



Department of Homeland Security

Ethics and Integrity: Protocols for Processing of EB-5 Immigrant Investor Visa Petitions and EB-5 Regional Center Applications, Including Stakeholder Communications

1. Purpose:

- a. To establish protocols to properly process stakeholder communications related to the Employment-Based Fifth Preference Immigrant Investor Program (the EB-5 program). It is critical to DHS's mission to ensure that we administer the EB-5 program with integrity.
- b. Congress created the EB-5 program in 1990 to stimulate the U.S. economy through job creation and capital investment by alien investors. In order to promote employment in the United States, the EB-5 program provides alien investors with the opportunity to obtain lawful permanent residence in the United States for themselves, their spouses, and their minor unmarried children by making a certain level of capital investments and associated job creation or preservation.
- c. The program makes immigrant visas available to foreign nationals who invest at least \$1,000,000 (or \$500,000 if the investment is in a targeted employment area, defined as certain rural or high unemployment areas) in a U.S. business that will create or, for "troubled businesses" only, preserve at least ten full-time jobs for U.S. citizens or employment-authorized immigrants in the United States.
 - i. The "Immigrant Investor Pilot Program," established by Congress in 1992, allocates EB-5 visas for investors in regional centers designated by USCIS. The program has been regularly reauthorized by Congress on a bipartisan basis, most recently in September 2012, when Congress eliminated the term "pilot" and extended its authorization through September 30, 2015.
 - ii. A regional center has jurisdiction over a limited geographic area, serves the purpose of concentrating pooled investment in defined economic zones and is defined by regulations as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."

2. Protocol Application: The following Ethics and Integrity protocol applies to all DHS and USCIS employees and contractors involved in policymaking, evaluation, or review of the EB-5 program or the adjudication of any particular EB-5-related petition or application.

3. Authorities:

a. EB-5 Authorities:

- i. 8 C.F.R. § 1.2 (Definitions);
- ii. 8 C.F.R. § 2.1 (Authority of the Secretary of Homeland Security);
- iii. 8 C.F.R. § 204.6 (Petitions for employment creation aliens);
- iv. 8 C.F.R. § 216.6 (Petition by entrepreneur to remove conditional basis of lawful permanent resident status);
- v. 8 C.F.R. § 216.3 (Termination of conditional resident status)
- vi. 8 C.F.R. § 103.2 (Submission and adjudication of benefit requests)
- vii. 8 C.F.R. § 103.3 (Denials, appeals, and precedent decisions);
- viii. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 203(b)(5), 216A, 245(k); 8 U.S.C. §§ 1153(b)(5), 1186b, 1255(f);
- ix. Homeland Security Act of 2002, Pub. L. No. 107-296, § 451; 6 U.S.C. § 271;
- x. 21st Century DOJ Appropriations Authorization Act, Pub. L. No. 107-273, §§ 11031-37 (2002);
- xi. Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 402 (2000);
- xii. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 102-395, § 610 (1992).

b. Ethics Regulations and Statutes:

- i. 18 U.S.C. § 208: This provision contains a prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons (e.g., spouse and dependent children) or organizations.
- ii. 5 C.F.R. § 2635.101(b)(8): Employees shall act impartially and not give preferential treatment to any private organization or individual.
- iii. 5 C.F.R. § 2635.101(b)(14): Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.
- iv. 5 C.F.R. § 2635.702: An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is

affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.

- v. 5 C.F.R. § 2635.501, 502: These are two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his/her official duties. For example, where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his/her household, or knows that a person with whom she/he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his/her impartiality in the matter, he/she should seek assistance of his/her supervisor and agency ethics officials.
- vi. 5 C.F.R. § 2635.502(c), (d). These provisions discuss DHS Designated Agency Ethics Official and Associate Agency Ethics Official involvement in 5 C.F.R. § 2635.502 determinations.

4. Guiding Principles for EB-5 Processing:

- a. Compliance with Existing Ethics Rules. All official action taken upon receipt, adjudication or oversight of any EB-5 petition, application, policy or procedure must be completed by employees who are free of personal financial conflicts,¹ including financial conflicts imputed to them by statute² or that involve a person or entity with which the DHS official holds a “covered relationship.”³ Official actions of DHS employees should not rise to the level of an actual endorsement of any non-federal entity, person or project,⁴ should not fail to treat persons or entities with impartiality,⁵ and should not create an appearance of legal or ethical impropriety.⁶
- b. Transparency. Transparent processing and documentation of the adjudication of EB-5 petitions and applications promotes integrity and inspires confidence and trust in EB-5 stakeholders and the American people. Activities related to the adjudication of EB-5 petitions and applications shall be conducted in a manner that ensures appropriate transparency, consistent with FOIA⁷ and Privacy Act⁸ rules.
- c. Consistency. EB-5 adjudications and appeals actions should be adjudicated based on a reasonable application of past precedents, in particular prior decisions involving EB-5 petitions presenting the same or similar facts and circumstances. While every EB-5

¹ 18 U.S.C. § 208.

