AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services (USCIS)
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via www.regulations.gov

RE: EB-5 Reform and Integrity Act of 2022; Ensuring the Integrity of the EB-5 Program; Automatic Revocation of Petitions for Immigrant Classification — Comments on the Notice of Proposed Rulemaking (CIS No. 2770-24; DHS Docket No. USCIS-2026-0100; RIN 1615-AC94), 91 Fed. Reg. 40676 (proposed July 2, 2026)

Dear Regulatory Coordination Division:

The American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent regional centers, new commercial enterprises, job-creating entities, and individual investors regarding the requirements of the EB-5 Immigrant Investor Program. AILA appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) implementing the EB-5 Reform and Integrity Act of 2022 (RIA), Pub. L. 117-103.

AILA has organized its review of the NPRM around the specific regulatory provisions spanning proposed 8 CFR§§204.400 through 204.433. This letter consolidates AILA's concerns into 12 categories, and for each one identifies the specific NPRM provisions where the issue arises, quotes or summarizes the operative rule text, and sets out AILA's recommendations.

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1. DHS CREATES NEW SUBSTANTIVE REQUIREMENTS BEYOND THE RIA

Several proposed provisions impose eligibility restrictions, deadlines, or compliance obligations that appear nowhere in the RIA or the Immigration and Nationality Act (INA). AILA urges DHS to implement Congress's statutory language rather than adopt new policy choices Congress did not enact.

Proposed 8 CFR §204.401 – Definition of "Person Involved"

> DHS proposes to clarify that a person is in a position of substantive authority if the person serves as an administrator, a board member, a general partner, a limited partner, a manager, an officer, an owner, or in a similar position at the regional center, new commercial enterprise, or job-creating entity. *See* proposed 8 CFR §204.401, *Person involved.* AILA believes that this proposed definition is overly broad, similar to the concerns noted by commentators when Form I-956H was published. Specifically, the RIA defines a "person involved with" in the following manner. INA § 203(b)(5)(H)(v):
>
> For the purposes of this paragraph, unless otherwise determined by the Secretary of Homeland Security, a person is involved with a regional center, a new commercial enterprise, any affiliated job-creating entity, as applicable, if the person is, directly or indirectly, in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the program described in subparagraph (E). An individual may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner, an officer, a board member, a manager, an executive, a general partner, a fiduciary, an agent, or in a similar position at the regional center, new commercial enterprise, or job-creating entity, respectively. INA §203(b)(5)(H)(v).

The NPRM incorrectly states that all owners, direct or indirect, of a regional center, new commercial enterprise or job creating entity (JCE) will be automatically considered a "person involved with" a regional center, including a limited partner. The text of the RIA states that a "person is involved with" a regional center is in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the program described in subparagraph (E). *See* INA §203(b)(5)(H)(v). Thus, the definition proposed by USCIS is overly broad because it automatically assumes that individuals meet the definition through title alone; however, the test is whether an individual has the authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the program.

Moreover, the RIA states that "an individual may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner…" *Id.* Thus, the text of the RIA is clear that an owner (or even a limited partner) MAY be a person involved, but an owner or a limited partner does not automatically meet the definition. Instead, the owner or limited partner must still be in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the program. The proposed 8 CFR §204.401, *Person involved* definition is ultra vires and overly broad. ***USCIS must adopt a definition that considers whether the individual actually has the management or authority to decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding.***

As the EB-5 industry matures in the years after the passage of the RIA, institutional investors may acquire ownership interests in regional centers. It is unclear how this provision would work practically in such situations. Specifically, does the government contemplate that an institutional or individual investor with no operational role and only a passive ownership interest in a regional center would be subject to the Form I-956H filing requirement and attendant biometrics capture? Given the welcome evolution and potential further development of the EB-5 industry, AILA urges DHS/USCIS to draw back this requirement to apply only to actively involved owners (i.e., those exercising operational or managerial authority over the EB-5 funding), lest it hinder institutional and other investor involvement in regional centers that is consistent with the RIA's provision requiring that EB-5 offerings be fully compliant with U.S. securities law (codified in INA §203(b)(5)(Q) and related program integrity and compliance provisions in INA §203(b)(5)(E)-(K)).

Additionally, the NPRM appears to provide no process for regional centers, New Commercial Enterprises (NCEs), or JCEs to contest such a determination from the agency that a person is "involved" in the entity. The absence of such a process creates uncertainty regarding how entities may correct erroneous or overbroad determinations. The NPRM contemplates issuing a Notice of Intent to Deny if there are issues with any persons involved during review of an application for regional center designation. If the regional center did not take commercially reasonable efforts to remove the person from his or her involvement, then USCIS would generally deny the application for designation. This process, as outlined, does not seem to cover situations where the agency determines that an involved individual is ineligible after approval of the application for designation. Where the agency may be erroneous in making a finding, such as in a case of mistaken identity or the identified issue has been resolved, the regional center, NCE, or JCE should be afforded the opportunity to respond and explain why they believe the person remains eligible to be involved. Second, the 14-day timeframe proposed in the NPRM to take commercially reasonable efforts to remove the person from his or her involvement with the affected entity(ies) and provide USCIS information on the removal of that person is insufficient, for example, where an internal investigation may be required. The NPRM provides no basis, in statute or otherwise, for the 14-day period. Without sufficient time to review the agency's allegation, this proposed timeframe would put regional centers potentially at risk of wrongful termination or breach of contract. ***AILA recommends that USCIS increase the timeframe to take commercially reasonable efforts to remove any such individual.***

Finally, because the NPRM defines "involved persons" to include immigrant investors who are owners of an NCE, this implies that USCIS could deny a project application due to the ineligibility of one (1) immigrant investor. The intended result of ensuring eligibility of involved persons would more easily be accomplished through denial of that immigrant investors Form I-526E rather than taking an action that would prevent other immigrant investors from attaining approval of their Forms I-526E. Additionally, the EB-5 investors go through their own background and vetting process at several stages: Form I-526/E, the immigrant visa or adjustment of status process, and Form I-829. At each stage a background check is completed and the investor is vetted. There is no indication in the text of the RIA that Congress intended the investors themselves to be included in this definition, nor does USCIS have the ability to collect overseas biometrics from hundreds or thousands of investors prior to I-526/E approval. ***In the absence of clear congressional authority, the proposed definition as it applies to the EB-5 investors themselves is overbroad and ultra vires.***

Proposed 8 CFR §204.405 — Spouse and Children as Derivative Beneficiaries

A principal EB-5 investor's spouse and unmarried children under 21 already derive immigrant classification from the principal's petition under INA § 203(d); they need not make a separate qualifying investment and take the same preference category and priority date as the principal. Whether a child has "aged out" is governed by the Child Status Protection Act (CSPA), which in the EB-5 context can freeze a child's age using the pending time attributable to petition adjudication. Separately, the RIA added express protection for derivatives of good-faith investors: under INA §203(b)(5)(M), a petition that continues to meet EB-5 eligibility following termination of a regional center or debarment of an NCE or JCE retains the original priority date and prevents age-out of derivative beneficiaries. USCIS has implemented these protections through Policy Manual guidance (Volume 6, Part G) rather than through amended regulations. The RIA also authorizes concurrent filing of a Form I-485 adjustment application by a principal and derivatives who are in the United States when a visa number is available — a benefit USCIS already recognizes in practice.

The proposed rule would move these derivative protections out of policy guidance and into a dedicated regulatory section. As described in the source review, the proposed section would:

(a) confirm that dependents obtain conditional permanent residence on the strength of the principal's single qualifying investment;
(b) fix the child's qualifying age and unmarried status as of the filing of the principal's Form I-526 or I-526E;
(c) codify concurrent Form I-485 filing for family members already lawfully in the United States; and
(d) preserve a family's timeline where the investor moves to a compliant project within the RIA's remediation window following program noncompliance.

AILA Recommendations

1. **Support codification but preserve CSPA benefits.** AILA supports moving derivative and anti-age-out protections into regulation. DHS should confirm in regulatory text that the section does not displace or narrow the CSPA, and that the RIA's anti-age-out protection for good-faith investors operates in addition to, not instead of, the CSPA. Using the I-526/I-526E filing date as the age anchor is helpful for certainty, but the rule should make clear it establishes a protective floor and does not withdraw any CSPA age calculation that would yield a younger "CSPA age."
2. **Protect innocent dependents.** Where a regional center, NCE, or JCE is terminated or debarred through no fault of the family, the regulation should ensure derivatives retain their priority date and are shielded from age-out while the investor pursues remediation. It should also confirm that USCIS will hold the matter in abeyance and toll deadlines, consistent with current Policy Manual guidance.

3. **Do not create new documentary traps.** Evidentiary requirements for the qualifying relationship (marriage and birth records) should track existing standards and permit secondary evidence where primary records are unavailable, so that families are not disqualified on documentary technicalities.

Proposed 8 CFR §204.406 — Establishment and Retention of the Priority Date

As an initial matter, the current regulation at 8 CFR §204.6(d) already establishes the core priority-date framework that the source review attributes to the proposed section. Under 8 CFR §204.6(d), the priority date is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed; a denied petition does not establish a priority date; a priority date is not transferable to another alien. In addition, where an investor has multiple approved petitions, the investor is entitled to the earliest qualifying priority date; and the priority date of an approved petition carries to a subsequently filed EB-5 petition, except where the investor already used it to obtain legal permanent resident (LPR) status, or where USCIS revoked the approval for fraud, willful misrepresentation, or material error.

In addition, INA §203(b)(5)(M) and USCIS policy (Policy Manual Vol. 6, Part G, Ch. 2 and Ch. 3) provide that a good-faith investor who files an amended petition following termination or debarment may use the priority date of the original petition (for amended I-526E filings on or after May 15, 2022), that changes to the business plan in that amendment are not treated as a material change, and that qualifying petitions retain the original priority date and prevent derivative age-out.

AILA Recommendations

1. **Codification is welcome; the retention floor must not shrink.** Because 8 CFR §204.6(d) and INA §203(b)(5)(M) already supply these protections, DHS should confirm that the new section is at least as protective as current law and policy and should state expressly that it does not disturb priority dates already established under 8 CFR §204.6(d) or preserved under existing Policy Manual guidance.
2. **Avoid filing date traps and scrutinize any evidentiary-perfection deadline.** An added deadline for transmitting initial evidence should not become a trap that forfeits a properly claimed filing date. We recommend that any such window be sufficiently generous, allow petitioners an opportunity to cure deficiencies through a request for evidence, and expressly preserve the original priority date where the petitioner has acted in good faith.
3. **Make the noncompliance remediation path workable.** The regulation should adopt, not tighten, the current 180-day remediation framework, confirm that reassociation or reinvestment preserves the original priority date and prevents derivative age-out, and direct USCIS to hold affected petitions in abeyance and toll deadlines. It should also protect only good-faith investors while excluding those who knowingly participated in the underlying misconduct, consistent with INA § 203(b)(5)(M).
4. **Address backlogged nationals directly.** For investors from heavily backlogged countries, priority-date retention is the single most important safeguard against a mid-process project failure. DHS should confirm that retention applies regardless of how far the family has progressed and regardless of intervening visa-bulletin movement, so that a project failure does not push a family to the back of a multi-year line.
5. **Confirm grandfathering interaction.** DHS should clarify how the proposed rule interacts with the RIA's grandfathering of petitions filed on or before the applicable sunset date, so that a retained priority date continues to be adjudicated under the rules in effect when the family first filed.

<u>Proposed 8 CFR §204.407(a)(1) — "Regional center investors" - Pooled Investment for Standalone EB-5</u>

The EB-5 statutory language provides that visas are available to qualified immigrants who pool their investments in a program implementing the EB-5 provisions that "involves a regional center" designated by DHS.

> The text does not expressly provide that EB-5 investors may pool their investments **only** through a designated regional center; rather, it addresses the availability of visas to qualified immigrants participating in a program implementing the EB-5 provision that "involves a regional center."

DHS's interpretation improperly transforms a provision defining eligibility for a particular regional-center visa program into a categorical prohibition on pooled investment structures outside that program. In doing so, DHS unnecessarily restricts the entrepreneurial flexibility Congress afforded EB-5 investors and effectively adds a limitation to the statute that Congress could have, but did not, expressly impose. At minimum, the statute does not support reading the regional-center language as an affirmative prohibition on pooled direct EB-5 enterprises, particularly where that interpretation materially limits lawful investment and entrepreneurship opportunities. Immigrant investors can co-own a business with others pursuant to proposed §204.407(c)(4), but this interpretation restricts those possibilities, including with family members. ***AILA recommends that this provision be amended to be consistent with Congressional intent.***

<u>Proposed 8 CFR §204.407(a) — Continued Eligibility Through Adjudication</u>

As proposed, 8 CFR §204.407(a) would create an open-ended obligation to remain eligible throughout an adjudication period that can last for years, contradicting the "approvable when filed" principle articulated in *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998), and reflected in proposed 8 CFR §204.406, which fixes the priority date as of proper filing. It risks penalizing investors for post-filing developments outside their control, such as project changes or intervening market conditions, even though subsections (a)(1) and (a)(2) already confine continued eligibility to specific, enumerated conditions (continuing project-application approval and the filing of required amendments).

Additionally, the final sentence of proposed 8 CFR §204.407(a)(2), which provides that "[m]ultiple standalone investors may not invest in the same new commercial enterprise," creates a new substantive eligibility restriction not mandated by the RIA, inconsistent with prior USCIS guidance, and without any reasoning behind why pooled investment cannot be used for standalone petitions. Additionally, direct pooled investments provide an important alternative mechanism should the Regional Center Program lapse or otherwise become unavailable in the future.

AILA recommends that DHS clarify that eligibility is determined as of the filing date, and that "continued eligibility through adjudication" is limited to the specific conditions enumerated in (a)(1) and (a)(2). DHS should delete the final sentence of proposed 8 CFR §204.407(a)(2).

<u>Proposed 8 CFR §204.407(b)(1), (2) – Investment on the Date the EB-5 Immigrant Petition is Filed</u>

Proposed 8 CFR §204.407(b)(1), (2) states:

> Unless otherwise specified, for an EB-5 immigrant visa petition filed on or after March 15, 2022, the investor must invest one million, fifty thousand United States dollars

> ($1,050,000) in capital in a new commercial enterprise in the United States, which must remain…

This provision should preserve the statutory alternative that an investor may be "actively in the process of investing." INA §203(b)(5)(A)(i) makes visas available where the alien "has invested … or, is actively in the process of investing" the required capital. Read literally, "must remain invested on the date the … petition is filed" could be understood to require the entire investment to be completed before filing, eliminating the statutory alternative. DHS's proposed definition of "actively in the process of investing" already allows committed capital, including capital placed in escrow pending approval, to satisfy the requirement. *See* proposed 8 CFR §204.401. The phrase "which must remain invested on the date the EB-5 immigrant visa petition is filed" is also in proposed (b)(2).

AILA recommends that DHS confirm that (b)(1) and (b)(2) are satisfied where the investor is "actively in the process of investing" as defined in §204.401, including where the required capital is committed to the new commercial enterprise or held in escrow for release upon approval of the petition.

Proposed 8 CFR §204.407(b)(3) — New $1,400,000 High-Employment-Area Investment Tier

Unlike the standard and targeted-employment-area (TEA) investment amounts, which Congress set effective March 15, 2022, the high-employment-area premium is a discretionary DHS proposal. DHS itself recognizes this distinction, as reflected by its own prospective effective date (60 days after publication of the final rule) rather than the statutory effective date. *See* proposed 8 CFR §204.407(b)(3). The premium is not tied to any statutory directive, it is not based on a finding that it advances the program's statutory purpose of attracting capital and job creation into the U.S. economy, and, in AILA's assessment, it will simply deter comparatively rare high-employment-area investment without redirecting capital into TEA projects, because such investors are typically drawn to a specific project rather than a specific price point.

AILA recommends that DHS withdraw the high-employment-area premium and apply the standard minimum investment amount to such investments, or, at minimum, substantially reduce the premium.

