



**Immigrant Investor Program Office
2019 IIUSA EB-5 Industry Forum
Sarah M. Kendall Remarks
October 29, 2019**

Good morning! Thank you for inviting me back to speak at this forum.

I have been the Chief of the Immigrant Investor Program Office (IPO) for over a year and I can honestly say that we have a **dedicated and hard-working staff** who continue to handle this complex caseload with diligence and integrity. The agency has made great strides in governing the program, and we are committed to ensuring that it works for you all and the American people.

You all know this because you are living this on a daily basis, but interest in the program has grown since its inception. Consider the numbers. In 2007, there were 11 regional centers operating in the United States. Today, there are 819. In 1991, the approximate amount of EB-5 annual investments totaled **forty million five hundred thousand dollars (\$40,500,000)**. By September 1, 2019, the approximate amount of EB-5 investments from the inception of the program is in the billions of dollars.

With this growth comes inevitable change and improvement. Before I delve into our plans for the future, I'd like to provide some updates from what I said at last year's forum.

A significant item from last year's remarks was the working process surrounding development of the proposed modernization rule. The agency had published the proposed rule, EB-5 Immigrant Investor Program Modernization in 2017, and on July 24, 2019, it was published as a Final Rule in the Federal Register. This final rule goes into effect **on November 21st**. The new regulatory changes under the EB-5 modernization rule are an essential part in improving program integrity. The Rule ensures that the program's minimum capital investment requirements keep pace with

inflation and continue to facilitate the amount of job creation envisioned by Congress. The corresponding update to the USCIS Policy Manual should be posted very shortly. This will ensure that our officers, and the public, have the guidance needed to carry out the changes from the Final Rule.

Briefly, the new rule provides for:

- An increase in the required minimum investment amounts;
- A retention of priority dates in certain cases;
- An amendment to certain targeted employment area (or TEA) designation criteria and process; and
- Removing state designation of TEAs.

The rule applies prospectively. This means that all filings made prior to November 21 will be adjudicated under the current requirements. Filings received on or after November 21st will be adjudicated under the regulations as updated by the EB-5 modernization rule.

In preparation for implementing the final rule, USCIS is establishing internal training to assist our adjudicators and economists in applying the new regulations to filings received on or after November 21st. This training involves having adjudicators participate in several scenario-based interactive training sessions. These will allow them to further understand and interpret requirements under the new rule.

During our last stakeholder engagement, held on September 9th, we received questions regarding TEA determinations, so I would like to discuss this topic in more detail.

Congress explicitly wanted a discount investment level for certain areas – to include a rural area or an area that has experienced high unemployment. A rural area is any area not within either a standard metropolitan statistical area, also known as an MSA, designated by the Office of Management and Budget or the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.

When it comes to high unemployment areas where unemployment is at least 150% of the national

average, the new rule establishes that cities or towns with 20,000 or more residents that are outside of an MSA are eligible for TEA designation provided that the unemployment rate for the area equals or exceeds 150% of the national average. This is an additional independent area that could qualify as a high unemployment TEA, the others being: the MSA; the specific county within an MSA; and the county in which a city or town with a population of 20,000 or more is located.

Apart from these independent areas that could qualify as a TEA, USCIS may also designate, as an area of high unemployment, a collection of census tracts comprising the census tract or contiguous census tracts in which the new commercial enterprise (NCE) is principally doing business. This includes, any or all directly adjacent census tracts, where the weighted average of the unemployment rate for the combined tracts, based on labor force employment measure for each census tract, is at least 150% of the national average unemployment rate. This replaces the current provision that allows state governments to designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more as an area of high unemployment. As noted in the comment responses to the final rule, this does not establish a separate application or process for obtaining TEA designation from USCIS prior to filing the EB-5 immigrant petition and USCIS will not issue separate TEA designation letters for areas of high unemployment. USCIS will make the determination as part of the existing adjudication process.

Another point of clarification that I'd like to make has to do with how some investors will only have invested a partial amount of their capital before the November 21st date, assuming that they also will have already filed their I-526 petitions before November 21st and are still actively in the process of investing the remaining amount of capital while meeting all other applicable requirements at the time of filing. Investors who filed their petitions before November 21st will continue to be subject to the requirements under the current rule. Petitioners must show actual commitment of the required amount of capital and do not need to have completed their investment before the effective date of the new rule, but may continue to be actively in the process of investing the minimum investment amount required under the current rule. For example, an investor filed their I-526 petition in June 2018 based on an investment in a TEA. They otherwise meet all other eligibility requirements at the time of filing, including identifying the capital for

investment and its lawful source, and have invested \$100,000 and are actively in the process of investing the remaining \$400,000, for example, placing the \$400K in an escrow account based on terms that comply with the agency's escrow policy, when the new rule becomes effective on November 21st. Because they filed their petition before the effective date of the new rule, they may continue to be eligible based on investing \$100,000 and being actively in the process of investing \$400,000, for a total of the required \$500,000.

I want to emphasize, however, that investors must be eligible at the time of filing and the failure to have identified and committed the full amount of capital at the time of filing does not establish eligibility under applicable requirements.

