

United States Senate

WASHINGTON, DC 20510-4305

January 24, 2023

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Washington, DC 20528

RECEIVED

By ESEC at 10:50 am, Jan 25, 2023

Dear Secretary Mayorkas:

I am writing with regard to U.S. Citizenship and Immigration Services' (USCIS's) ongoing efforts to implement the *EB-5 Reform and Integrity Act of 2022* (RIA). The RIA is a significant legislative accomplishment, and I appreciate USCIS's engagement with my office both leading up to its enactment, as well as during the implementation phase. However, I am concerned about remarks made during a recent stakeholder engagement meeting, which suggest that USCIS is considering new sustainment requirements for new investors that would effectively decouple the time frame foreign investors must sustain their investment in the United States from their conditional permanent residence period. Such requirements would be inconsistent with the text and intent of the RIA, and I would encourage USCIS to consult carefully with the EB-5 stakeholder community on this and other issues that arise during implementation.

The RIA adds a new requirement to the EB-5 provisions of the *Immigration & Nationality Act* (INA), specifically that an alien's capital investment be "expected to remain invested for not less than 2 years." (hereinafter, the "sustainment provision").¹ During a recent EB-5 National Stakeholder Engagement, the Immigration Investor Program Office stated that "[t]hese modifications relieve the burden on new investors of maintaining their investment at-risk for long timeframes well beyond the scope of the investment project."² Stakeholders have expressed to me their concerns that USCIS may interpret this provision of the RIA to permit an investor to receive a return of their capital after it has been invested for two years, even if that period elapses prior to the end (or, for that matter, the beginning) of the investor's conditional permanent residency. Such a reading would be inconsistent with the text and purpose of the RIA.

Under its most natural reading, the sustainment provision requires that the alien's capital investment remain invested at least through his or her period of conditional permanent residence. Current USCIS policy requires an alien investor to submit evidence that he or she "sustained the investment throughout the period of the immigrant investor's residence in the United States" as part of his or her petition to

¹ *Consolidated Appropriations Act, 2022*, Pub. L. No. 117-103, 136 Stat. 49, 1070, Div. BB, sec. 102(a)(1) (Mar. 15, 2022) (RIA).

² U.S. Citizenship & Immigration Services, *EB-5 National Stakeholder Engagements*, at 5 (Oct. 19, 2022) (remarks by Paul Egan, Acting Policy Division Chief), available at <https://www.uscis.gov/sites/default/files/document/data/National%20Engagement-EB-5%20Immigrant%20Investor%20Program.pdf>.

remove conditions on permanent resident status.³ That conditional permanent residence period is two years—the same as the minimum two-year sustainment period codified under the RIA.⁴

Under longstanding statutory interpretation jurisprudence, “Congress is presumed to preserve, not abrogate, the background understandings against which it legislates.”⁵ Congress drafted the RIA to be completely consistent with USCIS’s current sustainment policy, rather than abrogate it. First, the RIA establishes new capital redeployment parameters that allow commercial enterprises to redeploy capital that must be maintained at risk for multiple years. Congress was aware of the need for EB-5 visa petitioners who face lengthy backlogs to maintain their capital at risk, and the capital redeployment provisions respond to that need.⁶ The redeployment provisions even explicitly decouple the sustainment period from the alien investors’ job creation requirement, clarifying that before the capital can be redeployed, the commercial enterprise must have “created a sufficient number of new full time positions to satisfy the job creation requirements of the program for all investors in the new commercial enterprise”⁷ A new two-year sustainment period would be inconsistent with redeployment rules that facilitate longer-term investments, and anticipate capital being redeployed even after the required jobs have been created.