Proposed 8 CFR §204.407(c)(4) – Multiple Investors

This provision is unnecessarily overbroad because it appears to require an individual EB-5 investor to establish the lawful source of capital contributed by other investors or owners to the NCE or JCE, even where that capital has no connection to the petitioner's investment. An investor should be required to establish the lawful source and path of his or her own invested capital, not independently prove the source of funds belonging to unrelated investors, domestic entities, or other owners of the enterprise. Requiring such proof would impose an unreasonable and potentially impossible evidentiary burden on investors who have no access to the financial records or source-of-funds information of other participants and could discourage legitimate pooled investment structures.

The RIA defines "capital" as "cash and all real person, or mixed tangible assets owned and controlled by the alien investor, or held in trust for the benefit of the alien and to which the alien has unrestricted access." INA 204(b)(5)(a)(4)(D). Moreover, INA §204(b)(5)(L) states that the alien investor's capital and any funds used to pay administrative fees come from a lawful source and through lawful means. Thus, the RIA's lawful source of funds inquiry is limited to the investor's own capital, both by the definition of "capital" and the RIA Section L. *Matter of Ho* and *Matter of Izummi* likewise concern the investor's qualifying investment and the source and path of the investor's capital; neither establishes a general requirement to document the lawful source of every dollar used by a separate JCE. DHS should not transform the investor's source-of-funds inquiry into an audit of the JCE's entire capital structure._USCIS should therefore clarify that an investor's source-of-funds obligation is limited to the capital attributable to that investor, absent specific evidence linking another investor's unlawful capital to the petitioner's eligibility or investment. Proposed 8 CFR §204.407(c)(4) is ultra vires as written.

AILA recommends that DHS: (i) limit this paragraph to additional, non-EB-5 capital found to be unlawful, not to the withdrawal or forced replacement of an EB-5 investor's capital following denial of that investor's petition; and (ii) provide a commercially reasonable cure period of no less than one year to remove or replace capital that has been established as non-lawful.

Proposed 8 CFR §204.407(c)(4) – Bridge Financing

Eliminating use of bridge financing as a basis for demonstrating job creation is highly detrimental the EB-5 industry and its purpose of creating jobs in the U.S. economy. Furthermore, applying this rule retroactively to projects with approved or pending I-956F petitions would lead to unnecessary litigation against USCIS from Regional Centers, developers, and investors who committed to projects in reliance on USCIS's long-standing interpretation of acknowledging bridge financing as a legitimate tool in EB-5 projects. Implementing less-restrictive alternatives, such as adopting reasonable limitations rather than an outright prohibition, would achieve the goals of demonstrating a nexus between EB-5 capital and job creation. Bridge financing is a standard and necessary tool in EB-5 project finance.

Because EB-5 capital is raised over time and its availability is subject to USCIS and DHS's processing timelines and investor demand, developers regularly use interim (bridge) financing to commence or continue construction on schedule, with EB-5 capital later replacing that interim financing. The jobs created during the bridge-financed period are real jobs for U.S. workers that would not exist if not for the project the EB-5 capital ultimately sustains, and long-standing USCIS policy has recognized this by permitting job-creation credit where EB-5 capital replaces bridge financing. Eliminating that credit would not enhance program integrity, but would penalize investors for the ordinary, good-faith sequencing of project finance, disqualify legitimately created jobs, and materially disrupt established capital-stack structures across the industry.

The recommended less-restrictive alternative is for DHS to permit job-creation credit for bridge financing subject to reasonable limits: (i) a maximum bridge-loan term; and (ii) a cap on bridge financing as a percentage of total project costs. These limits ensure that bridge financing is genuinely interim and does not dominate a project's capital stack, while preserving EB-5 capital's ability to finance real projects and create real jobs. Moreover, this would allow projects to advance short-term financing, via inter-company notes for example, while waiting for EB-5 money to be advanced to the project; this allows projects to continue paying real-time expenditures while waiting for the EB-5 capital to become available. Recent requests for evidence and notices of intent to deny from USCIS on Form I-956F have focused on whether the project is shovel ready and whether the project has started construction. Where USCIS places emphasis on a project commencing to show imminent job creation, it cannot simultaneously deny a project's ability to pay for those construction expenditures via short term bridge financing. Placing a restrictive cap on bridge loans could eliminate entrepreneurship and projects that can rely on EB-5 capital and where the nexus of job creation from EB-5 investors is most apparent.

AILA's recommendation is to revise proposed 8 CFR §204.407(e)(1) to permit job-creation credit where EB-5 capital repays bridge financing that: (a) has a term of no more than three years and (b) constitutes no more than 70% of total project costs.

Proposed 8 CFR §204.408(b)(3)(ii) – No Escrow Required in Statute

This language could improperly be interpreted as imposing an escrow requirement, even though escrow is not required by the statute and many legitimate EB-5 projects do not use escrow arrangements. Evidence from an escrow agent should therefore be identified as one permissible form of evidence, rather than a mandatory evidentiary requirement applicable to all investors and projects.

USCIS should clarify that, where no escrow agent is involved, other reliable evidence demonstrating the deposit or transfer of the investor's capital is sufficient. This proposal should be eliminated.

Proposed 8 CFR §204.408(b)(6) - Codifying Precedent Case Decisions about Concrete Business Activity

DHS also proposes to codify *Matter of Ho,* 22 I&N Dec. 206 (Assoc. Comm. 1998), by identifying activities that, standing alone, do not constitute concrete business activity and therefore do not demonstrate that capital is at risk, such as maintaining funds in a business account under the investor's control, developing a business concept, forming an entity, or executing a lease. In doing so, DHS appears to be elevating prior adjudicatory interpretations into binding regulatory text. The NPRM fails to fully explain the legal basis for doing so and it should address reasonable alternatives. Administrative Appeals Office (AAO) decisions contain different things: legal interpretations, applications of law to particular facts, dicta, evidentiary observations, and policy considerations.

For each of the four precedent decisions, DHS should identify the precise proposition it seeks to codify, the actual holding supporting that proposition, and the specific statutory and regulatory provisions the decision interpreted. DHS should also explain how changes in the RIA impact the interpretive rulings of the AAO.

Proposed 8 CFR §204.408(c) – Evidence Tracing the Path of Capital Invested in the New Commercial Enterprise

The requirement that the investor "trace the path of capital back to its origination" is overly broad. The lawful path of funds inquiry should be limited to the investor's most recent lawful acquisition of the capital, i.e. the immediate, latest lawful capital event, not an open-ended tracing to some remote point of origin. Two recent federal court decisions have firmly rejected the origination-tracing approach which this language would codify. In *Battineni v. Mayorkas,* 752 F. Supp. 3d 195, (D.D.C. Oct. 2, 2024), the court held that the relevant question is the immediate source of the investor's capital and that no regulation requires tracing funds back to earlier owners. In *Zhou v. Noem,* No. 19-cv-2650 (TJK), slip op. *at* 20*,* (D.D.C. Feb. 6, 2025), the court, expressly following *Battineni*, observed that requiring proof of a prior holder's source of funds could regress indefinitely, leaving petitioners no way to meet the burden.

The requirement is also inconsistent with the governing preponderance of the evidence standard (*Matter of Chawathe*, 25 I. & N. Dec. 369, 375 (AAO 2010)), holding that, in most administrative immigration proceedings, that a petitioner only needs to show that the lawful character of the capital is "more likely than not," as opposed to eliminating all doubt by documenting every antecedent transaction.

For example, a petitioner was lawfully employed for 10 years, then used some of his personal salary proceeds to finance a new business. After the business grew, that individual received a dividend payment, the proceeds of which he subsequently invested in a new EB-5 commercial enterprise. In this example, the path of funds should only be shown from the latest lawful acquisition of the capital: receipt of dividends and the subsequent transfer to the new commercial enterprise. Requiring investors to trace the path of funds from the original employer to the petitioner via bank statements or from the employment savings of the petitioner to his business would create an impractical requirement that could extend back decades and would not be commercially feasible for most law-abiding individuals to meet. The preponderance of evidence standard in this case can be met by providing records of Petitioner's prior employment, or other indirect evidence that supports the fact that the petitioner had access to lawful capital prior to starting his own business and thus making it more likely than not that the start-up capital for his own business was derived lawfully.

Additionally, many immigrant investors use the equity built in their real estate assets as collateral to obtain a loan to fund an EB-5 investment. The path of funds should only be shown from the latest lawful acquisition of capital from the lender. It is inappropriate to extend the requirement to corroborate the original earning of funds used to acquire the real estate, particularly where the real estate was acquired many years or even decades earlier through otherwise lawful means. Requiring an investor to reconstruct the complete historical source of the funds used to purchase an appreciating asset via bank statements that is subsequently pledged as collateral would impose an evidentiary burden far beyond what is necessary to establish that the EB-5 capital itself was lawfully acquired. Once the investor establishes the lawful loan transaction, the existence and value of the collateral, and the transfer of the loan proceeds into the EB-5 investment, the relevant source-of-funds inquiry should be satisfied. Extending the inquiry further back would improperly conflate the source of the collateral with the source of the EB-5 capital and would create an impractical requirement for investors whose assets were accumulated through ordinary financial and commercial activity over many years.

AILA's recommendation is to revise the text of section 204.408(c) to require the investor to trace the path of the capital from the investor's most recent lawful acquisition of the capital (the immediate, latest lawful capital event) to the new commercial enterprise and delete "back to its origination".

The requirement for a "complete transaction history" in proposed section 204.408(c)(2) is overly broad and, particularly when read together with the proposed origination requirement, imposes an impractical and limitless tracing obligation that is ultra vires. Such an interpretation risks requiring investors to reconstruct financial transactions extending back decades, contrary to the concerns recognized by courts in *Battineni* and *Zhou*. Bank statements and other transactional records are often unavailable after extended periods or following account closure, while other reliable evidence—such as business registrations, employment records, salary documentation, tax records, and pension fund records—may establish the lawful acquisition of capital. The requirement should therefore be limited to tracing the capital from the investor's most recent lawful acquisition of the capital through the date of investment, consistent with proposed 8 CFR §204.408(c)(3). USCIS should also revise the language to permit "transaction history or other credible evidence that establishes, by a preponderance of the evidence, the lawful acquisition and transfer of the investment capital."

Proposed section 204.408(c)(3) appropriately recognizes that the relevant transfer history should run from the time the investor acquired the capital through the date of investment, rather than requiring an unlimited tracing of the capital back to its original source. Section 204.408(c)(3) supports this approach by focusing the evidentiary inquiry on the investor's most recent lawful acquisition of the capital. USCIS should therefore conform paragraph (c) and paragraph (c)(2) to this standard and consistently require evidence tracing the capital from the investor's most recent lawful acquisition forward to the EB-5 investment. This approach provides a clear, administrable standard while avoiding the impractical requirement to reconstruct financial transactions extending back decades. It also appropriately focuses the source-of-funds inquiry on whether the capital invested in the EB-5 enterprise was lawfully acquired by the investor.

Proposed section 204.408(c)(4) appropriately recognizes licensed, Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT)-compliant money or value transfer services and money services businesses as acceptable means of transferring EB-5 capital, and use of such a regulated intermediary should satisfy the investor's obligation without requiring disclosure of the intermediary's own source of funds, which generally cannot be disclosed. Proposed 8 CFR §204.408(c)(6) should be limited to establishing the lawful path of the investor's capital from the most recent lawful acquisition of the capital and should not be used as a backdoor means of imposing an origination-tracing requirement.

Proposed 8 CFR §204.412(b) — Oversight of Non-Affiliated Job-Creating Entities

DHS proposes that regional centers would be required to establish and maintain controls over the activities of independent entities. Nothing in the RIA requires regional centers to supervise entities over which they have no ownership, contractual authority, or operational control. There is no legal basis for imposing internal-control obligations over non-affiliated job-creating entities, and this exceeds the authority that regional centers ordinarily possess and may be unable to exercise in practice. Instead, the RIA created the concept of an "affiliated" JCE and then put additional requirements on those affiliated entities. This NPRM section is ultra vires.

AILA recommends that DHS limit internal-control and oversight obligations under 8 CFR §204.412(b) to matters reasonably within the regional center's contractual authority or commercially reasonable control and remove "non-affiliated job-creating entities" from the scope of mandatory oversight.

Proposed 8 CFR §204.426(b) — Three-Month Redeployment Default

DHS proposes that "any redeployment of investor capital must be made within 3 months of the return of capital to the new commercial enterprise. USCIS will consider evidence that a longer period was reasonable for a specific type of commercial enterprise or into a specific commercial activity under the totality of the circumstances." Proposed 8 CFR §204.426(b); 91 Fed. Reg. at 40677). The RIA itself sets no redeployment deadline; the three-month default is a DHS policy judgment, discussed further in Category 6 below.

Proposed 8 CFR §204.416 — 120-Day Advance Amendment Filing and Associated Fee

The NPRM would require regional centers to file a formal amendment (currently carrying a fee of $18,480 for Form I-956) at least 120 days before implementing significant organizational or ownership changes — including changes as routine as the promotion of a long-serving employee into a position covered by INA §203(b)(5)(H). See proposed 8 CFR §204.416(b). For an operator of multiple regional centers, a single organizational change can trigger amendment fees exceeding $250,000. Neither the NPRM nor the companion EB-5 fee rule provides a processing-time goal for these amendments, and while filed, the amendment can halt adjudication of related project applications and investor petitions for a year or more (discussed further in Category 7).

AILA recommends that DHS provide a less costly, streamlined notification or annual-reporting mechanism for non-material organizational changes, and reserve the formal, fee-bearing amendment process for changes that are genuinely material to eligibility or compliance.

Proposed 8 CFR §204.418(b)(3) – Regional Center Annual Statements

Proposed 8 CFR §204.418(b)(3)(ii) would require the annual statement to include a description of how capital is being used to execute the project and evidence that 100 percent of the capital has been committed to it. This requirement duplicates information USCIS already receives, and independently verifies, through other components of the RIA's oversight framework. Before any regional center investor may submit an EB-5 immigrant visa petition, the regional center must first file a Form I-956F project application, which already describes the project in detail, including how investor capital is being deployed to execute it. USCIS subsequently obtains confirmation that capital has, in fact, been committed and deployed as described through the regional center audits required under RIA and through the Form I-829 petitions to remove conditions that regional center investors must file, both of which independently demonstrate how capital has been committed to each capital investment project. Requiring the regional center to resubmit substantially the same narrative and accounting every year, for the life of each open capital investment project, imposes a recurring compliance burden without a corresponding benefit, since USCIS already has multiple, more targeted opportunities to verify the same information.

Proposed 8 CFR §204.418(b)(3)(iii) would require the annual statement to include detailed evidence of the progress made toward completion of each capital investment project, including, as applicable, photographs, expenditure reports, invoices, permits, and certificates of occupancy. As with subparagraph §204.418(b)(3)(ii) above, this requirement duplicates information USCIS already obtains through other mechanisms. The regional center audits required under the RIA already evaluate the progress of each capital investment project and Form I-829 petitions to remove conditions likewise require the same category of progress documentation identified in this subsection. Compiling and submitting this project-level documentation on an annual basis, for every capital investment project with pending petitions, is unnecessary in light of the audit and I-829 processes and imposes an unnecessary administrative burden on regional centers and USCIS.

Proposed section 204.418(b)(3)(vi) would require the annual statement to report material changes to the documents submitted with the associated project application during the preceding fiscal year. Whether a change to a project is "material," however, is not a determination committed to the regional center in the first instance; it is a determination that USCIS itself makes when reviewing an amendment to, or a new filing associated with, the project application. Requiring the regional center to self-identify and report "material changes" therefore asks the regional center to anticipate and apply a standard that only USCIS is positioned to apply and exposes the regional center to the risk that USCIS will later disagree with the regional center's own materiality assessment notwithstanding the regional center's good-faith compliance with this subsection. Such a reporting requirement is also not needed because USCIS already has, and regularly exercises, the opportunity to evaluate whether a project has undergone a material change at the Form I-956F application or amendment stage, and again in connection with Form I-829 filings, making the annual statement a third, duplicative checkpoint for the same issue.

