your prompt attention to this matter.

Sincerely,

Jerrold Nadler	Charles E. Schumer	John Cornyn	Lindsey O. Graham
Member of Congress	United States Senator	United States Senator	United States Senator

Original Regional Center Program Language:

Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395 (October 6, 1992) (as amended)[1]

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentratingpooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

(b) For purposes of the program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3,000 visas annually until June 30, 2021, to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)] and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], to accompany orfollow to join such aliens.

(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR204.6, the Secretary of Homeland Security shall permit aliens admitted under the program described in this section to establish reasonable methodologies for determining the number ofjobs created by the program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity,job creation, or increased domestic capital investment resulting from the program.

(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)),the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the program described in this section. Notwithstanding section 203(e) of suchAct (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence.

[1] See 8 U.S.C. 1153 Notes.