



**Immigrant Investor Program Office
2018 AILA & IIUSA EB-5 Industry Forum
Sarah M. Kendall Remarks
October 29, 2018**

Thank you for inviting me to speak at this forum.

As this is my first time speaking with you as the Chief of IPO, let me tell you a little about my background...

I have been a public servant since 1996 when I was hired by the Department of Justice to work in the INS General Counsel program. Since then I have held a number of positions – both legal and operational – within national security, law enforcement and operations within DHS and the broader interagency. I have worked as a policy maker at all levels of government. Of note, I served as the associate director for the Fraud Detection and National Security Directorate from 2012 to 2015. I joined USCIS in May 2012 after serving as the National Security Council's (NSC) director for border and interior enforcement since January 2010. My duties involved immigration, transnational organized crime, terrorism, intelligence, law enforcement, and anti-fraud policy.

I was present at the meeting between the IIUSA Board and our Director, Francis Cissna, a few weeks ago. The meeting provided IIUSA the opportunity to articulate the questions and concerns of the community to Director Cissna. The transcript from that meeting can be found on the USCIS website.

Director Cissna's expectations for the EB-5 program were laid out during the meeting. Summarizing, they are:

- He expressed that USCIS is working on a series of reforms focused on making the program run better and on enhancing the integrity of the program.
- He expressed a clear desire to protect the program from abuse by bad actors, and those who commit fraud or exploit loopholes in the program.
- His expectation is that we work to improve transparency, protect national security, and ensure lawful administration of our nation's immigration programs.
- He noted his expectation that the program is one in which foreign nationals actually place their investments at-risk, in projects that create real and verifiable employment.

The agency has been working to ensure that Director Cissna's expectations are met.

First, through the public regulatory process:

- 2017, DHS published the EB-5 Immigrant Investor Program Modernization Notice of Proposed Rulemaking (NPRM). The NPRM proposed, among other changes, to increase the minimum investment amounts for new EB-5 petitioners and reform the Targeted Employment Area designation process.
- DHS also published an Advance Notice of Proposed Rulemaking (ANPRM) regarding certain aspects of the EB-5 regional center program and requested public comment on those potential changes. A number of potential regulatory changes discussed in both the NPRM and ANPRM are intended to further support and enhance EB-5 program integrity.
- The agency is moving forward with rulemaking on both notices and anticipates regulatory action soon. Earlier this month, our Fall Unified Agenda was published and included three EB-5 rules: the Final Rule for the NPRM discussed above and two additional Notices of Proposed Rulemaking to make further operational and security updates to the EB-5 program.

Second, through policy updates to the USCIS Policy Manual:

- In May 2018, we published an update to the Policy Manual that rescinded prior guidance on the tenant occupancy methodology.
- In August 2018 we updated the Policy Manual to clarify agency policy as it relates to a regional center's geographic area and requests to expand the geographic area of a regional center. More on this later. We also updated the Policy Manual to clarify agency policy with respect to changing regional center affiliation, and the reasonableness of certain multipliers used in economic models based on geographic impact.

I believe that it is critical for the strength of the program that USCIS and the EB-5 stakeholder community work to improve transparency, protect national security, and ensure lawful administration of our nation's immigration programs.

The program has been burdened with a lack of statutory clarity. While we await further clarification from Congress, Director Cissna has expressed that our focus must be on the day-to-day management of the program. Specifically, program integrity is critical to the Administration's focus at this time.

The agenda for this conference outlines many issues of interest to the EB-5 stakeholders' writ large – I'll tailor the next phase of my remarks to broadly address, to the extent that I can, those topics:

I understand the community has expressed concern regarding the issue of the further deployment of capital in cases where the investment has been made but the visa is not yet available.

Further deployment of capital (e.g. redeployment)

The USCIS Policy Manual was updated on June 14, 2017 to provide guidance on the capital at risk requirement, including the sustainment of that requirement through the conditional

permanent residence period. This guidance is relevant to those cases where capital is further deployed after the job creation requirement has been satisfied.

Once the job creation requirement has been met, the following requirements continue to apply to any further deployment of capital:

- The immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on that capital;
- Both a risk of loss and a chance for gain must be present for the investment; and
- Business activity must actually be undertaken.

I'll note that the at-risk requirements are identical before and after the job creation requirement is satisfied, except that before the job creation requirement is satisfied, the full amount of the investment must also be made available to the business (es) most closely responsible for creating the employment upon which the petition is based.

At the Form I-526 stage, even though there is no additional job creation requirement in a further deployment, the requirement for a commercial activity within the scope of the new commercial enterprise's ongoing business, of course, remains. Therefore, the capital is properly at risk if it is used by the new commercial enterprise to engage in commerce (in other words, the exchange of goods or services) consistent with the scope of the new commercial enterprise's ongoing business.