A significant overall issue with the Form I-956G Regional Center Annual Statement is that the form does not offer an effective mechanism for regional centers to report on projects designated before enactment of the RIA, as distinct from projects designated and structured under the RIA's post-enactment framework.

A primary example of this issue is Attachment 1 to Form I-956G, which requests reporting on information framed for, and applicable to, post-RIA projects. Pre-RIA projects frequently cannot provide meaningful responses because the project-application and disclosure requirements that governed them at the time of designation differed significantly from those established by the RIA. Absent a mechanism to distinguish between the two categories of projects, regional centers overseeing pre-RIA projects are left either to provide inapplicable or approximate responses to post-RIA-specific reporting items or to leave those items blank, either of which risks USCIS treating the annual statement as deficient or incomplete through no fault of the regional center.

AILA Recommendations

1. Eliminate or Narrow the Annual Capital Commitment Reporting Requirement.
USCIS should consider eliminating section 204.418(b)(3)(ii) or, at minimum, narrow it with an exact document required, such as a report from the Fund Administrator, rather than requesting that the regional center to re-describe based on unclear requirements the capital use and re-establishment of a full 100 percent commitment showing each year. Such recurring narrative reporting is potentially duplicative of existing records and imposes a significant administrative burden without a corresponding compliance benefit.

2. USCIS Should Eliminate or Limit Annual Progress Reporting and Material Change Reporting to High-Level Status Updates. Similar concerns arise with proposed section 204.418(b)(3)(iii), USCIS should consider eliminating section 204.418(b)(3)(iii) or limit the annual statement's progress-reporting obligation to a brief, high-level status update for each capital investment project, reserving the detailed, document-level evidence described in this subsection for the audit process and for Form I-829 adjudications, where such evidence is already required and more directly relevant. In addition, USCIS should consider eliminating section 204.418(b)(3)(vi) in light of the material-change review already conducted at the Form I-956F amendment and Form I-829 stages, or revise the subsection to require the regional center to report all changes to the documents submitted with the project application without requiring the regional center to characterize which of those changes rise to the level of a "material change," leaving that determination to USCIS.

3. Revise Form I-956G. USCIS should revise Form I-956G, including Attachment 1, and its accompanying instructions to provide a distinct reporting pathway for pre-RIA projects that reflects the information such projects can actually provide, rather than applying a single, post-RIA-oriented set of reporting items to all projects regardless of when they were designated.

Proposed 8 CFR §204.419 – Submitting a Project Application

It is understood that proposed 8 CFR §204.419 states that a regional center project must file a Form I-956F project application before any regional center investor may submit an EB-5 immigrant visa petition; however, the proposed rule does not state how soon after the Form I-956F filing the investor may do so, nor does it define what constitutes a "properly filed" Form I-956F for this purpose. Leaving this timing undefined creates unnecessary uncertainty for regional centers and investors, who must coordinate the sequencing of the project application and the immigrant visa petition and who currently have no regulatory basis for confirming that the project application has been sufficiently filed to permit the petition to proceed.

USCIS should change 8 CFR §204.419 to affirmatively state what constitutes a "properly filed" Form I-956F project application for purposes of this section. ***We recommend that USCIS confirm that a regional center investor may file the EB-5 immigrant visa petition once the Form I-956F has been filed with USCIS, as supported by evidence of that filing, such as an I-956F lockbox or receipt notice, or evidence of a processed Form I-956F filing fee.*** USCIS should also clarify whether the immigrant visa petition may be filed immediately upon submission of the Form I-956F or whether the regional center investor must instead wait until USCIS has accepted the Form I-956F for filing, issued a receipt notice, or reached some other defined filing milestone, so that regional centers and investors are not left to determine, on a case-by-case basis, when the underlying project application has been sufficiently filed to permit an associated EB-5 immigrant visa petition to proceed.

2. PRESERVE — NOT NARROW — EXISTING INVESTOR PROTECTIONS

Codification of Policy Manual guidance into binding regulation is welcome, but only where it preserves the protections investors already rely upon. AILA's review of proposed section 204.405 (derivative beneficiaries) and section 204.406 (priority date establishment and retention) found that most of the substance already exists in INA §203(b)(5)(M), 8 CFR §204.6(d), and USCIS Policy Manual Volume 6, Part G. The principal risk is not what these sections state, but what they might silently omit or narrow relative to current law.

Existing protections that must be preserved without narrowing include: priority-date retention across multiple filings; the anti-age-out protection for derivative beneficiaries under INA §203(b)(5)(M); the interaction between that protection and the CSPA including those who have filed adjustment of status applications based on immediate visa availability to date under the RIA's visa categories; the 180-day remediation window following regional center termination or NCE/JCE debarment; and the rule, already established at 8 CFR §204.6(d), that a denied petition does not establish a priority date but an approved petition's priority date carries forward to a later petition.

DHS should state expressly, in the regulatory text itself, that proposed §§ 204.405 and 204.406 are at least as protective as existing statute, regulation, and Policy Manual guidance, and should confirm that any new evidentiary-perfection deadline for priority-date claims is curable through a request for evidence rather than an automatic forfeiture.

Proposed 8 CFR §204.407(e)(3) – Regional Center Investors, Reasonable Economic Methodologies

AILA generally supports DHS's effort to establish a more objective, transparent, and reproducible methodology for determining high-unemployment areas, including the use of statistically valid Federal data, weighted census-tract unemployment rates, and publicly documented methodologies. However, AILA respectfully disagrees with eliminating the Census Share Methodology, which combines American Community Survey (ACS) census-tract employment distributions with more current Local Area Unemployment Statistics (LAUS) county unemployment data and can therefore better capture significant changes in local labor market conditions than ACS five-year estimates alone. Because ACS five-year estimates necessarily reflect labor market conditions over an extended period, they may lag substantially behind recent economic changes, while the Census Share Methodology incorporates more current Federal unemployment data without sacrificing the census-tract geographic distribution provided by ACS. Accordingly, the fact that the Census Share Methodology is not based exclusively on census-tract unemployment estimates does not make it statistically invalid; rather, it provides a transparent and reproducible means of applying current Federal unemployment conditions to the relevant census-tract employment distribution.

AILA recommends that DHS should continue to permit petitioners to establish high-unemployment-area eligibility using either (1) ACS census-tract unemployment data or (2) the Census Share Methodology using ACS census-tract employment shares and current LAUS county unemployment data, provided the methodology relies exclusively on publicly available Federal data and is transparent, reproducible, and statistically valid. Maintaining both methodologies would provide greater flexibility to accurately reflect current labor-market conditions while preserving the objectivity and integrity of the targeted employment area determination.

Proposed 8 CFR §204.416 – Amending or Withdrawing a Regional Center Designation

AILA supports regulatory codification of the INA §203(b)(5)(E)(vi) requirement that a regional center file an amendment to its designation at least 120 days prior to implementing significant proposed changes to its organizational structure, ownership, or administration, including the sale of the regional center, or any other arrangement that would result in individuals not previously subject to the requirements in INA §203(b)(5)(H) becoming involved with the regional center.

AILA has concerns, however, with several aspects of how the NPRM would implement this provision. The NPRM provides a framework for required amendments but does not specifically contemplate discretionary or "permissive" regional center amendments. Prior to the RIA, regional centers could seek advance agency review of changes to approved regional centers and projects through the filing of a Form I-924 amendment. *See* USCIS, Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program, https://www.uscis.gov/i-924 (archived content). ***DHS should preserve this option in the final rule.***

There are many situations in which a regional center may want USCIS confirmation that a project remains compliant even though the change does not trigger one of the NPRM's mandatory amendment provisions. Specifically, a regional center may seek USCIS review of changes to a project business plan, economic analysis, financing, or other project-related facts and circumstances. These types of changes do not clearly fall within the NPRM's mandatory amendment requirements, yet they can raise questions during later adjudications of Forms I-526E or I-829. A regional center may wish to obtain USCIS confirmation that the changes do not: constitute a material change affecting investor eligibility; require refiling or additional approvals; and undermine the approved business plan or economic methodology.

A permissive amendment process would encourage transparency and allow USCIS to resolve these questions contemporaneously rather than years later.

Amendments should only be required for material organizational changes affecting eligibility or compliance rather than routine operational decisions. For example, routine improvements to compliance manuals or procedures should not trigger costly amendment filings. Similarly, EB-5 Program regulations should recognize that organizational business plans evolve after designation and should not require amendment unless material to eligibility.

AILA recommends that the final rule provide for pending project applications and EB-5 immigrant visa petitions to continue to be adjudicated upon the filing, rather than the adjudication, of the amendment. Alternatively, AILA urges the agency to establish a 60-day processing time for amendments that trigger a halt to associated adjudications, and that the final rule provide for project application and investor petition adjudications to move forward for adjudication after the 60-day processing time has passed, regardless of whether USCIS has adjudicated the amendment.

Proposed 8 CFR §204.417 - Bona Fides of Persons Involved with the Regional Center Program

AILA notes persons involved with a regional center are being fingerprinted multiple times, apparently due to their roles in multiple NCEs. Duplicative appointments at USCIS Application Support Centers (ASCs) are wasteful both for the individuals required to travel repeatedly to and spend their time at ASCs to have their biometrics captured and for the agency. Individuals who are "persons involved with" are different than the EB-5 investors and their derivatives. Presumably, USCIS is collecting fingerprints from these individuals to conduct a required background check. Unlike EB-5 investors, USCIS does not need to capture regular photographs of "persons involved with" the program who are not applicants for an immigration benefit. For example, a person involved with a regional center is not receiving a card with a photo that needs to change overtime. USCIS should be able to use technology to identify individuals who have already had their fingerprints taken within a set period of time and reuse fingerprints to confirm that there has been no new derogatory information by running a new background check based on fingerprints previously collected. Doing so would lessen the burden on regional center operators and conserve agency resources without compromising program integrity in any way. ***AILA urges DHS/USCIS to include in the codification of this RIA provision that the agency will reuse fingerprints and avail itself of other technology to prevent wasteful, unnecessary requirements, such as multiple ASC appointments for the same individual within a short period of time.***

Proposed 8 CFR §204.418 – Regional Center Annual Statements

DHS proposes increased reporting requirements, which would require regional centers to report information they cannot independently verify. This may lead to incomplete, inaccurate, or inconsistent reporting, which would not advance the investor-protection goals of the RIA. Regional centers should only be required to report information reasonably available to them or within their control. To comply with the accounting of aggregate capital requirement at proposed section 204.418(b)(3)(ii), regional centers should be permitted to submit audited financial statements or equivalent accounting records already prepared for business purposes.

3. GOOD FAITH INVESTORS SHOULD NOT BEAR THE CONSEQUENCES OF CONDUCT OUTSIDE THEIR CONTROL

Proposed 8 CFR §204.426(a) When a New Commercial Enterprise May Redeploy Investor Capital

Proposed 8 CFR §204.426(a) states that repayment of the initial investment by the job-creating entity may be changed from what was contemplated by the business plan through a "properly filed and approved amendment." The preamble does not clarify, however, whether an NCE must obtain USCIS approval of the corresponding Form I-956F amendment before redeployment of investor capital may occur, or whether it is sufficient for the NCE to file the amendment before redeployment occurs, with approval to follow.

This distinction has significant practical consequences. Form I-956F amendments are subject to USCIS adjudication timeframes that can extend well beyond the three-month redeployment window discussed in Category 7 below. If USCIS requires an approved amendment before redeployment may occur, NCEs will regularly be unable to redeploy capital within the timeframe the rule otherwise contemplates, through no fault of the NCE, and regardless of how promptly the amendment was filed. This would place regional centers and NCEs in the untenable position of either violating the redeployment timing requirement or leaving investor capital idle and at risk of USCIS finding it was not properly maintained "at risk."

AILA recommends that the final rule clarify that the timely, properly filed Form I-956F amendment containing the specifics of the redeployment investment in an amended business plan rather than its adjudication and approval — satisfies the proposed requirement, provided the NCE otherwise executes the business plan in good faith. This approach is consistent with how DHS treats initial Form I-956F filings (allowing for I-526Es to be filed upon I-956F receipt) and would avoid penalizing investors, NCEs and regional centers for USCIS processing delays outside of their control.

Proposed 8 CFR §204.433(a) — Determinations of Fraud, Misrepresentation, Deceit, or Criminal Misuse.

Proposed 8 CFR §204.433(a) governs the issuance of notices to EB-5 investors following the termination of a regional center or the debarment of a related entity, triggering the opportunity to preserve eligibility under INA §203(b)(5)(M). DHS proposes an unlimited look-back period. When applied to petitions filed years ago under the prior regulatory regime, this unlimited look-back leaves an investor who obtained conditional residence long ago, and whose petition was adjudicated under the prior rules, indefinitely exposed to a determination made under definitions written afterward. ***AILA recommends that DHS incorporate a defined period of repose for determinations under this provision, particularly as applied to petitions filed before the effective date.***

Proposed 8 CFR §204.426(c) — Improper Redeployment of Investor Capital

In this provision, DHS provides that USCIS will automatically terminate a regional center's designation, and may debar or otherwise sanction the associated NCE, if the NCE does not comply with the redeployment parameters. Redeployment compliance issues are inherently fact-specific. They often turn on the nature of the business plan, the reasons for delay, the sufficiency of documentation, and whether noncompliance was within the NCE's control. — Consequently, automatic termination risks penalizing a regional center, and the unrelated investors in its other NCEs, for the conduct of a single noncompliant NCE, over which the regional center may have limited practical control.

AILA recommends that USCIS should exercise discretion rather than mandate automatic termination where redeployment noncompliance is fact-specific, and should create a mechanism allowing a regional center to proactively withdraw its association from a noncompliant NCE before USCIS takes affirmative action. Moreover, it is the NCE that has control over a redeployment, the regional center may have little to no control over the due diligence timeline required for the NCE to choose a redeployment. It is unfair to terminate a regional center and impact other new commercial enterprises on the basis that one NCE has not redeployed in a timely manner. Moreover, this is ultra vires and not specified in the text of the RIA.

4. REPLACE VAGUE, DISCRETIONARY STANDARDS WITH OBJECTIVE, MEASURABLE CRITERIA

The NPRM relies on undefined discretionary language throughout, without providing measurable compliance standards, definitions, or safe harbors. DHS specifically solicited comment on regional center monitoring and oversight requirements, which is the single largest source of this undefined language. 91 Fed. Reg. at 40690–95.

Proposed 8 CFR §204.412(b) - "Reasonable Assurance" and "Effective Internal Controls"

This provision requires regional centers to maintain "effective internal controls" that provide "reasonable assurance" of compliance with "all applicable" immigration, securities, and labor laws. None of these terms are defined, and the provision supplies no safe harbor, no minimum documentation standard, and no benchmark by which a regional center can know in advance whether its compliance program will be deemed sufficient.

DHS should define the terms "reasonable assurance" and "effective internal controls" by reference to objective indicia, including a written compliance program, periodic reviews, documented financial oversight, and defined monitoring frequency, and should provide that adoption of these measures constitute a safe harbor.

Proposed 8 CFR §204.420(a) - Eligibility for a Project Application

DHS proposes to establish baseline eligibility requirements for a project application. The first of these requirements at section 204.420(a) is overly broad and amorphous. In the provision, DHS states that regional center's proposed project be "realistic and credible." However, DHS fails to define both terms in the NPRM. Importantly, failure to establish eligibility under this section constitutes a basis for USCIS to deny the project application. As such, AILA has concerns that use of such subjective language could result in inconsistent adjudications of project applications and also provide a mechanism to deny project applications without a clear legal basis. ***Therefore, AILA recommends removing section 204.420(a) or defining the terms real and credible in the NPRM***.

Proposed 8 CFR §204.417 - Bona Fides of Persons Involved with the Regional Center Program

The NPRM preamble provides that where USCIS determines a person involved with a regional center is ineligible, the entity has 14 days from the notice to take "commercially reasonable efforts" to remove the person and report the removal, with no definition of that standard and no stated basis for the 14-day period, and no process for the regional center to contest the underlying determination. *See* 91 Fed. Reg. at 40719.

DHS should extend the removal timeframe to at least 60 days or clarify that "commercially reasonable efforts" includes an internal investigation that may reasonably take longer than 14 days; and provide a process to contest an erroneous ineligibility determination.