Second, the RIA newly permits the Secretary of Homeland Security to extend an alien investor’s conditional permanent resident status by an additional year if the alien invested the requisite capital but did not yet create the required jobs. The extension is contingent upon the alien’s capital remaining invested while the alien is actively in the process of creating the required employment prior to the third anniversary of the alien’s admission for lawful permanent residence.⁸ This provision, which contemplates alien investors’ capital remaining at risk for more than two years after admission, would be in tension with a two-year sustainment period that would end for the majority of alien investors prior to admission.⁹

Finally, a two-year sustainment period that could terminate even prior to an alien investor’s admission to the United States would be inconsistent with the purpose of the RIA. Sen. Grassley stated that “[t]he EB-5 Reform and Integrity Act of 2022 is the result of years of hard work and negotiation, and it is our hope that it brings meaningful reform to a program badly in need of it and, mostly importantly, much-needed investment capital and the permanent jobs that can come with it, to inner city and rural areas where it is normally difficult, if not impossible, to attract investment capital.”¹⁰ I share this understanding of the bill’s purpose with my colleagues, and note that limiting the duration of these investments to only two

³ U.S. Citizenship & Immigration Services, *Policy Manual*, Vol. 6, Pt. G, Ch. 5 (Dec. 19, 2022), *available at* <https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-5>.

⁴ Immigration & Nationality Act, § 216A(d)(2)(A) (8 U.S.C. § 1186b(d)(2)(A)).

⁵ *U.S. v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002).

⁶ RIA sec. 103(b)(1) (codified at 8 U.S.C. § 1153(b)(5)(F)(v)).

⁷ RIA sec. 103(b)(1) (codified at 8 U.S.C. § 1153(b)(5)(F)(v)(bb)).

⁸ RIA sec. 104(a)(6) (codified at 8 U.S.C. § 1186b(d)(1)(B)(ii)).

⁹ Even as approximately half of EB-5 visas are issued to nationals of mainland China and India, these two countries face lengthy backlogs. *See* U.S. Department of State, *Report of the Visa Office 2021*, Table VI (Part IV), *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableVI_partIV.pdf (showing that of 2,023 EB-5 visas issued in FY 2021, 975 were issued to alien investors from mainland China, and 47 to alien investors from India); *see also* U.S. Department of State, *Visa Bulletin for January 2023*, No. 73, Vol X (Dec. 19, 2022), *available at* <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-january-2023.html> (final action dates for EB-5 preference classes are Mar. 22, 2015 for mainland China and Nov. 8, 2019 for India).

¹⁰ 168 CONG. REC. S1105 (daily ed. Mar. 10, 2022) (statement of Sen. Grassley).

years would be inconsistent with Congress's goal of bringing investment capital to inner city and rural areas.

Thank you for your attention to this issue, and I encourage the Immigrant Investor Program Office to continue to consult carefully with the stakeholder community in implementing the RIA.

Sincerely,

A handwritten signature in black ink, reading "John Cornyn". The signature is fluid and cursive, with the first name "John" and last name "Cornyn" clearly distinguishable.

John Cornyn
United States Senator

Cc: Ur Jaddou, Director, USCIS
Alissa Emmel, Chief, Immigrant Investor Program Office, USCIS
Karen Karas, Deputy Chief, Immigrant Investor Program Office, USCIS
Paul Egan, Acting Policy Division Chief, Immigrant Investor Program Office, USCIS



U.S. Citizenship
and Immigration
Services

February 27, 2023

The Honorable John Cornyn
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

Thank you for your January 24, 2023 letter to the Department of Homeland Security (DHS). Secretary Mayorkas asked that I respond on his behalf.

We appreciate your thoughts on U.S. Citizenship and Immigration Services' (USCIS) efforts to implement the EB-5 Reform and Integrity Act of 2022 (RIA). Thank you for sharing your concerns about USCIS' remarks on the new sustainment requirements. Your feedback and that of your constituents, as with any member of Congress and other EB-5 stakeholders, is always welcome as we implement the RIA.

USCIS appreciates your suggestion to engage with the stakeholder community when implementing the RIA and is committed to engaging with the public on a regular basis. In line with this commitment, USCIS has planned quarterly stakeholder engagements through Fiscal Year 2023 plans to publish updates to "EB-5 Questions and Answers" posted on the USCIS website. USCIS is constantly looking for ways to improve our engagement with EB-5 stakeholders and remains committed to transparency for all benefits we administer, to include the EB-5 program.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please have your staff contact the USCIS Office of Legislative Affairs at (240) 721-3801.

Respectfully,

A handwritten signature in black ink, reading "Ur M. Jaddou" followed by a long horizontal flourish.

Ur M. Jaddou
Director