- This means, for example, if the business of a new commercial enterprise was to loan pooled investments to job-creating entities for the construction of residential buildings, the new commercial enterprise, upon repayment of the initial loan that resulted in the required job creation, may further deploy the repaid capital into one or more similar loans to other entities.
- Similarly, the new commercial enterprise may also further deploy the repaid capital into certain new issue (i.e. primary market) municipal bonds, such as for infrastructure spending, as long as investments into such bonds are within the scope of the new commercial enterprise in existence at the time the petitioner filed the Immigrant Petition by Alien Entrepreneur (Form I-526).

Another topic of interest to the group is the question of bridge financing:

Bridge financing was adopted by USCIS as a pragmatic solution for situations where a project needs to commence before EB-5 funds are contributed. The current USCIS Policy Manual sets forth some parameters for when EB-5 funds may be used to replace temporary, interim or bridge financing from non-EB-5 sources.

- USCIS Policy has been and continues to be that EB-5 financing cannot be used to replace permanent, long-term financing.

- The difficulty has been in explaining what characterizes temporary, interim, or bridge financing as opposed to permanent and long-term financing.

The term of a loan (i.e. the time until its maturity) does not always automatically disqualify that loan as a “bridge”.

- Short-term temporary financing, or bridge loan financing, is simply interim financing for a business project until more permanent long-term financing can be obtained. While bridge loan financing will typically have a short term, the crux of any analysis will not exclusively deal with the temporal aspect of the loan but rather the terms of the purported bridge loan financing in relation to the larger project and the bridge loan’s interim nature. If the replacement of temporary or bridge financing with EB-5 capital was not contemplated prior to acquiring the original temporary financing, petitioners should present evidence, such as the business plan and/or other related financing documents, that expressly contemplates this use of the non- EB-5 bridge financing on an interim basis and further contemplates the future receipt of more permanent long-term financing, from EB-5 capital or otherwise.

Compliance Reviews

IPO is continuing to conduct compliance reviews. These reviews are an additional way to enhance program integrity and verify information in regional center applications and annual certifications. Although each compliance review is unique, common areas may include verifying the regional center’s organizational structure and reported job creation and reviewing the regional center’s internal controls and process for conducting due diligence in screening investors. As a reminder, regional centers that are selected for a compliance review will receive a letter from USCIS with a data request outlining exactly what documentation is requested.

Now that we’ve done a few, we would like to highlight the following:

1. Effective coordination between the regional center and USCIS is important. Often it helps if a regional center designates a point person to interact with the USCIS review team. It is helpful if the point person is aware of the EB-5 requirements and able to quickly access any and all documentation needed to establish EB-5 compliance.
2. If your regional center is selected for a compliance review, you will be contacted by USCIS, sent a data request with a deadline to respond and provide the information to USCIS, and after USCIS reviews the information we will schedule a time for our auditors to come out to your location for a site assessment.
3. This will allow the auditors to ask follow-up questions as well as review the regional center’s internal controls, financial controls, and verify the information provided to USCIS.
4. Regional centers selected for a compliance review should have documentation and information readily available for the USCIS review team during the on-site assessment.

Geographic Area

As part of a Form I-924 revision that became effective in December 2016, USCIS changed the way a regional center must request a change to its geographic area. USCIS implemented the new policy as of February 22, 2017, the date on which use of the revised Form I-924 became mandatory, as follows:

- Any requests for geographic area expansion made on or after February 22, 2017, require that a Form I-924 amendment be filed and approved to expand the regional center's geographic area.
 - The Form I-924 amendment must receive approval of the expanded geographic area *before* any Form I-526 filings may establish eligibility at the time of filing based on an investment in the expanded geographic area.
- If a geographic area expansion request was submitted on a Form I-924 amendment or Form I-526 prior to February 22, 2017, and the request is ultimately approved, the additional Form I-526 petitions associated with investments in that area are still adjudicated under the prior policy. That policy did not require a formal amendment to expand a regional center's geographic area and permitted concurrent filing of the Form I-526 prior to approval of the geographic area amendment.

I'll close out with a general report on IPO's productivity in the last Fiscal Year.

Productivity

Form I-924 Completions - 72% increase in production which resulted in a 75% reduction in our backlog.

Form I-526 Completions – These increased by 21.9 % and this represented the most productive year for IPO to date.

Backlog Reduction

IPO has been able to put a significant dent into the Form I-526 backlog due in large part to additional resources provided to IPO. We have reduced the backlog by 36%. We will be working towards additional reductions in the backlog in FY19.

I'll close with a reminder that IPO has announced on USCIS' GovDelivery system, that we will be holding a national telephonic public engagement on Monday, November 19, 2018.

I encourage all of you, if you have not already done so, to register for this engagement.

One more thing, we are about to publish an update to the policy manual on redemption that will provide additional guidance regarding redemption agreements. We are expecting the policy to be live on our website as early as tomorrow. As it is not yet published, I will be unable to

comment or answer questions on it at this time, but I look forward to engaging with you on this topic during our November national public engagement.

Thank you for the opportunity to speak with you about IPO and the EB-5 visa category.