Proposed 8 CFR §204.416 - Amending or Withdrawing a Regional Center Designation

This section establishes the procedures for a regional center to amend its designation or voluntarily withdraw its designation upon the occurrence of certain triggering events, and the provision fails to define key terms, such as the existence of "exigent circumstances," which would mean an exception applies to the 120-day advance filing requirement. As drafted, the NPRM should define exigent circumstances to include ordinary but time-sensitive personnel decisions, such as filling a critical vacancy, an executive's departure to a competitor, or termination for cause, that cannot be scheduled 120 days in advance.

DHS should amend the exigent circumstances definition to include commercially reasonable timelines for urgent hiring, departure, or termination of regional center personnel.

Proposed 8 CFR §204.407(c)(3) - Eligibility for Approval of an EB– 5 Immigrant Visa Petition, Source and Path of Invested Capital, and the Reason to Believe Override

DHS explains in the preamble and regulatory text that use of a regulated intermediary creates a favorable evidentiary presumption for the investor. The regulatory text creates an override, whereby DHS may question the source of funds if it has a "reason to believe" it was not lawfully sourced. DHS does not present the circumstances that would cast doubt on the source and path of invested capital, and the phrase "reason to believe" is undefined and could undermine the safe harbor if invoked on mere suspicion. DHS should include a definition that would rest on specific, articulable, record-based grounds, and any resulting request for evidence should identify those grounds.

Additionally, the statute does not require investors to prove a licensed intermediary's own source of funds. To the extent (c)(3) is read to require the investor to establish the lawful source of the intermediary's capital, that is contrary to law - see *Battineni v. Mayorkas,* 752 F. Supp. 3d 195 (D.D.C. Oct. 2, 2024) and *Zhou v. Noem,* No. 19-cv-2650 (TJK), slip op. at 20, (D.D.C. Feb. 6, 2025) (a petitioner need not prove the source of funds of a prior owner or exchanger) - and, for licensed, regulated institutions, impossible, because such institutions cannot lawfully disclose their proprietary funding or their other customers' information. The rule should confirm that a licensed, regulated intermediary's license and AML/CFT supervision suffice, and that individualized source evidence may be required only for private, informal or unlicensed intermediaries.

5. THE NPRM CREATES PROCEDURAL TRAPS AND UNNECESSARY TECHNICAL GROUNDS FOR DENIAL

Proposed 8 CFR §204.410 – Options After Termination or Debarment

The proposed rule should clarify that the 180-day period in section 204.410(e)(2) governs the timely filing of the amendment and, where applicable, the investor's commencement of the corrective action authorized by INA §203(b)(5)(M), but does not require the investor to complete all substantive requirements of the replacement investment—including job creation—within that 180-day period. Congress provided investors with a mechanism to preserve eligibility following termination or debarment; it did not require investors to accomplish the full economic and job-creation consequences of a replacement investment within 180 days. Many EB-5 investors are confused after receipt of Notice of Regional Center Termination and need legal guidance from both immigration and financial perspectives before making the remedial step that Congress created. Requiring completion of those requirements within 180 days would effectively make the statutory protection unavailable for many legitimate projects, particularly where job creation necessarily occurs over a longer period. USCIS should therefore clarify that an investor who timely files the required amendment and demonstrates that the investor has undertaken the actions necessary to preserve eligibility remains subject to the ordinary investment and job-creation periods applicable to the replacement investment.

The proposed rule should not impose a rigid snapshot test requiring all job-creation requirements to have been satisfied on the precise date of the termination or debarment notice. A good-faith investor who has maintained the required investment for at least two years and completes the remaining job creation shortly thereafter should not be required to undertake the disruptive and potentially unnecessary INA §203(b)(5)(M) amendment process solely because the jobs were created shortly after the notice date, particularly where the investor had no control over the termination or debarment.

Generally, AILA is in support of the aagency allowing amendments to applications and petitions after they have been filed (or approved) and that the agency will incorporate any material changes that occurred after filing. AILA suggests that the agency provide greater clarity regarding how material changes will be reviewed and adjudicated in such amendments. Historically, USCIS has treated any material changes that might affect the eligibility of the petitioner or applicant as grounds for a denial, even when such material changes have a positive impact on eligibility, such as additions to the capital stack of a project, changes of anticipated non-EB-5 funding sources, or changes in the NCE or JCE's management or organization. The proposed regulation would benefit from clear language indicating that USCIS will consider such material changes in a *de novo* review of the evidence and not treat the fact of a material change as grounds for a denial on its face.

AILA recommends that this section should include language clarifying how evidence of material changes in petitions will be evaluated and, if possible, disclaiming any negative effects on adjudication due to the fact of the material change itself. Ultimately, this section should rely on the eligibility concerns and not the vicissitudes of procedural stance.

Regarding section (b) on "material changes," AILA suggests that this section be compared or merged with comments relating to regional center project amendments, specifically in that regional centers should be permitted to pro-actively amend the comprehensive business plans for approved I-956F applications with fairly broad discretion. As noted in the USCIS policy manual, business plans frequently change through the development of any project, and so USCIS specifically allows material changes to business plans when investors have achieved conditional permanent resident status through the filing of their I-829 petitions. Applying that approach backwards to allow amendments to approved I-956F applications would create greater efficiency and consistency in the adjudication of I-526E petitions across the lifecycle of the I-956F-I-526E-I-829 adjudication process. For example, if, after the approval of an I-956F, circumstances surrounding the approved business plan have changed such that the NCE wishes to replace the JCE entirely.

In a notable case, a developer simply changed their mind regarding moving forward with a project due to sentimental reasons surrounding the development of a parcel of family-owned land. The JCE terminated the EB-5 loan negotiations and walked away from the project. The NCE then contracted with a new developer for a new project (within the same geographical area) and planned to move the EB-5 capital to that project. None of the changes were the fault of the investors, the regional center, or the NCE, and were undertaken by the NCE manager with the express purpose of preserving the immigrant investor's capital at risk for the purposes of creating jobs for qualified employees. This, however, was treated as an impermissible material change by USCIS and issued a Notice of Intent to Deny the I-956F amendment. If, however, the agency promulgates rules allowing for these pro-active amendments, especially when undertaken in good faith by the regional center, NCE, and/or investors, there would be a positive impact on the efficiency of adjudications and the consistency of outcomes. Such amendments should be incorporated into the adjudication of associated I-526E petitions regardless of the procedural stance of the petition itself. It should not matter whether the I-526E is pending or approved or whether the immigrant investor has achieved CPR status when the changes happen or the amendment is filed. This would prevent disparate outcomes that would occur when material change policies are applied differently depending on the procedural stance of the underlying petition or application. As noted above, historically USCIS has allowed material changes when an immigrant investor is in CPR status, but investors in the same NCE who have not yet achieved CPR status would potentially have their I-526E petitions denied or revoked, even if the underlying material change would mean that the investor was still able to meet eligibility requirements subsequent to the changes.

The Agency should promulgate rules for regional centers to elect to amend approved I-956F applications for reasons discussed, above. Section 204.423 should include additional provisions allowing regional centers to change aspects of the comprehensive business plan including but not limited to changes in JCE, project details, and other issues already included in that section. The present section should include language regarding how material change in projects may be evaluated, and that such changes will not affect investors' petitions differently due to their procedural stances. This section should also include language that is permissive of amendments filed within a certain amount of time—such as 90 days—to allow investors to meet changes in the EB-5 program.

Additionally, AILA suggests additional protections for investors for the period in which amendments are required. Investors may not be aware of all changes that occur that could affect their eligibility within 30 days of the change. In many cases, regional centers and NCE managers provide only periodic updates to investors related to project progress, program requirements, and so on. ***A longer period of 60 or 90 days to file amendments would be preferable. Alternately, the Agency may require that the amendment be filed within 90 days of the investor becoming aware of, or being notified of, the change.*** This would reduce the burden on the investor to be highly aware of changes in the circumstances surrounding their petitions and give them more flexibility to learn of changes, work with their NCE or regional center sponsors to obtain documentation and take action to contribute additional capital, update evidence and submit that all to USCIS. Additional extensions for petitioners to provide evidence at some point after filing an amendment would be valuable as well, such as an indication on the form that the investor is filing an amendment but will provide evidence at some point in the future, such as within 30 days. Having a clear requirement of when evidence is required after submitting the form would be extremely helpful.

AILA encourages USCIS to extend the amendment filing timeframe to 90 days for investors, and/or 90 days following notification of such material changes by USCIS, or within normal adjudicative timeframes if discovered during the adjudicative process (i.e. in response to a request for evidence). When amendments are filed pursuant to this requirement, allow investors up to 30 days after filing to submit briefs and/or evidence in support of the amendment.

Regarding section (f), AILA strongly considers that the standard of "reason to believe" is exceedingly low in the case of potentially denying or revoking a duly-filed I-526E or I-829 petition, and that such penalties should only be levied after sufficient due process is extended to the immigrant investor. A "reason to believe" may be the grounds for reopening an approved petition or issuing a notice of intent to deny or revoke, but it should not be a grounds for levying a final disqualification for an investor. This section should be changed to indicate that a person would be disqualified only after USCIS has made a final determination, following a NOID or NOIR and after the investor has had an opportunity to respond, by at least the preponderance of the evidence (which USCIS would have the burden to prove) and that such determinations should be subject to appropriate administrative review, such as motion, appeal, or federal court review.

This section should be changed to reflect that disqualifications of investors from participating in the program occur only after a final determination by the Agency. AILA recommends using the following language: "An investor that USCIS has <u>determined by preponderance of the evidence</u> was a knowing participant in any activity that led to the termination or debarment of the regional center, the new commercial enterprise, or job-creating entity cannot qualify for the provisions of this section. Such determination may be based on actual or constructive knowledge and direct or indirect participation. USCIS will notify the investor of its intent to determine that the investor was a knowing participant in such activity with a notice of intent to deny or revoke the approval of the EB-5 immigrant visa petition, as appropriate. <u>Such determinations, as the grounds for a denial or revocation of an investor petition, shall be subject to administrative or judicial review, such as filing a motion or appeal or seeking relief through a federal court, as appropriate, for the specific adjudicative action."</u>

<u>Proposed 8 CFR §204.418(b)(3)(ii), (iii) and (vi) — Duplicative Annual Statement Requirements</u>

Proposed 8 CFR §204.418(b)(3)(ii)-(iv) would require regional centers, as part of their annual statement, to provide detailed information about investor capital, project status, and the progress of associated investments and job-creation activities. DHS states these provisions are intended to give USCIS ongoing visibility into how EB-5 capital is being used and whether projects continue to satisfy program requirements.

These requirements duplicate information USCIS already receives and independently verifies through the Form I-956F project application, the RIA's mandatory regional center audits, and Form I-829 petitions to remove conditions. Materiality, in particular, is a determination USCIS itself makes; requiring a regional center to self-characterize a change as "material" in the annual statement exposes it to the risk that USCIS later disagrees, notwithstanding good-faith compliance.

AILA suggests eliminating or narrowing §204.418(b)(3)(ii) and (iii) to a brief status update, reserving document-level evidence for the audit and Form I-829 processes; and revise §204.418(b)(3)(vi) to require reporting of all changes without requiring the regional center to characterize which are "material," leaving that determination to USCIS.

<u>Proposed 8 CFR §204.421(c)(3) — Infrastructure Project Government Contract Evidence</u>

For an EB-5 infrastructure project, DHS proposes in 8 CFR §204.421(c)(3) that the applicant must show there is a contract with a government entity (federal, state, local, or tribal) under which EB-5 investor money will be used to help fund a public infrastructure project. From a practical standpoint, governmental entities frequently cannot execute definitive leases or development agreements until design is substantially advanced and project financing is committed. Requiring "evidence of a contract" at the project-application stage creates a sequencing problem no sponsor can solve, and as a practical matter closes the infrastructure category to the public-private structures Congress intended to reach.

AILA recommends that USCIS accept, at the project application stage, evidence of the governmental entity's administrative rights and payment or occupancy obligations in whatever form the parties' contracting posture has produced, including a memorandum of understanding, letter of intent, or award notice, with the executed agreement to follow with the regional center's next annual statement.

6. THE RULE SHOULD REFLECT COMMERCIAL REALITY RATHER THAN IMPOSE UNWORKABLE DEADLINES OR REQUIREMENTS

Proposed 8 CFR §204.408(f) – Evidence of Sufficient Job Creation

The proposed evidentiary list is incomplete because none of the enumerated documents necessarily establishes the statutory requirement that each position be full-time, meaning employment requiring at least 35 hours per week. USCIS routinely requests additional evidence and, in practice, may deny EB-5 petitions where the record does not establish the number of hours employees are expected to work, even where payroll, tax records, employment eligibility documents, and a business plan establish that the positions exist. Quarterly tax records and Form I-9/E-Verify documentation establish that an individual is employed and authorized to work, but they do not necessarily establish that the employee works 35 or more hours per week; likewise, a business plan may identify positions without establishing the actual or expected hours of employment.

Proposed 8 CFR §204.410 - Amending an EB–5 Immigrant Visa Petition

Proposed 8 CFR §204.410 establishes the procedures for amending an EB-5 petition to maintain eligibility following a regional center termination, debarment, or other qualifying event under the investor-protection provisions of the RIA. must file an amendment to a previously filed EB–5 immigrant visa petition within 180 days of the date USCIS issues notification to the investor that the investor's regional center, new commercial enterprise, or job-creating entity, as applicable, has been

AILA suggests amending the proposed provision to toll the 180-day period while a termination or debarment decision is subject to administrative review, including a timely filed motion to reopen or reconsider. Requiring an investor to undertake potentially substantial and irreversible restructuring while the underlying agency action remains subject to review creates unnecessary uncertainty and may prejudice investors who ultimately prevail on appeal. At minimum, ***USCIS should provide discretion to extend the 180-day period for good cause where the investor demonstrates that the pending administrative challenge materially affects the investor's ability to determine which INA §203(b)(5)(M) option to pursue***.

Proposed 8 CFR §204.420(e) - Separate Accounts and Fund Administrators

Proposed 8 C.F.R. §204.420(e) requires that the NCE or JCE, as applicable, to have established a separate account and to have engaged a fund administrator. The RIA itself requires that immigrant investor capital must, at the NCE stage, be maintained in a separate account. It also states that immigrant investor capital in a separate account can only be transferred to another separate account OR a JCE. The plain language of the RIA would thus indicate that, if immigrant investor capital is transferred to a JCE, it does not have to be maintained in a separate account from other JCE capital. However, section 204.420(e), as written, would seem to imply that, if a JCE is involved, it should establish a separate account. ***AILA suggests clarifying this point in the final regulation. Additionally, the regulation should expressly confirm in this section or elsewhere, that the separate NCE account can receive and hold both immigrant investor capital contributions and administrative fees.***

Proposed 8 CFR §204.426(b) — Three-Month Redeployment Window

DHS explains that the three-month redeployment period "is intended to provide sufficient flexibility for an NCE to identify and execute a redeployment investment while maintaining the statute's intent that the investment remain at risk for at least two years." 91 Fed. Reg. at 40677. In AILA members' experience advising regional centers and NCEs, a minimum of twelve months is often needed to properly identify, underwrite, negotiate, and close a new redeployment investment, particularly for large redeployments or NCEs structuring multiple simultaneous redeployments. Before this rulemaking, USCIS addressed redeployment through the Policy Manual's "commercially reasonable period of time" standard, understood industry-wide to permit up to approximately one year — a workable standard from which the proposed rule departs without explanation of why a shorter period is necessary to protect investors or program integrity.