² *Id.*

³ 5 C.F.R. § 2635.502.

⁴ 5 C.F.R. § 2635.702.

⁵ 5 C.F.R. § 2635.101(b)(8).

⁶ 5 C.F.R. § 2635.101(b)(14).

⁷ 5 U.S.C. § 552.

⁸ 5 U.S.C. § 552a.

adjudication turns on the particular facts of a case, USCIS leadership, employees and contractors should ensure adjudication of petitions and applications is performed using a consistent and regular process.

d. **Appearances.** Appearances matter in positions of public trust. DHS employees and contractors involved in the adjudication of EB-5 petitions have a duty not only to act impartially in the performance of their official duties, but also to avoid the appearance of impropriety. Even the mere appearance of a lack of impartiality or the granting of preferential treatment (e.g., treating similarly situated applicants differently), can call into question the fairness and integrity of our Nation's immigration laws.

As a general matter, a DHS employee could potentially violate the prohibition against preferential treatment or create an appearance of the same in a number of ways.

Examples of such missteps include the following:

- Working on, or attempting to expedite or otherwise influence the processing of, an immigration application, petition, or benefit for a friend, relative, neighbor or acquaintance;
- Meeting with certain stakeholders to the exclusion of others who are similarly situated;
- Referring applicants to a particular immigration practitioner or vendor; or
- Using his or her official position or title in a manner that could reasonably be construed to imply that DHS or the federal government sanctions or endorses his or her personal activities or those of another.

5. Procedures for Stakeholder Contacts Regarding Specific EB-5 Petitions or Applications: Because the focus of the EB-5 program is the creation of U.S. jobs and the stimulation of economic development in a particular area or region, the timeliness and outcome of the adjudication of individual petitions is often a matter of interest for members of the U.S. Congress, state and local political leaders, industry leaders, civic groups, non-profit entities and various business-oriented interest groups, as well as the actual EB-5 petitioners or regional center applicants. With regard to specific stakeholder contacts with DHS employees and contractors involved in EB-5 adjudication and processing in specific cases, the following protocols shall be followed by all DHS employees and contractors:

a. **Contacts with EB-5 Petitioners, Applicants and Other Stakeholders.** Contacts with an EB-5 petitioner, regional center applicant, their respective representatives, or other stakeholders⁹ should be directed to the adjudicator of the relevant case and should come through the customer service intake process or through other methods of contact specifically permitted by the regulations governing the implementation of the EB-5

⁹ CIS Ombudsman office stakeholder contacts are exempt from this general provision. The CIS Ombudsman has separate authority to conduct such contacts, as an entity independent from USCIS, and CIS Ombudsman personnel will conduct such contacts following established policies.

program so that the contact can be tracked and documented. There is a strong presumption that all substantive communications from stakeholders should be made in writing, with each written contact memorialized by placing the document in the relevant EB-5 case file. Any substantive telephonic or other non-written communications with petitioners, applicants or their attorneys shall be documented by all involved in the specific case, and stored in the case file.

b. **Contacts with Members of the U.S. Congress and Congressional Staff.** Members of Congress have legitimate interests in providing constituent service and in promoting economic development in their districts or states. Congressional communications related to oversight can also be an important means for holding government accountable to the people and ensuring Congress is informed about the operation of existing laws and programs, and the potential need for new legislation.

For DHS, congressional contacts about particular EB-5 petitions or applications may provide information relevant to the adjudication or more generally assist the DHS mission by promoting citizen awareness of and access to the adjudication processes, as well as generally increasing transparency to the public at large. Although there are many legitimate reasons for congressional communications with DHS about EB-5 petitions or applications, DHS employees and contractors must be mindful of the importance of responding to such communications in a way that does not create an actual or perceived impropriety. To that end, the following procedures should be followed by all DHS employees and contractors who receive congressional communications about pending EB-5 petitions or applications:

- i. Written contacts and questions should be responded to in writing as required by USCIS policy and stored in the file for the petition or application.
- ii. Oral communications from Members of Congress or staff should, whenever possible, be respectfully and immediately referred to the USCIS designated Office of Legislative Affairs leadership or liaison so that concerns can be evaluated as outlined in USCIS procedures.¹⁰ In those limited circumstances where those referrals are deemed not possible, the DHS employee or departmental senior leader shall take the following actions:
 - Encourage the congressional staffer or Member to have the staff reduce the information or questions into writing so it can be included in the file for the petition or application, and transparently and objectively evaluated through normal processes;
 - Reduce the substance of the communication into a written after action memo or email, including any notes taken contemporaneously with the contact, which shall be sent to the designated USCIS OLA liaison for action as outlined in

