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The Real Estate Roundtable

February 28, 2024

The Honorable Dick Durbin
Chair
U.S. Senate, Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
U.S. Senate, Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jim Jordan
Chairman
U.S. House of Representatives
Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
U.S. House of Representatives
Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Judiciary Committee Chairs and Ranking Members:

Thanks to your leadership Congress passed the *EB-5 Reform and Integrity Act of 2022 (RIA)*. This bipartisan legislation modernized the EB-5 “regional center” program to attract overseas investors while deterring fraud in the program and enhancing national security protections. *RIA* also made foreign investment capital more accessible for infrastructure and economic development projects in rural, urban, and suburban markets across the nation. Since *RIA*’s enactment, however, [“guidance”](#) enacted by the U.S. Citizenship and Immigration Services (USCIS) is undermining the landmark compromise that took years for your committees to achieve. We respectfully ask you to correct USCIS’s arbitrary, irrational, and procedurally defective guidance through available legislative vehicles (including any continuing resolution) so the EB-5 program can function as Congress intended.

The troubling October 11, 2023 [guidance](#) states that EB-5 investments made after *RIA*’s enactment must “remain invested for at least two years.” That is, USCIS takes the position that foreign investors need only to sustain their investments for two years, and their investments may be returned by project developers within two years. This website guidance statement contradicts regulations kept by USCIS on its rule books for decades. The controlling regulation at [8 C.F.R. § 216.6\(c\)\(1\)\(iii\)](#) directs that EB-5 investments must be sustained throughout the applicant’s conditional residency period – *not* for only a flat two-year period.

The October 2023 [guidance curtails](#) EB-5 capital – at a time when stressed commercial real estate (“CRE”) markets need **greater** access to capital. Current vulnerabilities to CRE that threaten the health and stability of our economy are well known by now. The [Wall Street Journal](#) (Jan. 16) reports that \$2.2 trillion in CRE debt is maturing before 2028, “boosting the prospect of a surge in defaults as property owners are forced to refinance at higher rates.” The [2023 annual report](#) of the Financial Stability Oversight Council (FSOC) listed CRE as the top financial risk to the U.S. economy. Treasury Secretary Yellen [testified](#) recently to the Senate Banking Committee that she expects significant “stress and losses” at regional banks exposed to the imminent wave of souring CRE loans.

EB-5 will certainly not solve all of CRE’s current liquidity issues. However, as noted below, USCIS’s flawed “two-year payback” guidance is amplifying the problem, harming potential housing related developments, and undermining the job creating goals of regional centers. Moreover, we believe USCIS has enacted the guidance, which purports to change existing regulations, without following rulemaking procedures required by law.


- ***Office-to-Residential Conversions Need Investments for More than Two Years:*** Underutilized and increasingly vacant commercial buildings can be reimagined to provide much needed housing, but “conversion” projects face many [challenges](#) – particularly a lack of conventional financing. USCIS’s “two-year payback” guidance deflates any realistic opportunities for EB-5 capital to be accessible to support conversions and increase housing supplies. It typically takes longer than two years to assemble all the layers in a capital stack, **and** secure permits and local zoning changes, **and** re-design and re-build office structures to accommodate multifamily housing. The guidance at issue effectively neuters EB-5’s potential as a financing source for adaptive re-use projects. Furthermore, USCIS’s “two-year payback” policy runs counter to other federal [initiatives](#) that can help bring underutilized commercial buildings back to productivity.
- ***EB-5 Capital Must be Kept “At Risk” to Boost Job Creation:*** Longstanding USCIS regulations ([8 C.F.R. § 204.6\(j\)\(2\)](#)) require that EB-5 capital must be “at risk.” The agency’s policy manual and landmark decisions have been clear – for decades – that developers cannot offer, and investors cannot expect, guarantees for a return on (or of) capital within a certain number of years.¹ Regardless of industry, very few projects are stabilized and in a position to repay capital contributions in two years, and those that can will have diminished job creation and minimal economic impact. The “two-year payback” guidance eliminates liquidity risk and undermines the job creating benefits that Congress envisioned with its recent comprehensive reforms.
- ***USCIS has Violated the Administrative Procedure Act (APA):*** [8 C.F.R. § 216.6\(c\)\(1\)\(iii\)](#) – the regulation that couples the EB-5 sustainment period with an investor’s conditional residency period – has been in place for [30 years](#). Interpretative guidance posted by the agency on its website cannot undo years of industry practice and market expectations shaped by a rule duly promulgated under the Administrative Procedure Act (APA). USCIS’s [end-run](#) around the regulation that ties capital sustainment to conditional residency – via a statement posted on a website – is a textbook example of bad government. Congress should redress it.

¹ [USCIS Policy Manual Vol. 6, Part G, Ch. 2 Sec. A](#), citing [Matter of Izummi](#) (1998) and [Matter of Ho](#) (1998).

- ***We Need Congress to Address the Issue:*** RER, along with the U.S. Chamber of Commerce, EB-5 Investment Coalition, and IIUSA, sent a letter on [February 9, 2023](#) to USCIS during an “engagement process” run by the agency that can only be described as a *fait accompli*. We asked the agency to confirm that the capital sustainment period remains tied to conditional residency, but our efforts for administrative relief have not succeeded. We call on Congress to correct USCIS’s error with a short statutory change that simply codifies the long-standing regulatory approach to couple the periods for EB-5 capital sustainment and conditional residency.²

Thank you for considering our request. For more information, please contact Duane J. Desiderio, Senior Vice President and Counsel at RER (ddesiderio@rer.org).

Sincerely,



Jeffrey D. DeBoer
President and Chief Executive Officer

cc:

The Honorable Mike Johnson, Speaker of the House
The Honorable Charles E. Schumer, Senate Majority Leader
The Honorable Mitch McConnell, Senate Minority Leader
The Honorable Hakeem Jeffries, House Minority Leader
Members of the Senate and House Judiciary Committees

² Our tailored, recommended legislative fix: “Section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) is amended in subparagraph (A)— in clause (i) following ‘for not less than 2 years’ by inserting ‘and to include the period of the alien investor’s status as a conditional permanent resident of the United States.’”