Three months is not always sufficient time, in a commercial context, to properly identify, underwrite, negotiate, and contract for a new investment. Delays are common in commercial financings, and a three-month period is particularly unworkable for large redeployments or for NCEs that must structure multiple simultaneous redeployments across different projects. Nothing in the text of the RIA limits the timing of a redeployment. Coupled with the extreme result of regional center termination for failure of an NCE to meet the redeployment requirements (which impacts other NCEs sponsored by the regional center), USCIS must not temporally restrict redeployment as it does in the NPRM. If USCIS is concerned about the amount of time that the funds wait at the NCE between return of funds by the first JCE and a subsequent deployment, and how that may "reduce" the at-risk period to under twenty-four (24) months, ***USCIS could adopt a rule where the "at risk" period is paused during any due diligence period where the NCE was selecting a suitable redeployment project.***

AILA recognizes that proposed 8 CFR §204.426(b) permits USCIS to consider evidence that a longer period was reasonable under the totality of the circumstances for a particular type of enterprise or investment. However, relying on a case-by-case exception to a categorically unrealistic default will generate unnecessary uncertainty, additional evidentiary burdens, and inconsistent adjudications across similarly situated NCEs. ***AILA recommends that USCIS instead adopt a default redeployment period of not less than twelve months, measured from the date capital is returned to the NCE, while retaining the case-by-case exception for circumstances that warrant even more time.*** This approach would better reflect commercial reality while still furthering the statute's intent that redeployed capital remain at risk.

7. INVESTORS AND REGIONAL CENTERS SHOULD NOT BE PENALIZED FOR USCIS'S OWN PROCESSING DELAYS

Proposed 8 CFR § 204.416 — Amending or Withdrawing a Regional Center Designation

If the government finalizes this NPRM without change, USCIS would hold adjudication of any project application and any associated EB-5 immigrant visa petitions while certain regional center amendments are pending. Neither this NPRM nor the companion EB-5 fee rule sets a processing time, or even an aspirational processing goal, for amendments; USCIS's own published data show that 80 percent of Form I-956F project applications are adjudicated within 12 months, meaning the hold could extend a year or more.

AILA recommends that USCIS provide for pending project applications and investor petitions to be adjudicated based on the filing, rather than the adjudication, of the amendment; alternatively, USCIS could establish a defined processing time (e.g., 60 days) after which related adjudications may proceed regardless of whether the amendment has been adjudicated.

8. PRESERVE LONGSTANDING EB-5 PRACTICE ABSENT CLEAR STATUTORY CHANGE

Several proposed provisions depart from decades of accepted USCIS practice and precedent without clear statutory authorization for the departure.

The continued-eligibility requirement in proposed 8 CFR §204.407(a), discussed above, contradicts the "approvable when filed" principle articulated in *Matter of Izummi,* 22 I&N Dec. 169 (Assoc. Comm. 1998), and reflected in the priority-date-fixing approach of proposed §204.406.

Proposed § 204.407(c)(2) requires an investor to establish legal ownership of invested capital, providing that bank statements and other financial documents "do not meet this requirement if the documents show someone else as the legal owner of the capital." This interpretation of *Matter of Ho,* 22 I&N Dec. 206 (Assoc. Comm. 1998), does not account for legitimate account structures — joint holders, payable-upon-death beneficiaries, custodial or nominee arrangements — that do not displace the investor's actual ownership. As written, the provision risks creating an irrebuttable presumption against ownership in circumstances where, under *Matter of Chawathe* 25 I&N Dec. 369)(AAO 2010), an investor should be able to establish ownership by a preponderance of the evidence.

AILA recommends adding a clause to 8 CFR §204.407(c)(2) providing that the documentary requirement is satisfied "unless additional credible evidence is presented to establish the petitioner's ownership or co-ownership of the capital."

Separately, in proposed 8 CFR §204.412, DHS proposes to eliminate the Census Share Methodology as an acceptable means of demonstrating a high-unemployment area, relying solely on American Community Survey five-year estimates. Because five-year estimates average conditions over an extended period, they may not capture recent, significant deterioration in local labor markets, which the Census Share Methodology — combining current Local Area Unemployment Statistics with ACS census-tract distributions — is better positioned to reflect.

AILA also recommends USCIS continue to permit petitioners to demonstrate high-unemployment-area eligibility using either ACS census-tract data alone or the Census Share Methodology, provided the methodology relies exclusively on publicly available federal datasets and is transparent, reproducible, and statistically valid.

Proposed 8 CFR §204.407(e)(2) – Employment Creation Allocation

The total number of full-time positions created for qualifying employees will be allocated solely to investors who have used the new commercial enterprise as the basis for an EB–5 immigrant visa petition. No allocation will be made among persons not seeking classification as an immigrant investor or among any non-natural persons, either foreign (subject to 8 CFR §204.417) or domestic. USCIS will recognize any reasonable agreement made among investors regarding the identification and allocation of such qualifying positions. If no such agreement exists, USCIS will allocate job creation based on the filing date of the EB–5 immigrant visa petition.

AILA suggests that DHS modify the rule to specify which filing date controls the default allocation - the I-526E classification petition or the I-829 petition to remove conditions. The recommendation is to allocate available jobs based on the I-829 filing date.

Proposed 8 CFR §204.407(e)(3) – Job Creation for Regional Center Investors

AILA supports DHS's proposed treatment of direct and indirect job creation for construction activity lasting less than two years. From both an economic and practical perspective, the proposed methodology is sound and appropriately implements the EB-5 Reform and Integrity Act of 2022. To avoid uncertainty and promote consistent adjudications, however, DHS should expressly state that the calculation is performed on a simple linear basis.

For example, where construction lasts twelve months, fifty percent (12 ÷ 24) of the estimated direct jobs would be counted; where construction lasts eighteen months, seventy-five percent (18 ÷ 24) would be counted. Expressly incorporating this calculation into the regulation would eliminate ambiguity while remaining faithful to the statutory language enacted by Congress.

From an economic perspective, linear proration is the most appropriate methodology. It reflects the proportional duration of construction activity, is transparent, easy to administer, and produces consistent and predictable results for both petitioners and adjudicators. The proposed approach also represents a significant improvement over prior practice. Before enactment of the RIA, projects with construction periods of less than twenty-four months frequently could not receive credit for any model-derived direct construction jobs, while projects lasting twenty-four months or longer could receive credit for all such jobs. This created an artificial threshold that, in some instances, encouraged developers to extend construction schedules solely to satisfy the regulatory requirement rather than because additional construction time was economically or operationally necessary. The linear proration approach appropriately eliminates that unintended incentive while more accurately reflecting actual employment generated by the project.

AILA recommends DHS provide additional clarity and ensure uniform application, DHS should expressly state in the regulatory text or accompanying guidance that the required proration of model-derived direct jobs is calculated on a simple linear basis by multiplying the estimated direct jobs by the fraction of the twenty-four-month period during which construction activity occurs.

Proposed 8 CFR § 204.408(b)(1) – "Remains Invested" and Commencement of the Sustainment Period

This provision requires evidence that the investor's capital was still invested in the NCE when the EB-5 petition was filed, even if the investment was made earlier. ***AILA recommends that DHS clarify the language to confirm that the initial required capital must remain invested as of the priority date of the I-526/I-526E petition filing, not with an adjustment of status application or payment of fees to the National Visa Center.***

DHS should clarify that the two-year sustainment period begins when the investor's full qualifying capital is contributed pursuant to the qualifying investment commitment, rather than at a later project-level transfer selected by the NCE or JCE. A commitment-based standard provides an objective, investor-specific date that can be established from the investor's subscription and banking records and avoids making the commencement of the investor's statutory sustainment period dependent on transactions between entities over which the investor has no control.

If DHS instead measures the sustainment period from a subsequent transfer of capital, the final rule must establish an objective method for attributing pooled capital to individual investors. Investors in a pooled NCE generally contribute capital on identical terms and receive partnership interests, but neither a Schedule K-1 nor the underlying transaction documents necessarily identify which investor's capital corresponds to a particular draw or transfer. Without an express attribution methodology, identically situated investors could receive different sustainment periods based on an attribution convention selected by the NCE or applied differently by adjudicators.

The proposed framework also creates a notice problem. As drafted, the triggering event may occur at the enterprise level, without any requirement that the NCE provide the investor with the information necessary to determine when the investor's sustainment period begins or ends. An investor should not bear the burden of establishing compliance with a date that the regulation does not make ascertainable from records available to the investor.

A commitment-based standard avoids this problem. The relevant date would be the date on which the investor's full qualifying capital is contributed with the qualifying commitment in place—a date that is individually documented, verifiable, and known to the investor.

<u>Proposed 8 CFR § 204.408(d) – Evidence of Lawful Source of Investment Funds and Administrative Costs and Fees.</u>

In proposed 8 CFR § 204.407(d), the government sets forth the evidentiary requirements for proving the lawful source and path of investment funds and administrative fees, requiring documentation tailored to the origin of the capital, including earnings, property sales, businesses, gifts, loans, and other funding sources.

The phrase "bank records demonstrating the accumulation of capital" in 8 CFR § 204.407(d) should not be interpreted to create a separate requirement that an investor document the historical accumulation of funds through years of bank statements. The INA requires evidence that the investment capital was lawfully obtained, but does not require investors to reconstruct the entire financial history of how lawful income accumulated over many years, particularly where the lawful source can be established through other credible evidence such as employment records, income documentation, tax returns, business records, or investment records. INA §203(b)(5)(A); INA §203(b)(5)(L). The RIA requires petitioners to submit evidence demonstrating that their investment capital was obtained through lawful means and to identify persons involved in transferring that capital. See INA §203(b)(5)(L)(i), (IV). In addition, proposed 8 CFR §204.408(d) should also clarify that the phrase "administrative costs and fees associated with the petitioner's investment" refers only to fees and expenses directly associated with the investment transaction or project, and does not include attorney fees, USCIS filing fees, or other government filing or professional fees paid by the investor in connection with the immigration process. Those expenses are not part of the investor's EB-5 capital contribution and should not be subject to the same source-of-funds documentation requirements applicable to the investment capital.

In practice, USCIS has increasingly required investors to document the accumulation of funds in their accounts, including years of bank statements purportedly showing the gradual accumulation of salary or other lawful income. Neither the INA nor the RIA requires an investor to demonstrate the historical accumulation of capital through a continuous series of bank records. Requiring years of monthly bank statements can be impossible where accounts have been closed or financial institutions no longer retain historical records, and it adds little evidentiary value where the investor's lawful income and corresponding tax obligations are independently established. ***AILA recommends that DHS clarify that accumulated capital may be established by a preponderance of credible evidence and that a complete history of account accumulation is not required where other evidence sufficiently establishes the lawful acquisition of the capital.***

<u>Proposed 8 CFR § 204.408(d)(2)(i) - Appraisal or Property Value</u>

The requirement for an "appraisal or property value" should be flexible enough to account for situations in which the property was sold years earlier and the investor no longer owns the property or has access to obtain a retrospective appraisal. Property value should therefore be permitted to be established through any credible contemporaneous evidence, including the recorded sale price, closing documents, contemporaneous appraisal or valuation, tax assessment, or comparable sales data. ***DHS should not require a formal appraisal where reliable contemporaneous evidence is available to establish the property's value at the relevant time.***

Proposed 8 CFR § 204.408(d)(2)(ii), (3)

These provisions effectively re-impose the open-ended accumulation tracing requirement addressed above by requiring investors to reconstruct how funds were accumulated, often years or decades earlier, to purchase property that may have since been sold. Such a requirement demands historical financial records that investors were not legally required to retain and that may be impossible to obtain from financial institutions, particularly for closed accounts or transactions many years in the past. Where the investor can establish the lawful acquisition and ownership of the property and the subsequent disposition or use of its proceeds, requiring a reconstruction of the original accumulation of the purchase funds adds little evidentiary value and exceeds what is necessary under the preponderance of the evidence standard. ***AILA recommends that DHS should therefore eliminate this requirement or clarify that the lawful source of the property and resulting investment capital may be established through credible evidence appropriate to the circumstances, without requiring an exhaustive reconstruction of the funds originally used to acquire the property***.

Proposed 8 CFR §204.408(d)(4) - Certified Copies of Any Judgments

DHS proposes to require the investor to disclose and provide documentation regarding any monetary judgments, pending civil or criminal proceedings, governmental administrative actions, or similar legal matters involving the investor, whether in the United States or abroad, or alternatively attest that no such matters exist.

Requiring evidence of "any private civil action" is unnecessarily broad and could impose a substantial and irrelevant burden on investors who, because of their profession, business activities, or position, may have been named as defendants in numerous civil proceedings. Being named in a lawsuit or even having a monetary judgment entered against an individual, does not establish wrongdoing or indicate that the investor's EB-5 capital was unlawfully obtained. The requirement should therefore be limited to private civil actions that are materially relevant to the lawful source or path of the EB-5 investment capital.

AILA recommends DHS strike "any" and revise the provision to require evidence of "private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States that are relevant to the EB-5 source or path of funds."

Proposed 8 CFR §204.408(d)(5) - Documentation Evidencing Gifted or Loaned Capital

The NPRM proposes requiring evidence demonstrating source-specific documentation, exempting banks, for evidence concerning gifts, loans, and other capital sources, as well as disclosures of certain judgments and legal proceedings. Limiting the exemption to "banks" is unnecessarily narrow because many legitimate mortgages, home-equity lines of credit, and other loans are issued by licensed, regulated professional lenders that are not technically banks. Requiring such lenders to disclose the source of their own lending capital is generally impractical, may be prohibited by confidentiality obligations, and is unnecessary where the lender is subject to regulatory oversight and is acting in the ordinary course of its licensed business. The regulation should therefore focus on the regulated and professional nature of the lender rather than its institutional label and should recognize licensed lenders and money-service businesses as providing a reliable source of lawful loan proceeds.

AILA recommends DHS replace "non-bank lender" with "professional, licensed lender or money-service business acting in the regular course of its lending business," consistent with the safe-harbor approach in § 204.407(c)(3).

Proposed 8 CFR §216.3 - Termination of Conditional Resident Status

DHS proposes that a conditional permanent resident's termination of status, and all of the rights and privileges concomitant thereto (including authorization to accept or continue in employment in the United States), will take effect as of the date of such determination by USCIS. The proposed language conflicts with longstanding BIA precedent establishing that an alien's lawful permanent resident status does not terminate until a final administrative order of removal. *Matter of Lok*, 18 I&N Dec. 101, 106–07 (BIA 1981); *Matter of Stowers*, 22 I&N Dec. 605, 612 n.10 (BIA 1999); *Matter of A-M-*, 25 I&N Dec. 66, 69 (BIA 2009), and as reflected in USCIS' current Policy Manual, which allows for conditional green card holders with denied Form I-829s to continue obtaining Form I-551 ADIT stamps until final order of removal. Nothing in the RIA states that the denial of an I-829 petition by USCIS is to result in a loss of continued permanent residence by the investor, and thus, the provision is ultra vires.

Proposed 8 CFR §216.6(g)(2), (h) – Termination of Conditional Green Card Status After Missed Interview

DHS proposes that, if an investor fails to appear for a required interview or fails to file an I-829, "USCIS will terminate the investor's permanent resident status as of the second anniversary" of conditional permanent residence. Proposed 8 CFR §§216.6(g)(2),(h). This language should be revised because USCIS may not unilaterally terminate the investor's lawful permanent resident status. Under INA §216A(c)(3)(C)–(D), an investor whose conditional status is terminated is subject to removal proceedings and is entitled to seek review of the termination in those proceedings. The proposed language also conflicts with longstanding BIA precedent establishing that an alien's lawful permanent resident status does not terminate until a final administrative order of removal. Thus, even if USCIS determines that an investor failed to file an I-829 or failed to appear for an interview, that determination does not itself extinguish the investor's LPR status, or the employment authorization incident to that status. Treating the anniversary date as the date on which the investor loses the ability to work would effectively impose the consequences of a final removal order before the investor has received the review process Congress established. ***The regulation should expressly provide that an I-829 filing or interview failure does not, by itself, terminate the investor's employment authorization or other incidents of LPR status before entry of a final administrative order of removal.*** DHS should also explain why EB-5 conditional permanent residents are being treated differently from other lawful permanent residents whose status remains in effect until a final order of removal.

Additionally, AILA requests DHS to revise proposed §216.6(h) to require USCIS, before terminating status for failure to appear at interview, to provide notice of the proposed termination and a reasonable opportunity to request rescheduling based on good cause.