¹⁰ Again, CIS Ombudsman contacts are governed by policies established under authorities independent of USCIS. See footnote 6 above.

normal processing for congressional inquiries. This written memorandum, and any relevant written materials responsive to the matters raised in the phone/personal conversation, shall also be included in the file regarding the particular petition or application; and

- Notify the Member of Congress or congressional staff that the contents of the conversation regarding the EB-5 petition or application will be documented by USCIS and may, as appropriate, be shared with other leadership or the applicants or petitioners whose cases are discussed.

c. **Communications with Other Elected Officials.** Governors, mayors, and other state and local leaders may have concerns similar to those of Members of Congress, and contacts with their offices and staffs should be treated consistent with the procedures identified here.

d. **Communications with White House Staff.** The DHS directive on communications with the White House applies by its terms to EB-5 adjudications. *See Communications with the White House Regarding Open Investigations, Adjudications, or Civil and Criminal Enforcement Actions*, MD 0430 (Mar. 1, 2003).

6. Leadership Intervention in Specific EB-5 Petition or Regional Center Application Decisions/Adjudications:

a. Senior leaders may intervene in particular cases under the procedures described in section 6 of this document. “Intervention” means providing substantive direction or input on decision-making or appeals regarding particular EB-5 cases, including requests to expedite. Intervention does not include mere requests for information (e.g., request for case status).

b. Senior leadership interventions in decision-making or appeals regarding particular EB-5 cases should be reserved for exceptional circumstances where the senior leader can articulate an impartial mission-related reason for intervention. Examples include, but are not limited to, situations where the case:

- i. may affect national security;
- ii. may hinder a governmental response to an emergency matter, where serious economic injury or actual physical injury could occur;
- iii. may result in a serious failure to meet the Department of Homeland Security’s mission accomplishments; or

- iv. involves allegations of misconduct by government employees and contractors (e.g., a conflict of interest) that raise questions about the integrity of the adjudication process.¹¹
- c. In such cases, if senior DHS leadership deems that circumstances exist that require leadership intervention in a particular case, they shall, in writing, memorialize the decision. This written memorialization shall articulate the manner in which leadership became aware of the facts of any case that led to the decision to intervene, and the impartial mission-related reason for intervention.
- d. In the event the Secretary or Deputy Secretary considers personal intervention in a particular case, prior consultation with the General Counsel is required.
- e. For all other officials, the memorandum mentioned in paragraph (c) above shall be provided to the senior officials designated here for the purpose of providing the Director (or the Director's delegate) individual, written recommendations regarding an extraordinary intervention in a particular case. The senior officials providing such recommendations shall include the following members:
 - i. The Deputy Director
 - ii. The USCIS Chief Counsel
 - iii. The CIS Ombudsman or delegate
 - iv. Any other official the Director designates
- f. Upon receiving recommendations from the above officials, if the Director, or the Director's delegate, decides that an extraordinary case intervention is appropriate, he or she shall document that decision and the reasons for it in writing.

7. Training on Protocols: The Director and the CIS Ombudsman shall establish a training program for personnel involved in EB-5 policy, procedural development and actual adjudication of EB-5 petitions and applications, as well as for any other relevant DHS personnel.

8. Expedite Requests: The USCIS general policy governing expedited processing of applications and petitions applies to all requests to expedite processing of EB-5 petitions or applications.

9. Report a Suspected Violation of These Protocols, Ethics Rules, or Any Statute, Regulation or Policy to:

- a. DHS Inspector General:

¹¹ Similar considerations may motivate a decision to expedite processing of EB-5 petitions or applications. DHS employees should refer to and follow USCIS expedite protocols for those decisions.

- Email: dhs-oig.officepublicaffairs@oig.dhs.gov
- Phone (tollfree): 1-800-323-8603; 1-844-889-4357 (TTY)
- Fax: 202-254-4297

b. USCIS:

- Fax: 202-233-2453
- Mail:

Chief, Investigations Division
Office of Security and Integrity MS 2275
U.S. Citizenship and Immigration Services
633 Third Street, NW, 3rd Floor
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c. DHS Designated Agency Ethics Official or the Associate Agency Ethics officials:

- DHS Ethics Email: FinancialDisclosureHQ@hq.dhs.gov
- DHS Ethics Phone: 202-447-3515