Last year, I also discussed our intention of strengthening the program against bad actors and fraud. At IPO we know that many EB-5 projects go well, providing much-needed jobs for American communities and significant additional capital investments. However, there are a growing number of cases where we have worked with our law enforcement and other partners, including the SEC, related to civil and criminal investigations. In the last year, we have trained, presented and worked with more law enforcement agencies than ever before. Partnership with law enforcement or other entities occurs both when our staff finds something of concern during the adjudication process and when investors report suspected fraud. IPO has made structural changes to ensure continued program integrity.

As you know, IPO has a Compliance program. Immigration officers conduct site visits to new commercial enterprises and job-creating entities (JCEs) in conjunction with filed I-829s. We also conduct regional center compliance reviews, a process in which we seek to verify the information provided by regional centers in the regular course of business. This process includes auditors reviewing commercial and public records as well as the filings from the regional center under review. We also work with USCIS and Department of State officials abroad to perform overseas verification checks on various questions that arise in our petition pool, such as for source of funds and other key elements of the program.

Bad actors, fraud, and compliance issues have not gone unnoticed by Members of Congress. We realize that there are discussions underway about reforming the program, and USCIS been asked to provide technical assistance on several EB-5 bills in the last year. USCIS has been consistent in

providing technical assistance that focus on strengthening our ability to administer the program with integrity. Various members of Congress have introduced or worked on bipartisan bills that would make strides towards addressing issues that USCIS leaders have long articulated regarding the need to shore up the agency's authority to fully address fraud, misrepresentation, criminal misuse and other nefarious concerns found in the EB-5 caseload. Some of these bills include proposals to collect additional fees from regional centers and investors which would be allocated to DHS to perform audits and site inspections. Some proposed legislative language we have seen would require more broadly based background checks for individuals associated with the regional center. Obviously, I cannot predict the future of these efforts, but I wanted to make you aware that we continue to place importance on continually assessing and improving the of the EB-5 program's integrity.

I also spoke last year on the topic of redeployment of funds and I'd like briefly address some questions we have received on this topic.

The last modification to the USCIS Policy Manual on this topic was published in 2017. That update to the Policy Manual primarily addressed the need to continue to remain eligible by keeping invested capital at risk through further deployment for all petitioners, including the sustainment of that requirement through the conditional permanent residence period for Form I-829 petitioners.

We understand that some petitioners have not only invested in an NCE but have also satisfied the job creation requirement through the initial deployment of capital and had their initial deployment of capital repaid back to the NCE. For example, the JCE repaying the initially deployed loan of EB-5 capital back to the NCE and thereby potentially leading to their investment no longer being considered at-risk.

We have received valuable feedback from the stakeholder community signaling that there is a desire to have a more robust expression of redeployment policy. We continue to work on such policy, and are interested in your input.

Now that we are a month into the new fiscal year, an important reminder that I'd like to give you

concerns Form I-924A, the Annual Certification of Regional Center. Regional Centers that were approved as of September 30, 2019 should be filing their I-924A for fiscal year 2019. The form and the associated fee need to be filed with the California Service Center on or before December 29, 2019. In fiscal year 2018, 106 regional centers failed to file their I-924As and were issued Notices of Intent to Terminate. For regional centers that do timely file, there are steps that can be taken to reduce the chances of receiving Requests for Clarification/Requests for Evidence from USCIS regarding the I-924A, including:

- (1) Make sure that the information provided on the form is accurate. If there are inconsistencies between what is provided on the I-924A and what was previously provided to USCIS, take time to explain why something is different;
- (2) Regional Centers are required to provide government-issued photo identification for all principals as part of their annual I-924A submissions. During the fiscal year 2018 filing period, a significant amount of submissions lacked the required photo identification. Please review the form requirements and make sure that your submission is complete. This will save us time and you time; and
- (3) Regional Centers **must** report changes to the Regional Center's name, ownership, organizational structure, principals or geographic area, among other things, by submitting an I-924 amendment and paying the associated fee. Regional Centers cannot simply notify USCIS of such a change on an I-924A.

Many of you submitted questions in advance and although I've covered a few in my remarks today, there are a few more that I would like to address now.

Would USCIS consider the filing of a premium expedited processing Application to be filed with the I-526 petition?

At this time, we are not considering a premium processing option.

(1) Will you hold regular stakeholder meetings?

We have received feedback from EB-5 stakeholders on this question. We understand that there is a desire to have a regular schedule of stakeholder engagements. USCIS had determined that IPO will host two regular public meetings a year to provide a more regular opportunity to engage the EB-5 community.

(2) Various questions about processing times

The increased processing times have been the subject of much comment and understandable concern in the community – especially after the high production rates posted in 2018. IPO had a challenging year in 2019 – we worked diligently to implement the program our leadership and the American people expect while also managing the lapse in authorization of the regional center program.

For example, consistent with former Director Cissna’s remarks to IIUSA’s board and to Congress in 2018, in 2019, IPO focused on enhancing the integrity of the program and working to find ways to protect the program from abusive actors. This has meant greater coordination with agencies in the law enforcement community and with other partners, including at the Securities and Exchange Commission. In the last year, both our FDNS and Compliance teams have presented training *to* and worked *with* a larger number of outside agencies than in all years past. The community has likely noted the results of our law enforcement partners’ and other partners’ work in criminal and civil cases, and the SEC enforcement actions in various federal courts. We have also invested in building more robust quality assurance and control programs to ensure consistent adjudication practices. Additionally, in the last year we conducted a training update for all I-526 adjudicators and economists. We anticipate doing the same for adjudicators of the Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status. All of this has some impact on processing times.

From December 22nd through January 25th, the sunset of the Regional Center program disrupted IPO operations even after the program was reauthorized. The sunset cost IPO weeks of adjudicative time and interfered with our records management processes, since IPO had to pivot to other work. After the program was reauthorized, we had to again reorder our workforce to restart work on I-924s and I-526s associated with a Regional Center.

(3) In cases where investors have been the victim of fraud or misappropriation, but take corrective action, such as taking over a project, investing more money, finding a new developer, etc., can USCIS develop a policy that supports rather than punishes innocent investors that work in good faith to rectify circumstances created by bad actors?

In cases where investors have been the victim of fraud or misappropriation of funds, USCIS continues to adjudicate those petitions in accordance with applicable legal requirements for EB-5 eligibility.

Petitioners must be eligible at the time of filing, continue to be eligible through adjudication and, for purposes of revocation of approved Form I-526 petitions, continue to be eligible through the time they obtain status. In general, they must demonstrate a qualifying investment of the requisite amount of capital and creation of sufficient jobs. This includes a demonstration that their capital has been placed at risk for the purpose of generating a return on such capital and that the full amount of such capital is made available to the relevant job-creating business(es). Form I-829 petitioners must also demonstrate that they sustained their investment for the 2-year period of their conditional residence. USCIS will consider all relevant facts and circumstances surrounding the fraud and/or misappropriation of funds in particular cases, including any corrective actions by the investors, in line with legal requirements.

The new EB-5 rule which becomes effective November 21, offers greater flexibility to certain immigrant investors who have been the victim of fraud or misappropriation of funds and who have a previously approved Form I-526 petition. If they have not yet obtained status and need to file a new Form I-526 petition because the fraud or misappropriation adversely impacted their continued eligibility under the earlier approved petition, they generally may now retain the priority date of their earlier approved petition subject to certain exceptions.

(4) Can you speak about regional center oversight of investment activity?

The overall purpose of a regional center is to pool EB-5 investor capital and deploy it into a new commercial enterprise for the purpose of promoting economic growth through investment and job creation. Thus, a regional center is responsible for monitoring capital investment activities and the allocation of the resulting jobs created or maintained under the regional center's sponsorship. To the extent that a regional center fails to engage in proper monitoring and oversight of the capital investment activities and jobs created under its sponsorship, that regional center may no longer serve the purpose of promoting economic growth in compliance with the program and its authorities.

When there is a failure of the regional center to monitor capital investment activities, not only can there be a failure to promote economic growth, but there can also be significant harm. For example, in cases where EB-5 funds have been misappropriated, contractors may not be paid. Even companies that existed and were healthy prior to working on an EB-5 project can go bankrupt when fraud or lax management by a regional center leads to the failure of EB-5 projects. Further, the mishandling of EB-5 funds may also jeopardize the EB-5 investors' eligibility for lawful permanent resident status in the United States.

Safeguarding the integrity of the EB-5 program is of paramount importance to USCIS and to the public. We seek to effectively administer the program and guard against abuse. Unfortunately, despite the successes of the program, instances of malfeasance and abuse by a limited number of program participants have resulted in cases involving substantial financial losses to investors, negative impact to local economies, and to the program's credibility generally. Even with stringent safeguards in place, program integrity depends in part on the responsible actions of program participants. This is especially so given the role of Regional Centers designated by USCIS specifically based on their making a case for how they will actualize the promotion of economic growth and the job creating goals of the EB-5 program.

The requirement for regional centers to engage in monitoring and oversight is not new. USCIS provides guidance in the USCIS Policy Manual that a regional center will oversee all investment activities affiliated with, through or under the sponsorship of the regional center and reminds the regional center of this responsibility in its I-924 approval notice. Prior to the USCIS Policy Manual, the Adjudicator's Field Manual spoke about how the regional center needed to provide evidence to USCIS of its plans to "oversee all investment activities affiliated with, through or under the sponsorship of the proposed Regional Center."

To reiterate what I said last year, the expectations we have for ourselves are to run this program with efficiency and with integrity. I believe that with the new EB-5 modernization rule, policy manual updates and other efforts, we will continue to meet these expectations.

I encourage you to examine how you might strengthen the EB-5 program. I urge you to find ways to make a meaningful impact on the industry's conduct and perceptions of integrity. Your efforts and the efforts of other industry associations can help improve these investment processes and help guard against malfeasance. The EB-5 community now has mature organizations that could and should participate in safeguarding its own marketplace. You are well positioned to contribute in this respect.

With that, thank you again for the opportunity to meet with you and speak with you about the EB-5 program.