AILA's concerns regarding departures from longstanding EB-5 practice also intersect with the retroactivity issues discussed in Category 12. There, AILA explains in greater detail why DHS may not use this rulemaking to attach new legal consequences to petitions, investments, or benefits filed under prior law absent clear congressional authorization.

9. THE FINAL RULE SHOULD CLEARLY RESOLVE TRANSITION AND GRANDFATHERING QUESTIONS

Proposed 8 CFR §204.400(a) — Applicability to Pre-2022 Petitions

> Although styled as an applicability provision, this section applies new grounds for denial and revocation to petitions filed years before the subpart existed and does so without the continuing-conduct limitation the supplementary information describes. The supplementary information states the exceptions apply "in instances where the petitioner poses an ongoing or continued threat to the public safety or national security of the United States or otherwise continues to engage in fraud, deceit, intentional material misrepresentation, or criminal misuse," but the regulatory text itself carries no such limit — it reaches any petition that "was predicated on or involved" the conduct, in the past tense, regardless of whether anything continues.

Compounding this, because 8 CFR §204.6 is removed and reserved by this same rule, the regulation that continues to govern the roughly 1,500 petitions still pending under the pre-2022 framework will no longer appear in the Code of Federal Regulations, leaving practitioners and adjudicators to work from a superseded, unpublished text.

AILA recommends that USCIS state the continuing-conduct condition directly in 8 CFR §204.400(a) itself, and preserve public access to the text of §204.6 as in effect on November 20, 2019, for use in adjudicating pending pre-2022 petitions.

10. REGIONAL CENTER OBLIGATIONS SHOULD BE LIMITED TO MATTERS WITHIN THE CENTER'S CONTROL

As set out in Category 1, proposed 8 CFR § 204.412(b) requires regional centers to maintain effective internal controls over "every new commercial enterprise and job-creating entity associated with the regional center, including non-affiliated job-creating entities," and to provide reasonable assurance of compliance with "all applicable immigration laws, securities laws, labor laws, and the terms and conditions of the investments under the purview of the regional center." A regional center has no legal authority to direct a non-affiliated job-creating entity's conduct, and open-ended responsibility for "all applicable laws" — potentially reaching tax, environmental, and state and local law without limitation — exceeds the compliance role Congress assigned to regional centers.

AILA recommends that USCIS limit § 204.412(b) oversight obligations to matters reasonably within the regional center's contractual authority or commercially reasonable control, and narrow "all applicable laws" to matters directly related to EB-5 program compliance.

11. FAVOR CURE AND REMEDIATION OVER AUTOMATIC, PUNITIVE ENFORCEMENT

Across the sections reviewed, AILA members consistently favor mechanisms that allow parties to correct deficiencies over automatic adverse consequences.

As discussed in Category 3, proposed 8 CFR §204.426(c) mandates automatic termination of a regional center's designation for an individual NCE's redeployment noncompliance, without regard to whether the noncompliance reflects bad faith. AILA recommends discretionary enforcement and a mechanism for a regional center to withdraw its association from a noncompliant NCE.

As discussed in Category 4, proposed 8 CFR §204.417 gives an affected regional center, NCE, or JCE only 14 days to take "commercially reasonable efforts" to remove an ineligible person involved, with no defined process to contest an erroneous agency determination in the first instance.

AILA recommends that USCIS permit regional centers to cure minor filing deficiencies through a request for evidence rather than outright rejection or denial where statutory eligibility is otherwise established.

Further, throughout subpart D, DHS should replace automatic or default-adverse consequences with a request-for-evidence or cure opportunity in the first instance, reserving termination, debarment, and denial for circumstances involving bad faith, a knowing violation, or a failure to cure after notice.

12. GENERAL LIMITATIONS ON PARAGRAPH N AND PARAGRAPH O – IMPERMISSIBLE RETROACTIVITY IN NPRM

A. Paragraph INA §203(b)(5)(N) Cannot Be Applied to Legacy Investors, and Paragraph INA §203(b)(5)(O) Cannot Reach Pre-Effective-Date Misconduct

Proposed 8 CFR §§204.432(a) and 204.433(a) do not merely implement new statutory authorities; they claim power to deploy those authorities "at any time," "regardless of when" the affected petition, application, or benefit was filed or approved, and to use pre-RIA facts whenever USCIS decides that a threat or misconduct "arose or continued to exist" after enactment. None of those temporal commands appear in the statute. DHS cannot write language into a regulation that Congress omitted from the law. Because Congress did not expressly provide for the broad retroactive reach reflected in the proposed rule, DHS should revise these provisions to more closely align with the text and effective-date framework established by the RIA.

INA §§203(b)(5)(N) and (O) (hereafter AILA will refer to "paragraph (N)" and "paragraph (O)") consist of different temporal rules. Paragraph (N) created a new EB-5-specific mechanism that can upend the entire petition-and-status sequence on national-interest grounds. Properly interpreted, it may not be applied at all where the principal investor filed the underlying Form I-526 before March 15, 2022. Paragraph (O), by contrast, identifies specified forms of misconduct; it may apply only where USCIS identifies a qualifying post-effective-date act, supports each required finding with reliable evidence, and explains the statutory nexus. Treating those distinct questions as one generic inquiry into whether something later "continued" obscures the legal issue and would make the presumption against retroactivity disappear precisely where it matters most.

1. Congress did not clearly authorize the proposed retroactive reach

The governing clear-statement rule

Under *Landgraf v. USI Film Products*, a court first asks whether Congress clearly prescribed a statute's temporal reach. 511 U.S. 244, 280 (1994). If it did not, the statute may not be applied when doing so would impair rights possessed when a party acted, increase liability for past conduct, or impose new duties with respect to completed transactions. *Id.* A law is retroactive when it creates a new disability, removes a previously available protection, or otherwise changes the legal consequences of completed events; the consequence need not take the form of conventional damages liability. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947–50 (1997).

The rule is particularly demanding in immigration cases. *INS v. St. Cyr* rejected efforts to infer retroactive reach from a general effective date, transition provisions addressing selected cases, or the absence of an all-purpose savings clause. 533 U.S. 289, 316–20 (2001). Congress must make the displacement of settled expectations unmistakable; ambiguity does not suffice, and an agency cannot use deference to supply the missing temporal command. *Id.* at 320–21 n.45. Actual proof of reliance by each affected person is not a prerequisite to the presumption. *Vartelas v. Holder*, 566 U.S. 257, 273 (2012).

The RIA contains no clear command reaching legacy investors

Congress provided effective dates for paragraphs (N) and (O), but it did not expressly state that either provision applies to petitions filed or approved before enactment, to conduct or transactions occurring before the effective date, or "regardless of when" the pertinent filing, approval, or event occurred. The proposal's language is DHS's invention. Paragraph (N)'s reference to I-829 petitions and documents evidencing conditional residence does no temporal work: investors who filed under the RIA will also reach the I-829 stage and hold conditional-resident documents. Paragraph (O)'s phrase "was predicated on or involved" describes the required relationship between misconduct and a benefit; it does not clearly prescribe when the misconduct may have occurred.

The RIA's broader statutory framework confirms that Congress knew how to draw temporal lines. Throughout the statute, Congress prescribed effective dates, protected specified pre-enactment filings, distinguished between petitions filed before and after March 15, 2022, and directed when particular changes would reach legacy cases. Most telling here, RIA §104(b)(2)(B) uses the filing date of the *underlying investor petition* to define the legacy cohort exempt from the new INA §216A requirements. Pub. L. No. 117-103, div. BB, 136 Stat. 1070, 1103. Congress also made filing-time eligibility controlling: an investor who was eligible for classification when the petition was filed "shall be deemed eligible" when it is adjudicated, subject to approval of any associated project application. INA §204(a)(1)(H)(ii); RIA §105(a), 136 Stat. at 1103. Those provisions reflect a coherent petition-filing architecture, not a regime in which agency delay moves the governing line. *St. Cyr* forecloses the negative inference DHS may prefer: Congress's express treatment of some temporal questions does not silently make every other new disability retroactive. 533 U.S. at 317–20.

Proposed 8 CFR §204.400(a) likewise begins from the correct premise that an investor petition filed before March 15, 2022 is governed by the pre-RIA rules. The proposal then manufactures a categorical exception for paragraph (N) and an unbounded exception for paragraph (O). No statutory text supplies the first or authorizes the second to reach pre-effective-date misconduct. An agency may implement a temporal command Congress enacted; it may not create the command itself.

DHS independently lacks retroactive rulemaking authority

The proposal also fails under *Bowen v. Georgetown University Hospital*, which holds that agencies have no power to promulgate retroactive legislative rules unless Congress conveys that authority expressly. 488 U.S. 204, 208–09 (1988). The D.C. Circuit has repeatedly enforced that limit. A rule is retroactive when it changes the legal landscape and attaches new consequences to completed events. *National Mining Ass'n v. Department of the Interior*, 177 F.3d 1, 8 & n.12 (D.C. Cir. 1999). A substantive rule may not be applied to pending claims if it changes settled legal consequences. *National Mining Ass'n v. Department of Labor*, 292 F.3d 849, 859–60 (D.C. Cir. 2002). Nor may an agency use a later rule to unsettle approved baseline transactions, punish noncompliance with an obligation that did not yet exist, or impose a newly authorized future-facing industry bar for pre-statute misconduct. *Arkema Inc. v. EPA*, 618 F.3d 1, 7–9, 15–17 (D.C. Cir. 2010); *Board of County Commissioners of Weld County v. EPA*, 72 F.4th 284, 295–98 (D.C. Cir. 2023); *Koch v. SEC*, 793 F.3d 147, 157–58 (D.C. Cir. 2015). Proposed 8 CFR §§204.432 and 204.433 would do all of those things, without the express delegation *Bowen* requires.

2. Paragraph (N) is categorically unavailable where the underlying I-526 predates the RIA

The completed EB-5 transaction—not the date of DHS's later decision—is the relevant event

The NPRM concedes that paragraph (N) is a "new discretionary authorit[y]" and that, before the RIA, USCIS could not directly take the proposed action against an EB-5 petition or application presenting national-security concerns unless some separate statutory ground supplied authority. *Employment-Based Immigrant Visa, Fifth Preference Regulations*, 91 Fed. Reg. 40,676, 40,699–700 (July 2, 2026). That concession is decisive. Applying the new authority to a legacy investor would add a previously unavailable basis to deny or revoke the petition chain, terminate documents and status, and impose program consequences after the investor committed capital and entered the EB-5 process under a different legal regime.

For a legacy investor, the controlling event was the pre-RIA investment and petition—not the date DHS later assigns to an alleged threat. Before paragraph (N) existed, the investor may have transferred hundreds of thousands of dollars, surrendered control of that capital for years, paid substantial fees, sold property or a business abroad, moved a family to the United States, altered careers and children's education, obtained approval of the I-526, and acquired conditional residence. Those steps are not realistically reversible. Paragraph (N) would place a new trapdoor beneath a transaction already undertaken and, often, substantially performed.

Chang v. United States is particularly instructive. The Ninth Circuit rejected the government's effort to apply newly announced EB-5 standards at the I-829 stage to investors whose Form I-526 petitions had been approved under the earlier regime. 327 F.3d 911, 925–30 (9th Cir. 2003). I-526 approval provisionally approves the investment plan; Form I-829 adjudication principally tests whether the investor carried out that plan. The government could not sever the two stages, call the I-829 a new application, and change the rules after the investors performed. *Id.* at 928–30. *Chang* thus confirms the integrated character of the EB-5 transaction and the exceptional reliance an approved Form I-526 engenders. The same transaction-centered reasoning also protects investors who timely committed capital and filed under pre-RIA law, even if agency delay left the petition pending on March 15, 2022; the retroactivity rule does not make the availability of protection turn on how quickly USCIS happened to adjudicate otherwise comparable filings.

Ordinary "continuing application" cases do not alter that conclusion. *Moore v. Frazier* concerned an unapproved I-130 and stressed that the amendment affected no prior decision, past eligibility, or completed transaction. 941 F.3d 717, 729–31 (4th Cir. 2019). EB-5 is materially different: the investor must already have invested or be actively investing when filing; Congress made filing-time eligibility controlling; *Chang* treats I-526 and I-829 as an integrated transaction; and paragraph (N) reaches not merely an undecided request, but approved petitions and conferred status. A case about permission to undertake a future act cannot erase those differences.

A later adjudication, discovery, or "continuing threat" label does not eliminate retroactive concerns

The proposed rule appears to assume that paragraph (N) applies prospectively whenever USCIS acts after the RIA and characterizes the asserted threat as current or continuing. However, the timing of USCIS's adjudication, discovery of the relevant facts, or subsequent characterization of those facts, does not resolve the retroactivity question. The question is whether paragraph (N) would attach a new disability to the investor's completed pre-RIA transaction. In *Vartelas*, post-enactment travel merely supplied the occasion for the government to attach a new disability to a pre-enactment conviction. 566 U.S. at 269–72. The Court looked to the completed predicate event, not the later procedural moment when the government imposed the consequence.

National Mining Ass'n v. Department of the Interior illustrates the distinction. The statute there was expressly keyed to a violation that was "currently" ongoing and therefore operated on that current violation regardless of when it began. 177 F.3d at 7–8. Paragraph (N), by contrast, does not say that the investor *is currently a threat*; it says that approval "is contrary" to the national interest "for reasons relating to threats." DHS adds the "arose or continued to exist" test in this NPRM. Nor does the proposed rule establish a rebuttable evidentiary presumption concerning present security risks, as in *Boniface v. Department of Homeland Security*, 613 F.3d 282, 288 (D.C. Cir. 2010). Instead, it authorizes DHS to impose new and immediate legal consequences based on conduct or circumstances that may predate enactment.

The same distinction governs here. Filing or adjudicating an I-829 after enactment does not turn a legacy petition into an RIA petition. Continued possession of an approval or lawful status is not a new application for the statutory regime to which the investor committed capital. Later discovery, evaluation, or recharacterization of old facts does not change their date. And the continuing consequences of completed conduct are not new conduct.

Nor can the word "threat" do the work of a temporal clause. If DHS could evade the presumption by labeling any historical association, transaction, or condition a threat that "continued to exist," every retroactive application could be redescribed as prospective. The presumption would become a drafting inconvenience rather than a rule of law. The categorical line therefore must hold regardless of when an associated filing is made or adjudicated, when DHS obtains or evaluates information, or when DHS alleges that a threat arose, persisted, or became apparent.

The filing-date rule protects the entire petition chain

AILA recommends that DHS clarify that paragraph (N) does not apply when the principal investor filed the underlying Form I-526 before March 15, 2022. In such cases, paragraph (N) should not be applied to the principal investor; a spouse or child deriving or seeking to derive status from the petition; the Form I-526 petition itself; an associated immigrant-visa or adjustment application; conditional residence; a Form I-829 petition; documents evidencing status; or any other petition, application, status, document, or benefit arising from or dependent on that filing. A categorical rule is essential. A narrower rule keyed to the date of a later application or asserted threat would fragment a single statutory process and reproduce the very retroactivity problem the filing-date line is meant to prevent.

Grandfathering paragraph (N) would not leave DHS powerless

The Government remains fully able to address genuine threats. It retains the national-security inadmissibility grounds in INA §212(a)(3), the national-security deportability grounds in INA §237(a)(4), and otherwise applicable rescission, revocation, fraud, and removal authorities, together with the procedures and burdens Congress attached to them. The question is not whether DHS may act against a person who presents a genuine threat. It is whether DHS may reach backward and use paragraph (N)'s newly created EB-5 mechanism against a person who entered the program under pre-RIA law. It may not.

3. Paragraph (O) may reach only separately identified post-effective-date misconduct

Paragraph (O) presents a different temporal question because it identifies fraud, deceit, intentional material misrepresentation, and criminal misuse as predicates for adverse action. AILA submits that paragraph (O) should not be applied based solely, or even materially. on misconduct completed before May 14, 2022. Paragraphs (N) and (O) became effective 60 days after the RIA's March 15, 2022 enactment—May 14, 2022. RIA §103(b)(2), Pub. L. No. 117-103, div. BB, 136 Stat. 1070, 1100. Thus, even under DHS's broader temporal theory, the new authorities could not govern the March 15–May 13, 2022 interval. Later discovery, later characterization, the continued existence of an approval, or the continuing effects of completed wrongdoing do not transform the original act into post-effective-date misconduct. A later affirmative act of concealment or misuse may be considered only if USCIS identifies that act as a separate post-effective-date statutory predicate, supports each required finding with reliable evidence, and explains the statutory nexus.

Pre-effective-date facts may supply context or circumstantial evidence of a distinct post-effective-date act; they cannot themselves carry the decision. Any adverse determination that refers to historical facts must identify the particular post-effective-date act, the actor, the statutory category the act allegedly satisfies, the evidence establishing every element, and the required relationship between that act and the benefit. Paragraph (O)(i) also remains "[s]ubject to subparagraph (M)" in every case. The agency cannot use a temporal rule to erase the good-faith-investor protections Congress made controlling.

4. DHS has not discharged its independent duty to address reliance interests

Even apart from the presumption against retroactivity, the APA requires an agency changing course to identify and weigh serious reliance interests. *See Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–23 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). The proposal does not grapple with the amount and irreversibility of legacy investments, official petition approvals, the status already conferred on principal and derivative residents, the practical impossibility of unwinding years-old transactions, or less disruptive alternatives. Saying that USCIS will characterize a threat or misconduct as post-enactment simply assumes the disputed legal conclusion. It is not an analysis of reliance.

5. Required regulatory corrections

DHS should delete "at any time," "regardless of when such petition, application, or benefit was filed or approved," and the provisions authorizing adverse action because a threat or misconduct supposedly "arose or continued to exist" after enactment from proposed §§ 204.432(a) and 204.433(a). ***Proposed 8 CFR §204.432 should instead state:***

> This section applies only if the principal alien's underlying petition for classification under section 203(b)(5) of the Act was filed on or after March 15, 2022. It does not apply to a petition filed before that date; to the principal alien or a spouse or child deriving or seeking to derive status from it; or to any petition, application, status, document, or benefit arising from or dependent on it, regardless of the date of filing, adjudication, approval, discovery, evaluation, or determination, and regardless of when any alleged threat, condition, conduct, or information arose, continued, was discovered, or was evaluated.

Proposed 8 CFR §204.433 should state that adverse action may rest only on a separate act of qualifying misconduct occurring on or after the statutory effective date. It should further provide that historical facts may be considered only as evidence of an independently identified post-effective-date predicate; later discovery, characterization, or consequences do not change the date of completed conduct; and every decision must identify the post-effective-date actor, act, statutory category, evidence, elements, and nexus on which USCIS relies.

B. Constructive Knowledge and "Should Have Known" Cannot Satisfy Congress's Knowing-Participation Standard

1. Congress chose actual knowledge, intentional participation, and causation

INA §203(b)(5)(M)(vi) withholds good-faith-investor protections only if the Secretary has reason to believe that the investor "was a knowing participant in the conduct that led to" the relevant entity's termination. Paragraphs (N)(iii) and (O)(ii) of INA §203(b)(5) use the same core formulation and, for debarment, require proof by a preponderance of the evidence. The text demands actual awareness of the material conduct, intentional participation in that conduct, and a causal connection between that conduct and the entity's termination. Proposed 8 CFR §§204.410(f), 204.432(b), and 204.433(b) dilute each element.

The contrast within the RIA is deliberate. In INA §203(b)(5)(I), Congress imposed duties concerning parties a regional center "knew or reasonably should have known" about. In paragraphs (M)(vi), (N)(iii), and (O)(ii), Congress instead required a "knowing participant." DHS cannot import the former standard into the latter. The omission of "reasonably should have known" is statutory text, not a gap for the agency to fill. ***AILA recommends that the proposed regulation be revised to be consistent with the statute.***

2. "Reason to believe" describes the Secretary's evidentiary judgment; it does not replace the fact that must be believed

Paragraph (M)(vi)'s "reason to believe" language addresses the Secretary's basis for making a finding. The object of the finding remains that the investor was a knowing participant. Circumstantial evidence may support an inference of actual knowledge; constructive knowledge cannot substitute for it. The Supreme Court has repeatedly distinguished what a person actually knew from information the person theoretically could have discovered. *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. 178, 186–91 (2020).

At most, a carefully confined willful-blindness doctrine may support actual knowledge where the person subjectively believed there was a high probability that the relevant fact existed and deliberately acted to avoid learning it. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766–71 (2011). That is a demanding subjective test. Negligence, recklessness, organizational title, a generalized duty of care, and failure to investigate are not enough.

3. DHS's formulation would punish investors for being deceived

As described in the NPRM's preamble, DHS would treat a person as a knowing participant if the person knew or "should have known" of a violation and failed to act. 91 Fed. Reg. at 40,700, 40,752. That is negligence-based supervisory liability dressed in the language of knowledge. It would permit the loss of paragraph (M) protection or permanent debarment even where an investor did not know of the misconduct, did not participate, lacked authority or a legal duty to stop it, and was affirmatively misled by the people who controlled the enterprise.

The standard is especially unworkable for individual regional-center investors, who commonly are limited partners or similarly passive owners. They usually lack operational control, internal accounts, authority over promoters and project managers, and a practical means to audit every entity in a layered investment structure. The proposal would punish the people deceived by managers for failing to discover the managers' concealment. A permanent immigration consequence cannot turn on an adjudicator's hindsight view that a passive investor should somehow have uncovered what the wrongdoer worked to hide.

Proposed 8 CFR §204.434 makes constructive knowledge more untenable by restricting disclosure of specified controlled information when the responsible agency has not authorized disclosure. DHS cannot infer knowledge or culpable inaction from an investor's failure to obtain information the regulation itself kept outside the investor's lawful access. The collision between information control and constructive knowledge is not a hard case at the margins; it exposes the basic irrationality of the proposed standard.

4. "Indirect participation" still requires intentional contribution to the termination-producing conduct

A person may participate indirectly by knowingly acting through an intermediary or intentionally assisting the relevant conduct. But mere investment, organizational association, receipt of a benefit, failure to uncover concealed wrongdoing, or failure to intervene without actual knowledge, authority, and a duty to act is not participation. If USCIS relies on an omission, it should have to establish actual knowledge, a specific legal or contractual duty, practical authority to intervene, an intentional decision not to act for the purpose of facilitating the misconduct, and a causal connection to the conduct that produced termination.

The NPRM also replaces Congress's causal phrase—conduct "that led to" termination—with conduct merely "related to" a paragraph (N) or (O) determination in proposed §204.431(b)(5) and (6). "Related to" can sweep in remote, incidental, or contemporaneous acts. ***It must be deleted.*** Congress required the person's knowing participation in the termination-producing conduct, not adjacency to a later agency finding.

5. The final rule must restore the statutory elements

INA §203(b)(5)(M)(vi) provides that good-faith investor protections are unavailable only when the Secretary has reason to believe that the investor "was a knowing participant in the conduct that led to" the termination of the relevant entity. INA §§203(b)(5)(N)(iii) and (O)(ii) employ substantially the same formulation and, in the debarment context, require proof by a preponderance of the evidence. Read together, these provisions require evidence of the investor's actual knowledge of the relevant conduct, intentional participation in that conduct, and a demonstrable nexus between the conduct and the termination or debarment at issue.

Based on the statute, AILA recommends that DHS delete every reference to constructive knowledge and "should have known" from proposed §§204.410(f), 204.432(b), and 204.433(b). The phrase "Knowing participant" should mean a person who was actually aware of the material conduct and intentionally participated in it. The rule may recognize circumstantial proof and the two-part subjective willful-blindness standard in *Global-Tech*, but it must exclude negligence, recklessness, status, title, association, and failure to investigate as substitutes for knowledge. It must also replace "related to" with "that led to," require an affirmative intentional contribution and material causal nexus, and state that passive ownership or association alone does not establish participation. ***For paragraph (M)(vi), the record must contain reasonable, substantial, and probative evidence supporting each element, not suspicion amplified by hindsight.***

C. The Fraud and Debarment Rules Must Track the Limits Congress Wrote

1. Paragraph (O) remains expressly subject to paragraph (M)

INA §203(b)(5)((O)(i) begins with four controlling words: "Subject to subparagraph (M)." In proposed 8 CFR §204.433(a) DHS omits these controlling words. The omission is substantive. Paragraph (M) protects an otherwise qualified investor when a regional center, new commercial enterprise, or job-creating entity is terminated or debarred for wrongdoing in which the investor was not a knowing participant. Without the cross-reference, USCIS could treat an investor's petition as having "involved" entity-level fraud and erase the reassociation, reinvestment, amendment, priority-date, and derivative-age protections Congress provided.

The words "Subject to subparagraph (M)" do statutory work; DHS may not edit them out. ***New 8 CFR §204.433(a) should begin: "Subject to section 204.410 and section 203(b)(5)(M) of the Act . . . "*** That language would not immunize an investor's own fraud. Paragraph (O) remains available when the investor's evidence, representations, or eligibility independently satisfies the statutory standard.

2. Proposed 8 CFR §204.433(b) expands the debarment predicates

In INA §203(b)(5)(O)(ii), Congress authorized a permanent future-participation bar when an entity was terminated for fraud, intentional material misrepresentation, or criminal misuse. Congress omitted "deceit" from that list even though it included deceit in paragraph (O)(i)'s benefit authority. Proposed 8 CFR §204.433(b) reverses both choices: it adds "deceit" and reduces "intentional material misrepresentation" to unqualified "misrepresentation." DHS must delete "deceit," restore "intentional material," and conform the regulation word for word to the statutory predicates.

The proposal further allows an entity's generic "debarment," rather than the statutory termination of its designation or program participation, to trigger the permanent person-bar. That substitution matters. Paragraphs (N)(iii) and (O)(ii) require the specified entity termination first; only then may USCIS prove, by a preponderance, that a person knowingly participated in the conduct that caused it. Proposed 8 CFR §204.431(d)(5)(ii) compounds the problem by reaching a person who "conducted or" knowingly participated and by treating generic "termination or debarment" as interchangeable. ***DHS must delete "conducted or," require the final qualifying entity termination Congress specified, and restore the statutory sequence throughout §§204.431, 204.432(b), and 204.433(b).***

3. "Predicated on or involved" requires a direct, substantial, and nonincidental nexus

Congress did not authorize adverse action whenever wrongdoing occurred somewhere in a project's orbit. *See* INA §203(b)(5)(O)(i). The phrase "predicated on" requires the benefit to rest on the misconduct; "involved" must likewise require a direct, substantial, and nonincidental connection. It cannot reach an unrelated falsehood by a promoter, misconduct concerning another investor, a collateral regulatory violation, or an act incapable of affecting the petition, benefit, capital, or lawful operation of the investment.

Fraud independently includes materiality, and Congress expressly made misrepresentation both intentional and material. *Kungys v. United States*, 485 U.S. 759, 770–72 (1988); *Neder v. United States*, 527 U.S. 1, 22–25 (1999). ***For deceit and criminal misuse, the regulation should require at a minimum a consequential—not fortuitous or collateral—connection to the benefit.*** USCIS should have to explain precisely how the identified misconduct entered into, supported, procured, maintained, or materially affected the petition, application, benefit, or EB-5 capital at issue.

4. The proposed definitions need enforceable limits

The proposed fraud definition applies materiality to concealment but does not state with equal clarity that an affirmative false representation must be material. The final rule should require knowledge of falsity, intent to deceive or induce action, materiality, and the requisite nexus to the EB-5 petition, benefit, or capital. Its definition of deceit—intentionally leading another to believe something untrue—is exceptionally broad. In INA §203(b)(5)(O)(i), deceit must have a direct and substantial connection to the relevant benefit; and, because Congress omitted it from paragraph (O)(ii), it can never serve as an independent debarment predicate.

The phrase “in connection with” in the proposed definition of criminal misuse is similarly unbounded. A decision resting on criminal misuse should identify the specific criminal offense, the conduct satisfying that offense, the legally required mens rea, the responsible actor, and the direct and substantial nexus between the offense and the EB-5 program, capital, petition, or benefit. A criminal label without those findings is not an adjudicable standard.

5. Paragraph (N) requires a current, individualized connection between approval and an identified threat

The preamble suggests that paragraph (N) may be invoked because a person acted on behalf of an authoritarian government or was affiliated with a Communist or other totalitarian party. Present-tense statutory language—approval “is contrary” to the national interest—cannot be satisfied by a label or historical association alone. USCIS must identify the concrete public-safety or national-security threat, explain why it is current or remains operative, connect approval of the particular petition, application, or benefit to that threat, and consider recency, voluntariness, significance, contrary evidence, and mitigation.

The Supreme Court’s association cases underscore the constitutional danger in imposing severe consequences without proof of knowing and meaningful involvement in unlawful objectives. *Scales v. United States*, 367 U.S. 203, 222–30 (1961); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–20 (1982); *Rowoldt v. Perfetto*, 355 U.S. 115, 120–21 (1957). And INA §212(a)(3)(D) contains carefully drawn rules and exceptions concerning Communist or totalitarian party membership. Paragraph (N) should not become a shortcut around the distinctions Congress placed in that provision.

6. Paragraphs (N)(iii) and (O)(ii) authorize only a future-participation bar

Congress authorized permanent debarment from **future** participation after the specified findings. Proposed 8 CFR §204.431(d)(5) instead bars “current and future” participation and appears to permit denial, revocation, or termination of pending and existing benefits merely associated with the debarred person. To the extent that USCIS acts under paragraphs INA §§203(b)(5)(N)(iii) or (O)(ii), that is impermissible. A debarment finding governs future participation; present adverse action must independently satisfy paragraph (N)(i), paragraph (O)(i), paragraph (M)(vi), or some other statutory authority.

DHS should also delete “including participation in the EB-5 program” from proposed §§ 204.432(a) and 204.433(a). That parenthetical would let USCIS treat participation itself as a petition, application, or benefit and thereby evade the separate entity-termination, proof, knowledge, causation, and future-only limits Congress placed on debarment. Sections 204.431(b)(5) and (6) likewise cannot create freestanding paragraph (N) or (O) sanctions untethered to those statutory predicates. Nor may §§ 204.432(a) and 204.433(a) automatically terminate or debar every “associated” entity after a benefit determination. Each entity designation or participation must itself be the subject of a separately supported statutory determination; association is not a sanction ground.

7. The statutory burden of proof, preponderance of the evidence, belongs in the regulation

Statutory authority require a final qualifying termination of the specified entity’s designation or participation as an antecedent predicate. Paragraphs (N)(iii) and (O)(ii) USCIS must identify that termination and the conduct that caused it. The statute then places on USCIS the burden to establish, by a preponderance of the evidence, that the associated person was actually aware of and intentionally participated in that identified conduct and that the conduct caused the termination. Proposed §§ 204.432(b) and 204.433(b) omit that burden. An association plus an inference is not a preponderance finding.

D. The Final Rule Must Guarantee Meaningful Notice and a Genuine Pre-Deprivation Opportunity to Respond

1. Pre-sanction notice cannot be optional

Proposed 8 CFR §204.431(e) makes pre-sanction notice optional, while 8 CFR §204.431(f) permits sanctions to take effect upon a final notice containing only a summary of violations and a description of the sanction. That is inadequate where the consequence may be entity termination, permanent debarment, loss of petition protection, or termination of conditional status. It also departs from 8 CFR §103.2(b)(16)(i), which already requires predecision notice and an opportunity to rebut derogatory information unknown to a benefit requestor.

Before acting under paragraph (N) or (O), USCIS must give written notice of the proposed action; identify the precise statutory and regulatory grounds; state the material allegations element by element; disclose the evidence to the extent required by § 103.2(b)(16); allow a meaningful response period; accept documentary, expert, and testimonial evidence; and issue a reasoned decision addressing every material rebuttal. A national-security label is not meaningful notice, and a conclusory "summary" cannot be the first time an affected person learns the case that already ended the person's status or livelihood.

Any emergency exception should be confined to a documented and imminent threat that cannot be addressed through ordinary interim measures. It should require immediate supervisory authorization, prompt post-action notice and review, periodic reconsideration, and restoration when the emergency predicate is not sustained.

2. Protected information requires more procedure, not less explanation

Proposed 8 CFR §204.432(c) permits USCIS to omit an explanation when information is classified or disclosure is otherwise prohibited. Existing 8 CFR §103.2(b)(16)(iii)–(iv) permits specified use of classified material only with authorization by the USCIS Director or designee; requires that authorization in the record; contemplates notice of the information's general nature and an opportunity to offer opposing evidence when security permits; and requires the decision to state that classified information was material. The new rule should not turn that narrow exception into permission to decide a case by incantation.

The final rule should require disclosure of all unclassified evidence and reasonably segregable information, together with the most informative unclassified summary consistent with law. The summary must identify dates, persons, conduct, and subject matter with enough specificity to permit correction of factual error. USCIS should make a written finding that each withheld item is legally protected and material, preserve the complete record and any classified annex for authorized review, and consider lawful substitutes such as cleared counsel or other protective arrangements. See *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 318–20 (D.C. Cir. 2014); *Al Haramain Islamic Foundation, Inc. v. Department of the Treasury*, 686 F.3d 965, 982–87 (9th Cir. 2012); *Zerezghi v. USCIS*, 955 F.3d 802, 810–13 (9th Cir. 2020).

Finally, proposed 8 CFR §204.432(c) incorrectly refers to a determination under paragraph (b), which addresses debarment; the benefit determination appears in paragraph (a). DHS should correct the cross-reference and make clear that notice applies independently to both benefit action and debarment.

Two additional corrections are necessary. Proposed 8 CFR §216.3(a) points to 8 CFR §103.2(b)(2) for review and rebuttal of adverse evidence, but that provision concerns secondary evidence and affidavits; the pertinent derogatory-information rule is at 8 CFR §103.2(b)(16). And proposed 8 CFR §204.431(h) withholds the stay ordinarily associated with a timely appeal from paragraph (b)(5) and (6) sanctions. A timely AAO appeal should stay those sanctions unless a designated senior official makes a written imminent-threat finding, in which event USCIS should provide expedited review.

E. The I-829 Interview Must be Mandatory Where the Statute Forbids Waiver—and Meaningful When National Security Is Invoked

1. Proposed §216.6(c) understates the mandatory interview rule and creates a waiver loophole

INA §216A(c)(1)(B) provides that the investor *shall* appear for a personal interview. Section 216A(d)(3)(B) permits waiver only under criteria developed in consultation with USCIS Fraud Detection and National Security and U.S. Immigration and Customs Enforcement, and those criteria may not be based on reducing processing times or conserving adjudicatory resources. Proposed 8 CFR §216.6(c), however, begins from the proposition that USCIS "may" require an interview and may waive whenever the petition establishes eligibility. The final rule must state that an interview is mandatory by default and publish the criteria developed through the consultation Congress required.

Congress went further for an investor who invested through an entity sanctioned under INA §203(b)(5) or falls within a class the Secretary determined presents public-safety or national-security threats: the interview *may not be waived*. Proposed §216.6(c)(1) recognizes that prohibition, but paragraph (c)(3) then permits waiver for good cause when the investor cannot attend. Good cause may justify rescheduling; it cannot override a statutory no-waiver command. Paragraph (c)(3) should begin: "Except where waiver is prohibited under paragraph (c)(1), USCIS may, upon a showing of good cause, reschedule or waive the interview."

The regulation should expressly treat the interview as nonwaivable whenever USCIS is considering adverse action under 8 CFR §204.432 in connection with an I-829. If a national-security issue arises after an earlier interview, USCIS should conduct a supplemental interview before deciding. Proposed 8 CFR §216.6(c)(2) should also track Congress's instruction that the designated local office be "convenient to the parties involved," not merely list offices that may exercise jurisdiction. Processing convenience for the agency is not consistent with the statutory measure.

2. Congress required an interview, not a one-sided interrogation

An interview is not meaningful if USCIS withholds the case, questions the investor, and then treats the answers as a substitute for notice and rebuttal. When national security may drive an I-829 denial, the investor must receive sufficiently specific advance notice and the available unclassified evidence; appear with counsel and a competent interpreter; testify under oath; present fact and expert witnesses and documentary or demonstrative evidence; address identity, intent, knowledge, affiliation, source reliability, and competing explanations; obtain a recording or reliable transcript; and supplement the record after the interview. If new grounds or evidence emerge, USCIS must provide supplemental notice and a further opportunity to respond before decision.

Where USCIS materially relies on an adverse witness or testimonial account and credibility matters, the interview must include a meaningful opportunity to confront and cross-examine the witness or test the account through an adequate substitute consistent with lawful security constraints. Congress's insistence on a live interview would be emptied of substance if USCIS could base termination of existing status on untested testimonial allegations while permitting only written denials from the person whose status is at stake.

3. Due process requires confrontation when disputed testimony and credibility materially drive the result

The protected interest is existing lawful permanent resident status

The constitutional interest does not depend on claiming an entitlement to a favorable exercise of paragraph (N)'s discretion. A conditional permanent resident is already lawfully admitted for permanent residence and possesses the general rights and privileges of that status. See 8 CFR §216.1. An adverse I-829 decision terminates that existing status and affects the investor's spouse and children. That interest is far weightier than a request for a future discretionary benefit. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–600 (1953); *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982).

Ching and Hanan require a fact-sensitive but real opportunity to test material adverse testimony

In *Ching v. Mayorkas*, USCIS relied on a former spouse's adverse sworn statement, credited it over substantial contrary evidence, and afforded no opportunity for cross-examination. 725 F.3d 1149, 1153–59 (9th Cir. 2013). Applying *Mathews v. Eldridge*, the Ninth Circuit held that due process required an evidentiary hearing and an opportunity to confront the adverse witness on those facts. *Id.* at 1157–59. The decision reflects the longstanding rule that, where an important factual determination turns on credibility, confrontation and cross-examination may be essential. *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970); *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959).

Hanan v. USCIS, No. 24-6193, slip op. at 24–30 (9th Cir. Apr. 27, 2026), confirms *Ching*'s protected-property holding while emphasizing that the procedural inquiry is case-specific. *Hanan* found cross-examination unnecessary where the disputed declarant was not essential, independent evidence included the noncitizen's own admission, USCIS supplied repeated response opportunities, and examination would not have altered the independent proof. The contrast identifies when confrontation is required: USCIS relies materially on disputed testimonial evidence, credibility affects the outcome, substantial contrary evidence exists, and live examination has meaningful probative value.

National-security allegations frequently turn on precisely those questions—identity, intent, affiliation, knowledge, translated conversations, informant reliability, or a declarant's memory, bias, coercion, and incentives. When they do, an interview limited to questioning the investor while shielding the material adverse testimony from any meaningful test violates due process. If the Government contends that a witness cannot lawfully be produced, USCIS should state that determination at the appropriate level and provide the best lawful substitute, not simply dispense with adversarial testing.

The Mathews balance is especially strong because Congress already required the interview

The private interest includes continued residence, work, and family stability for the principal and derivatives. The risk of error is substantial in cases involving mistaken identity, association, intent, foreign-source reporting, translation, confidential informants, or information stripped of context in a summary. The incremental burden is modest because Congress already required a personal interview and forbade waiver in the relevant cases. Using that existing event to receive live evidence and test material credibility is far less burdensome than creating a separate tribunal, and the Government has its own compelling interest in separating false positives from genuine threats.

4. Review in removal proceedings does not excuse an inadequate agency interview

A denied Form I-829 is reviewable in removal proceedings under INA §216A(c)(3)(D), and that review must remain fully available to principal and derivative residents. See *Hui Ran Mu v. Barr*, 936 F.3d 929, 933–35 (9th Cir. 2019). Removal review is an important safeguard, and AILA does not minimize it. But it occurs only after USCIS has denied the I-829 petition. It cannot make Congress's separately mandated predecision interview ceremonial or cure avoidable credibility error at the point of deprivation. The interview also creates the record on which later review will proceed. The prospect of later correction is no reason to design the first decision for avoidable error.

F. Paragraph (N) and (O) Determinations Must Receive Documented Supervisory and Headquarters Review

1. DHS already requires supervisory review for decisions of comparable gravity

DHS's regulations repeatedly reject the premise that a grave immigration decision should rest on the unchecked judgment of one officer. An expedited-removal order cannot become final until reviewed and approved by a supervisor no lower than the second-line level; the supervisor reviews the sworn statement and evidence and may seek more information or require another interview. 8 CFR§235.3(b)(7). A credible-fear determination cannot become final until a supervisory asylum officer reviews it, even though a negative determination may also receive immigration-judge review. 8 CFR §208.30(e)(8). Every naturalization grant or denial is subject to supervisory review, and a naturalization denial may be reviewed by a different officer of equal or higher grade who may receive evidence and testimony. 8 CFR §§316.14(b)(1), 336.2(b).

The classified-information regulation supplies another close analogue. Use of classified information in specified discretionary decisions requires authorization by the USCIS Director or designee, and the authorization must be placed in the record. 8 CFR §103.2(b)(16)(iii)–(iv). It would be perverse to impose a lower approval threshold when the same information is used to revoke an EB-5 approval, terminate conditional status, close an entity, or permanently debar a person.

USCIS policy likewise requires approval from the ICE Principal Legal Advisor or designee before a notice to appear includes an INA §212(a)(3) or §237(a)(4) national-security charge. USCIS Policy Memorandum titled, *Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* PM-602-0187, at 3–4 (Feb. 28, 2025). An NTA merely alleges a charge the Government must prove. Under the proposal, a paragraph (N) determination could itself impose immediate consequences. Requiring elevated legal approval to allege a national-security ground but none before imposing paragraph (N)'s consequences would invert sensible quality control.

2. Review should occur before notice and again before final action

Before USCIS issues a notice of intended adverse action under paragraph (N) or (O), a supervisor no lower than the second-line level should review the complete proposed notice, the supporting evidence, the temporal rule, and each statutory element, and approve the notice in writing. No final action should issue until a different second-line supervisor—one who did not conduct the investigation, make the referral, or draft the initial recommendation—independently reviews the complete record and concurs in writing. Every paragraph (N) determination should also require written concurrence from Fraud Detection and National Security headquarters. Both paragraph (N) and paragraph (O) determinations that would impose permanent debarment, entity termination, or status consequences should receive legal-sufficiency review by the USCIS Office of Chief Counsel and approval by the USCIS Director, Deputy Director, or a specifically designated senior headquarters official. Where classified information is used, the authorization and findings required by 8 CFR §103.2(b)(16)(iii)–(iv) must be made and preserved by the USCIS Director or designee.

3. Supervisory findings must be element-specific and part of the record

The reviewing official should identify the precise statutory predicate and burden; the filing and conduct dates and resulting temporal rule; actual knowledge, intentional participation, and causation where relevant; the current and individualized connection between approval and any asserted threat; paragraph (M)'s controlling protections; the materiality, nexus, and reliability of the evidence; the treatment of every material rebuttal; and the statutory authority for the selected consequence. Boilerplate concurrence would add ceremony, not quality control.

The reviewer must have authority to require supplemental notice, additional evidence, another interview, or reconsideration of the proposed consequence. Every concurrence, nonconcurrence, remand instruction, classified-information authorization, and legal-sufficiency determination should enter the record of proceeding. These protections belong in the regulation, where affected parties and reviewing bodies can enforce them, not only in unpublished operating instructions.

G. Paragraphs (N) and (O) Do Not Create a Summary Mechanism for Extinguishing Unconditional LPR Status

1. The preamble reads five words in isolation from the rest of the INA

The preamble states that an adverse paragraph (N) or (O) determination will terminate an investor's permanent resident status "whether conditional or not." 91 Fed. Reg. at 40,700. The NPRM appears to rely on the fact that paragraphs (N)(iv)(II) and (O)(iii)(II) refer, without an express modifier, to "terminate the permanent resident status" of the investor and derivatives. But those words are not a free-standing summary-removal code. Read in the INA's structure, they authorize direct USCIS termination while status remains conditional; once conditions have been removed, DHS must use rescission when available or charge removability in INA §240 proceedings.

2. The surrounding provisions identify conditional status and its termination machinery

Paragraph (N)(ii)(V) identifies a document evidencing *conditional* permanent resident status under INA §216A. Section 216A, in turn, supplies a complete mechanism for USCIS to terminate status while it remains conditional and for the resident to obtain review in removal proceedings. Once USCIS approves the I-829 and removes conditions, that mechanism has completed its function. Revoking an earlier EB-5 approval does not silently recreate conditional status or itself extinguish unconditional residence.

INA §240(a)(3) makes §240 the sole and exclusive procedure for determining whether an admitted noncitizen may be removed unless the INA specifies another procedure, and §240(c)(3)(A) requires DHS to prove deportability by clear and convincing evidence. INA §246 separately supplies rescission authority when its requirements are met. Congress did not say that paragraphs (N) and (O) displace those proceedings, their defenses, or their burdens for people whose conditions were already removed. A construction that does so by implication would be a startling departure from the INA's carefully differentiated status-termination scheme.

3. Proposed 8 CFR §216.3(b) confirms the lawful route and exposes the preamble's contradiction

The proposal itself recognizes the correct rule in 8 CFR §216.3(b): after conditions have been removed, USCIS may institute rescission proceedings under INA §246, if appropriate, or removal proceedings under INA §240. That statement directly contradicts the claim that §204.433 permits immediate administrative termination of unconditional status for fraud, and it supplies powerful structural confirmation for paragraph (N) as well. DHS cannot simultaneously say that the INA requires a statutory proceeding and that a paragraph (N) or (O) adjudicator may erase the same status with a sentence in a decision.

4. Constitutional avoidance forecloses summary termination

An unconditional lawful permanent resident has a weighty constitutional interest in continuing to live and work in the United States. *Kwong Hai Chew*, 344 U.S. at 596–98; *Landon*, 459 U.S. at 32–34. Congress created formal removal proceedings and imposed a heightened Government burden before an admitted noncitizen may be removed. *Woodby v. INS*, 385 U.S. 276, 285–86 (1966). Reading paragraphs (N) and (O) to authorize summary termination—potentially on undisclosed information under a discretionary standard—would raise grave due-process concerns. The established rescission-and-removal reading avoids those concerns and harmonizes the provisions with the INA as a whole.

5. Required regulatory correction

DHS should withdraw the "whether conditional or not" assertion and add the following limitation to proposed §§204.432(a) and 204.433(a):

> USCIS may terminate conditional permanent resident status only as authorized under section 216A of the Act. After the conditional basis of permanent resident status has been removed, nothing in this section authorizes summary termination of lawful permanent resident status. DHS may pursue rescission under section 246 of the Act, if applicable, or removal under section 240 of the Act based on a legally sufficient charge. Lawful permanent resident status continues unless and until terminated through the applicable statutory proceeding.

Conclusion

Taken together, these 12 categories reflect a single, unifying request: <u>that the final rule codify the EB-5 Reform and Integrity Act faithfully rather than expand it</u>. AILA urges DHS to: (1) implement Congress's statutory language rather than create new eligibility restrictions or compliance obligations; (2) confirm, in the regulatory text itself, that codification preserves rather than narrows existing investor protections; (3) shield good-faith investors, regional centers, and NCEs from the consequences of conduct, project outcomes, and agency delay outside their control; (4) replace undefined discretionary standards with objective criteria and safe harbors; (5) eliminate procedural traps and duplicative reporting requirements that risk unnecessary denials; (6) calibrate deadlines such as the redeployment window to commercial reality; (7) ensure that USCIS's own processing times do not become independent grounds for adverse action; (8) preserve longstanding, judicially and administratively settled EB-5 practice absent a clear statutory basis for departure; (9) resolve transition and grandfathering questions with precision; (10) tie regional center compliance obligations to matters within the center's actual control; (11) favor cure and remediation over automatic, punitive enforcement; and (12) revise paragraph N and paragraph O to more closely align with the text and effective date framework established by the RIA.

AILA appreciates the opportunity to comment on this NPRM and looks forward to continued engagement with USCIS as the rule is finalized. We welcome the opportunity to discuss these issues further.

Respectfully submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION