IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVEST IN THE USA,
80 M Street SE
Suite 100
Washington, DC 20003,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
3801 Nebraska Ave. NW
Washington, DC 20016,

ALEJANDRO MAYORKAS,
in his official capacity as Secretary of Homeland Security,
3801 Nebraska Ave. NW
Washington, DC 20016,

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
5900 Capital Gateway Dr. #2040
Camp Springs, MD 20746,

UR M. JADDOU,
in her official capacity as Director of United States Citizenship & Immigration Services,
5900 Capital Gateway Dr. #2040
Camp Springs, MD 20746,

Defendants.

Civ. No. 1:24-cv-918

COMPLAINT

Plaintiff Invest in the USA ("IIUSA") brings this complaint against the United States Department of Homeland Security ("DHS"), Alejandro Mayorkas, the United States Citizenship and Immigration Services ("USCIS"), and Ur M. Jaddou, and allege as follows:

INTRODUCTION

1. On October 11, 2023, USCIS announced a new rule that changes the length of time immigrant investors must sustain their investments under the EB-5 Immigrant Investor Program in order to obtain permanent resident status in the United States. USCIS did so without providing advance notice in the Federal Register or giving interested stakeholders the opportunity to comment, and with nothing more than a few sentences to explain its reasoning. This change alters a key aspect of the EB-5 program and breaks with decades of agency policy, existing regulations, and industry practice. The agency's action conflicts with the statute's text and is contrary to Congress's intent. And its promulgation without notice and comment violates the Administrative Procedure Act ("APA"). Ultimately, it works to the severe detriment of EB-5 investors, as well as all other stakeholders. USCIS's new rule must be set aside.

2. In the early 1990s, Congress enacted the EB-5 program to attract foreign investment capital into the United States, particularly to rural areas and areas with high unemployment. The incentives are straightforward: If a foreign national invests a certain amount of capital and creates a certain number of jobs in the United States, the investor may receive an employment-based visa (an EB-5 visa), which offers a pathway to lawful permanent residency in the United States.

3. Shortly after Congress created the EB-5 visa category, it developed a Regional Center Program to assist in implementation of the EB-5 program. In essence, the Regional Center Program streamlined the ability of foreign investors to satisfy the EB-5 statutory requirements for a visa, further incentivizing foreign investors to invest in job-creating enterprises in the United States. Rather than needing to invest capital in a business that directly created jobs (and thus having to manage the day-to-day operations and administrative tasks of the enterprise), investors using the Regional Center Program could instead invest their capital through regional centers, which pooled investments and deployed those funds into larger projects that created more jobs. This structure allows investors to meet the EB-5 requirements while magnifying the benefits Congress envisioned: economic growth and job creation in the United States. Since its inception, the EB-5

program, and the regional centers that facilitate investments under the program, have attracted billions of dollars in foreign capital and created hundreds of thousands of American jobs.

4. Although initially enacted as a pilot program, the Regional Center Program has become a well-established—indeed the nearly exclusive—means of obtaining an EB-5 visa. In the 1993 Appropriations Bill, Congress set aside a small number of visas for a few years exclusively to applicants under the Regional Center Program. Over the years, Congress reauthorized that set-aside provision dozens of times. The Program's popularity grew significantly in the 2000s, and now more than 95% of EB-5 visas go to regional center investors.

5. Regional centers provide a distinct benefit to investors. Regional centers enable investors to invest in larger-scale economic projects that typically create more U.S. jobs, increasing the likelihood that investors will satisfy the job creation requirement. In addition, by pooling capital from multiple EB-5 investors, regional centers provide investors with access to high-quality, professionally managed projects sponsored by established, well-capitalized companies with the substantial financial and administrative resources necessary to both execute the project's business plan over a period of years and maintain the detailed records required to demonstrate investors' compliance with complex EB-5 program requirements. Large commercial and real estate development projects such as these can revitalize rural and high-unemployment areas where jobs are needed, but often require a longer investment horizon. Regional centers have structured their businesses, investment contracts, and relationships with developers to enable these types of projects. As a result, the industry standard investment timeframe has settled around five years, which is typically long enough to create the necessary jobs, generate a return on investment for both investors and regional centers, and cover the investor's conditional residency period. Indeed, an IIUSA survey of 171 pre-RIA projects showed the average investment term was 5.5 years. IIUSA, *IIUSA's Recent Survey Sheds Light on the Average Sustainment Period of Pre-RIA EB-5 Projects* (Feb. 29, 2024), perma.cc/9ZRQ-E2PQ. This timeframe is also consistent with the general length of other federal incentive-based economic development programs.

6. The process for immigrant investors has multiple steps but is ultimately straightforward. First, an immigrant investor must select an investment opportunity and invest the required amount in a new commercial enterprise. The investment can be made directly in a job-creating business, or through a regional center under the Regional Center Program. The investor then files Form I-526 (for a standalone investor) or Form I-526E (for a regional center investor). Form I-526/I-526E requires documentation about the investor, the investment made, and the job-creating entity, so that USCIS can verify that the investment meets the requirements of the statute, and that the investor is eligible to participate in the visa category. *See* USCIS, *Instructions for Immigrant Petition by a Standalone Investor*, Form I-526 (expires 7/31/2025), perma.cc/J34T-A6MK.

7. The investor next files Form I-485 (for those residing in the United States) or DS-260 (for those residing abroad), in order to obtain an immigrant visa. Depending on whether a visa is available at the time, an investor can choose to file Form I-485 concurrently with Form I-526/I-526E, or file it after the Form I-526/I-526E is approved. Depending on USCIS processing times and visa availability, however, the wait time between approval of Form I-526/I-526E and the ability to file Form I-485 can be many months or even years. Once USCIS approves the Form I-485 application or upon admission to the United States with a visa, the investor and their family members are granted conditional permanent resident status for a two-year period. 8 U.S.C. § 1186b; *see* USCIS, *EB-5 Immigrant Investor Process* (last updated Oct. 26, 2022), perma.cc/K2G5-CB38.[1] Within 90 days of the end of the two-year period, the investor must file Form I-829 to petition for removal of conditions on their permanent resident status. Form I-829 requires the investor to provide evidence that he or she invested the requisite capital, sustained the

[1] Despite the name, those with conditional permanent resident status enjoy the same rights and privileges to live, work, and travel in the United States as those with permanent resident status; the status is conditional in the sense that it is only valid for two years, after which the investor must file Form I-829 and have that form successfully adjudicated in order to obtain permanent resident status.

investment for the required period, and that the necessary jobs have been or will be created. 8 C.F.R. § 216.6. If USCIS approves this petition, the investor becomes a lawful permanent resident.

8. USCIS has codified extensive regulations governing the Regional Center Program, including the requirement that investors sustain their investment for a minimum amount of time to maintain eligibility for an immigrant visa under the program. This "sustainment" rule is codified in the EB-5 program's regulations at 8 C.F.R. § 216.6(c)(1)(iii), which provides that an EB-5 visa applicant is eligible for a visa (assuming all other conditions have been met) if he or she has "continuously maintained his or her capital investment *over the two years of conditional residence*." 8 C.F.R. § 216.6(c)(1)(iii) (emphasis added). This regulation has been in place for nearly 30 years; it was originally promulgated by USCIS's predecessor agency in 1994. *See Conditional Permanent Resident Regulations for Alien Entrepreneurs, Spouses, and Children*, 59 Fed. Reg. 26,587, 26,592 (May 23, 1994). As of today, this regulation has not been repealed or replaced.

9. The two-year sustainment requirement in Section 216.6(c)(1)(iii) mirrors the statutory requirement that immigrant investors maintain conditional permanent resident status for at least two years before applying for lawful permanent residency. *See* 8 U.S.C. § 1186b(d)(2)(A).

10. USCIS's Policy Manual has long reflected the same requirement, stating that the "immigrant investor must provide evidence that he or she sustained the investment throughout the period of his or her status as a conditional permanent resident of the United States." USCIS Policy Manual, Vol. 6, Pt. G-Investors, Ch. 7, "Removal of Conditions," § A.2 (emphasis added).[2]

11. On July 1, 2021, Congress's authorization for the Regional Center Program expired, creating a lapse in authorization for immigrant investors to apply and invest through regional centers.

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[2] The USCIS Policy Manual is available online at www.uscis.gov/policy-manual. The text quoted above is current as of February 29, 2024. USCIS updated parts of its policy manual on October 26, 2023, but did not appear to change the text of this provision. *See* perma.cc/VZ5Y-LH7C.

12. On March 15, 2022, as part of the Consolidated Appropriations Act of 2022, Congress enacted the EB-5 Reform and Integrity Act of 2022 ("RIA"). Recognizing the longstanding predominance of the Regional Center Program in the EB-5 visa category, Congress codified the Program in the Immigration and Nationality Act ("INA") and the United States Code, making visas available through the Regional Center Program through September 2027.

13. The RIA maintained the Regional Center Program materially intact from the predecessor statute, but it included additional anti-fraud measures. The RIA also added language that the immigrant investors' investment "is expected to remain invested for not less than 2 years." 8 U.S.C. § 1153(b)(5)(A)(i); Consolidated Appropriations Act 2022, Pub. L. No. 117-103, 136 Stat 49, 1070, § 102, div. BB (Mar. 15, 2022).

14. When Congress passed the RIA, it intended to codify and renew the Regional Center Program and spur investment in infrastructure, rural regions, and high-unemployment areas. Indeed, the RIA provides specific set-asides for these types of projects and incentivizes investment in them by allowing for a lower investment amount and priority processing of related petitions for projects in rural regions. Large development projects, including some of the types of projects Congress incentivized, generally require investments in the range of five years or longer.

15. On October 11, 2023, USCIS issued a new rule. USCIS stated that the RIA "removed the requirement that the investor must sustain their investment throughout their conditional residence" and "add[ed] new language that the investment required by [the Act] must be expected to remain invested for at least two years." Email from USCIS, *USCIS Provides Additional Guidance for EB-5 Required Investment Timeframe and Investors Associated with Terminated Regional Centers* (Oct. 11, 2023), attached hereto as Exhibit A. USCIS then updated its website to reflect this new rule.

16. That is, prior to the challenged action, investors were required to have invested (or be in the process of investing) the necessary capital and maintain their capital at risk through the two years of their conditional residence period. Now, as a result of the new rule, investments in some cases need not even be sustained through the approval of an investor's I-526E petition and

in many cases not sustained through the *beginning* of the conditional residence period. *See* Exhibit A at 1 (USCIS acknowledging that the investment may occur more than two years *before* the investor files his or her Form I-526); *see also* USCIS, *EB-5 Questions and Answers* 6 (updated Oct. 2023), attached hereto as Exhibit B (USCIS acknowledging that investment capital may be returned after the Form I-526 or I-526E is filed but before it is approved).[3] Indeed, under USCIS's new interpretation, EB-5 investors could conceivably have their capital contribution returned to them before there is an adjudication of the lawfulness of the source of their funds—a situation Congress would not have intended given the RIA's emphasis on the integrity of the funds entering the United States. In practice, this results in a far shorter sustainment period relative to USCIS's prior rule and decades of settled industry practice.

17. Plaintiff Invest in the USA is the national membership-based 501(c)(6) non-profit trade association for the EB-5 Regional Center Program. IIUSA's members are comprised of over a hundred regional centers serving forty-seven states and territories. IIUSA's members have raised billions in foreign investment capital and developed hundreds of projects in the United States responsible for creating hundreds of thousands of jobs.

18. For years, regional centers have designed their investment programs, and related investment contracts, to comport with the sustainment rule. These investments are not only tailored to satisfy existing USCIS requirements but are also designed to fulfill the purpose of the EB-5 program: directing much-needed investment capital into projects that spur economic development and create permanent jobs in the United States, particularly in rural and inner-city areas that otherwise have difficulty attracting capital.

19. By upending the EB-5 investor marketplace, USCIS's action is causing immediate harm. USCIS has sparked mass confusion among would-be EB-5 investors, who depend on

[3] USCIS has historically taken two years or longer to adjudicate most Form I-526 (now Form I-526E under the RIA) petitions, which constitutes the first of many steps in the immigration process under the EB-5 program that, if successful, will ultimately lead to the investor receiving conditional residency.

regulatory stability to understand the governing rules. These investors seek to invest in projects sponsored by regional centers that appropriately comply with USCIS's directives, but USCIS's recent action—because it is facially unlawful—has left EB-5 investors without certainty as to the appropriate, governing law.

20. As for IIUSA's regional center members, they have structured their businesses and investment projects around USCIS's existing program design, including the preexisting two-year sustainment requirement tethered to the period of conditional residence. IIUSA members are developing important projects involving hundreds of millions of dollars of collective capital that will create large numbers of new American jobs and provide considerable benefit to EB-5 investors. But USCIS's action throws all this progress into jeopardy, because IIUSA members now no longer can rely on the preexisting sustainment period requirement as a benchmark for structuring EB-5 investment opportunities that fit within the framework of traditional construction projects.

21. Stakeholders deserve clear rules governing how long investors' investment must be sustained and how USCIS will calculate the sustainment period. USCIS's action, however, conflicts with decades of practice and reliable industry norms. And, because USCIS's action conflicts with existing, published regulations and the agency's own policy manual, it has generated considerable confusion for investors and other stakeholders.

22. The agency's action is unlawful because it is a legislative rule that was announced without adherence to the necessary procedural requirements. Through this action, USCIS effectively repealed its existing regulation that defines the two-year sustainment period as coinciding with the two-year conditional residency period—a regulation that was adopted through notice and comment rulemaking and published in the Code of Federal Regulations. 8 C.F.R. § 216.6(c)(1)(iii). USCIS's rule thus fills in a statutory ambiguity, "adopts a new position inconsistent with existing regulations," "effects a substantive change in existing law or policy" (*Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018)), and

has an "actual legal effect" on regulated entities (*Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)). *Accord Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

23. Additionally, USCIS's action fails to reflect reasoned decisionmaking. USCIS provided a few meager sentences explaining its rationale, and thus necessarily failed to consider important aspects of the issue, including whether its interpretation is consistent with other aspects of the statute and the impact that this change will have on the continued success of the EB-5 program. USCIS did not address possible alternative implementations of the two-year sustainment requirement or consider the costs and benefits of its decision. The agency also failed to consider significant reliance interests and decades of contrary agency policy and industry practice.

24. USCIS's abrupt action also harms investors. Because USCIS announced this rule without notice or opportunity for comment, and it conflicts with existing, published regulations and the agency's own policy manual, investors are rightly unsure of whether investments they make in reliance on it will ultimately be deemed compliant. This has generated considerable confusion and uncertainty for investors and harms the EB-5 program as a whole. Through a proper notice-and-comment process, all stakeholders should be empowered to present the full range of issues and perspectives to ensure that USCIS implements the RIA in a manner that best protects investors and secures their interests. This process would ensure that USCIS arrives at a sustainable EB-5 policy to facilitate investment projects that both promote U.S. job creation and economic growth while simultaneously advantaging those who invest considerable capital in this country. It would also enable USCIS to promulgate regulations that are consistent with the text of the RIA and Congress's intent. It was gross error for USCIS to skip this APA-mandated procedure, silencing the perspectives of investors, regional centers, and all others. USCIS cannot, without undertaking a meaningful regulatory process, overturn a decades-old regulation that acts as a keystone to the EB-5 program.

25. Had USCIS engaged in the notice-and-comment rulemaking process that the APA requires, IIUSA would have explained that this sustainment period is inconsistent with the text of

the RIA, unworkable given the other requirements of the program, and will cause significant disruption to the EB-5 marketplace.

26. IIUSA is not suggesting that an investor should be required to keep his or her investment at risk indefinitely. IIUSA is well aware that, due to USCIS backlogs, slow processing times, and "retrogression" (*i.e.*, lack of visa availability), many investors' conditional residency period (and therefore, the two-year sustainment period under USCIS's prior rule) may not begin for several years, resulting in years of capital redeployment that lasts far longer than the initial expected duration of investment. Fortunately, USCIS does not face a binary choice between the old regime and its new (and improperly promulgated) rule. Rather, there is a wide spectrum of RIA-compliant alternatives that stakeholders may present, and that USCIS should be required to meaningfully consider. Instead of engaging in any of this analysis, USCIS adopted a significant change in the structure of the EB-5 program without the benefit of input from investors themselves, long-time industry participants, and the broader public. As a result, USCIS's action is fatally deficient.

27. In sum, this is a textbook example of unlawful agency action. The agency's action threatens innovative and economically significant projects and upends decades of contrary agency policy and industry practice without warning. It undoes a decades-old regulation without the benefit of public participation in the rulemaking process, is contrary to law, and lacks reasoned analysis. It must be set aside.

PARTIES

28. Plaintiff Invest in the USA is the national membership-based 501(c)(6) non-profit trade association for the EB-5 Regional Center Program. IIUSA's regional center members are comprised of over a hundred regional centers serving forty-seven states and territories. Its mission is to advocate for EB-5 stakeholders, including its regional center members, to foster U.S. economic development and domestic job creation. It is headquartered in Washington, D.C.

29. Defendant United States Department of Homeland Security is the agency charged with administering the EB-5 program. Its principal office is at 3801 Nebraska Ave. NW, Washington, DC 20016.

30. Defendant Alejandro Mayorkas is the Secretary of the Department of Homeland Security. He is sued in his official capacity only.

31. Defendant United States Citizenship and Immigration Services is an agency of the United States government within the Department of Homeland Security. The Secretary of the Department of Homeland Security has delegated to USCIS the authority to adjudicate applications for certain immigration benefits, including administration of the EB-5 and Regional Center Programs.

32. Defendant Ur M. Jaddou is the Director of United States Citizenship and Immigration Services. She is sued in her official capacity only.

JURISDICTION AND VENUE

33. IIUSA brings this suit under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

34. This case arises under the laws of the United States. The court's jurisdiction is thus invoked under 28 U.S.C. § 1331.

35. Venue is proper in this district under 28 U.S.C. § 1391(e) because at least one defendant resides in this district, a substantial part of the events or omissions giving rise to the claim occurred in this district, and plaintiff IIUSA resides in this district.

FACTUAL ALLEGATIONS

A. EB-5 statutory background

36. As part of the Immigration Act of 1990, Congress established the EB-5 immigrant investor visa program. *See* Pub. L. No. 101-649, § 121(a) (Nov. 29, 1990) (*codified at* 8 U.S.C. § 1153(b)(5)). Congress allocates up to 7.1% of employment-based visas to the EB-5 category for "employment creation" immigrants who invest in new commercial enterprises ("NCEs") within

the United States that create American jobs. *See* 8 U.S.C. § 1153(b)(5)(A). The EB-5 visa category thus provides a pathway for foreign investors to become lawful permanent residents in the United States after investing in America.

37. There are two requirements to obtain a visa under the EB-5 program. First, the investor must invest a certain amount of capital. *See* 8 U.S.C. § 1153(b)(5)(A)(i). Second, the investment must "benefit the United States economy" and "create" at least ten American jobs. *Id.* § 1153(b)(5)(A)(ii).

38. An investor who receives an EB-5 visa is granted a conditional residence status. *See* Pub. L. No. 101-649, § 121(b) (Nov. 29, 1990). After two years, if he or she has satisfied the visa requirements (*i.e.*, sustained the requisite capital at risk and created the requisite jobs), the investor may apply to remove the conditionality and receive lawful permanent residency. *Id.*

39. Congress envisioned the EB-5 program as a means of stimulating investment and economic growth in rural areas and areas with high unemployment. The statute sets aside a certain portion of visas exclusively for investors who invest in and create jobs in these "targeted employment areas." *See* 8 U.S.C. § 1153(b)(5)(B). The requisite qualifying investment capital is lowered if the investment is made in a "targeted employment area." *Id.* § 1153(b)(5)(C).

40. The purpose of the program was "to provide new employment for U.S. workers and to infuse new capital into the country." S. Rep. No. 101-55, at 21 (1989). In its original form, the statute contemplated direct investment and job creation by foreign "entrepreneurs." *See* Pub. L. No. 101-649, § 121(b) (Nov. 29, 1990).

B. The Regional Center Program

41. In 1992, Congress set aside a portion of EB-5 visas solely for a more expansive method of job creation: the Regional Center Program.

42. In an appropriations bill, Congress outlined in general terms a new program "to implement" the EB-5 visa provisions. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, § 610(a) (Oct. 6,

1992) ("1993 Appropriations Bill"). The legislature "set aside 300 visas annually for five years" for a "pilot program" involving "a regional center in the United States for the promotion of economic growth … job creation, and increased domestic capital investment." *Id.* § 610(a)-(b).

43. The Regional Center Program created more economically impactful mechanisms for investors to satisfy the statutory requirements for an EB-5 visa. Under the Program, an economic entity (such as a partnership or limited liability corporation) could receive regional center designation from USCIS to pool investments from multiple foreign investors and U.S. citizens to fund a broad range of job-creating projects. This model eases the transaction costs of foreign investment incentivized by the EB-5 program (as investors do not have to be involved in every aspect of the day-to-day management of a business and its employees, since an investor is engaged in the EB-5 investment through a 'policy formulation' role), and it enables larger-scale economic projects that typically create more American jobs. Investors are also able to take advantage of provisions in the Regional Center Program that allow them to demonstrate job creation through economically and statistically valid models. *See* 8 U.S.C. § 1153(b)(5)(E)(v).

44. Although initially a "pilot" program, the Regional Center Program was codified extensively in the Code of Federal Regulations, and Congress reauthorized the visa set-aside provision dozens of times.

45. The program works as follows: To receive regional center designation from USCIS, the entity must submit a proposal that clearly describes its focus on a certain geographic region and how it would promote economic growth and job creation in that region. *See* 8 C.F.R. § 204.6(m)(3). The proposal must describe in detail the amount and source of capital it has received and use economically or statistically valid forecasting tools to estimate, in verifiable detail, the job-creation impacts of its investment projects. *Id.*

46. Once approved, a regional center pools investment capital to fund an NCE. There are several different models: the NCE could be a lending entity that provides loans for certain business activities, such as new construction; it could be an equity stake in a project company; or

it could be a direct investment into a development project—such as a hotel, convention center, or retail or residential development.

47. The investor's visa petition must demonstrate that sufficient capital is invested in an approved regional center project and that the investment will create at least ten jobs under the methodologies set forth in the regional center's application. 8 C.F.R. § 204.6(j), (m).

48. If all goes well, investors receive a green card (*i.e.*, lawful permanent residency) in addition to a return on their investment capital and ultimately the return of their capital. The regional center would also expect to receive some portion of the investment return.

49. The Regional Center Program grew substantially during the 2000s. In Fiscal Year 2007, there were only 11 approved regional centers. *See* Congressional Research Service, *EB-5 Immigrant Investor Visa* 7 (Dec. 16, 2021), perma.cc/W2XP-VS33. By the end of 2020, there were 674. *Id.* In recent years, the Regional Center Program accounted for over 95% of all EB-5 visas.

50. Foreign investors have deployed billions of dollars of capital in the United States and created hundreds of thousands of American jobs through the Regional Center Program. A study by the Department of Commerce in 2017 found that in just two years, $16.7 billion of EB-5 capital was invested, generating over 170,000 jobs. David K. Henry et al., U.S. Department of Commerce, Office of the Chief Economist, *Estimating the Investment and Job Creation Impact of the EB-5 Program* (2017), perma.cc/N4HR-NK8Z.

51. The Regional Center Program became successful because it provides a distinct advantage for investors. Regional centers can pool the investments of multiple investors, which eases the burden on investors and enables large-scale, professionally managed economic projects that typically create more American jobs. Regional centers have structured their investment contracts and relationships with developers to enable these types of projects. As a result, regional center projects often have investment timeframes of at least five years, if not longer, from when the investment is first made, which is typically long enough to create the necessary jobs, generate a return on investment, stabilize a project sufficiently to provide for a potential exit for the EB-5 funds, and cover the investor's conditional residency period. As mentioned above, an IIUSA

survey of 171 pre-RIA projects showed the average investment term was 5.5 years. IIUSA, *IIUSA's Recent Survey Sheds Light on the Average Sustainment Period of Pre-RIA EB-5 Projects* (Feb. 29, 2024), perma.cc/9ZRQ-E2PQ.

52. This timeframe is consistent with other incentive-based economic development programs. Indeed, virtually all federal economic development programs that provide investor incentives have investment holding periods that are longer than two years. By way of example, to receive the maximum Opportunity Zone benefit, the necessary investment period is ten years, 26 C.F.R. § 1.1400Z2(c)-1(b)(1)(i); for New Market Tax Credits, the necessary investment period is seven years, I.R.C. § 38(b)(13); for Qualified Small Business Stock treatment, at least a five-year investment is required, I.R.C. § 1202.

C. Congress reauthorizes and codifies the Regional Center Program

53. Congress has reauthorized the Regional Center program over thirty times since its inception. On July 1, 2021, the most recent authorization expired. This statutory sunset, and the lapse it created, has occurred at times before. *See generally Hulli v. Mayorkas*, 549 F. Supp. 3d 95, 103 (D.D.C. 2021) (describing "Congress's long history of reauthorizing the Regional Center Program").

54. Beginning July 1, 2021, USCIS stopped accepting EB-5 visa applications from the Regional Center Program until the program was reauthorized.

55. On March 15, 2022, as part of the FY 2022 Consolidated Appropriations Act, the President signed into law the EB-5 Reform and Integrity Act of 2022. *See* Pub. L. No. 117-103, div. BB.

56. The RIA memorializes the Regional Center Program, codifying it specifically in the Immigration and Nationality Act and the United States Code. The Act authorizes the Regional Center Program through September 30, 2027. *See* RIA § 103(b)(1) (adding 8 U.S.C. § 1153(b)(5)(E)(i)).

57. The RIA enhances oversight over regional centers. For example, the Act requires regional centers to describe how they will monitor NCEs, disclose the identities of persons involved in the regional center, and certify that those individuals do not have a history of criminal or fraudulent activity as described in the statute. *See* RIA § 103(b)(1) (adding 8 U.S.C. § 1153(b)(5)(E)(iii)).

58. The Act requires regional centers to undergo a USCIS audit every five years, maintain certain securities documentation, and adhere to certain compliance obligations. *Id.* (adding 8 U.S.C. § 1153(b)(5)(E)(v), (vii)). It also requires regional centers to file an application containing a comprehensive business plan, an economic analysis addressing job creation, any Securities and Exchange Commission documents, any documents provided to investors, a compliance plan, and a certification of compliance, before making any new investments or sponsoring any new projects. *Id.* (adding 8 U.S.C. § 1153(b)(5)(F)).

59. The Act imposes sanctions for a regional center's noncompliance, which may result in the center's termination, fines, or debarment of individuals. *Id.* (adding 8 U.S.C. § 1153(b)(5)(G)(iii)).

60. Besides these new anti-fraud measures, the reauthorized Regional Center Program codified by Congress in the RIA remains materially unchanged. The regional centers still serve the same purpose that they always have: They facilitate investors' ability to satisfy the EB-5 statutory requirements by allowing indirect investment, with continuing incentives to invest into infrastructure projects, rural and other targeted employment areas. *See id.* (adding 8 U.S.C. § 1153(b)(5)(E)-(S)).

61. Relevant here, Congress also added language to the statute to require that an immigrant investor's investment "is expected to remain invested for not less than 2 years." 8 U.S.C. § 1153(b)(5)(A)(i); RIA § 102, 136 Stat. at 1070.

62. This additional language echoes USCIS's longstanding requirement that the investor "continuously maintained his or her capital investment over the two years of conditional residence." 8 C.F.R. § 216.6(c)(1)(iii).

63. Concurrently, Congress removed a provision in 8 U.S.C. § 1186b(b)(1) that had explicitly required sustaining the investment "throughout the period of the alien's residence in the United States." Consolidated Appropriations Act 2022, Pub. L. No. 117-103, 136 Stat 49, 1100, § 104, div. BB (Mar. 15, 2022). But Congress also added a provision to allow an investor to take an additional year after the two-year residency period to create the required employment, "provided that such alien's capital will *remain invested* during such time." *Id*. (amending § 1186b(d)(1)(A)) (emphasis added).

64. Congress also added detailed provisions governing the redeployment of investors' funds and directed USCIS to prescribe regulations "that allow a new commercial enterprise to redeploy investment funds anywhere within the United States or its territories for the purpose of maintaining the investors' capital at risk," subject to certain requirements. *Id.* § 103 ("Parameters for Capital Redeployment").

D. USCIS amends its longstanding sustainment rule via email and website FAQs

65. As noted above, USCIS has long required investors to sustain their investment "over the two years of conditional residence." 8 C.F.R. § 216.6(c)(1)(iii).

66. This regulation was initially promulgated via notice-and-comment rulemaking in 1994 and has remained unchanged since. *See Conditional Permanent Resident Regulations for Alien Entrepreneurs, Spouses, and Children*, 59 Fed. Reg. at 26,592.

67. USCIS's Policy Manual has also long reflected the same requirement, stating that the "immigrant investor must provide evidence that he or she *sustained the investment throughout the period of his or her status as a conditional permanent resident of the United States*." USCIS Policy Manual, Vol. 6, Pt. G-Investors, Ch. 7, "Removal of Conditions," § A.2 (emphasis added).

68. In January 2023, USCIS announced on its website that the sustainment rule would be the subject of a Stakeholder Engagement meeting on March 20, 2023. *See* USCIS, *USCIS Immigrant Investor Program (EB-5) Stakeholder Engagement* (last updated Jan. 31, 2023),

perma.cc/87EM-C9R4. USCIS did not indicate in that post what its interpretation of the RIA would be.

69. On February 10, 2023, Plaintiff IIUSA submitted a letter in advance of the stakeholder engagement call, noting that USCIS's notice "suggest[s] that USCIS may interpret the RIA as requiring merely a two-year investment period, after which presumably, investors may receive a return of capital irrespective of their conditional residency." Letter from Aaron L. Grau, Executive Director, IIUSA, to Alissa Emmel, Chief, Immigrant Investor Program Office (Feb. 10, 2023), attached hereto as Exhibit C. IIUSA expressed the view in its letter that "such an interpretation of the RIA is contrary to both the clear intent of Congress and the policy goals of the EB-5 Program." *Id*. at 2. IIUSA appended a letter from Senator John Cornyn to Secretary Alejandro Mayorkas of January 24, 2023, expressing a similar sentiment. *Id.* at 5-7.

70. On October 11, 2023, almost 18 months after the RIA's enactment, USCIS issued its new rule via email and FAQs. USCIS stated that the RIA "removed the requirement that the investor must sustain their investment throughout their conditional residence" and "add[ed] new language that the investment required by [the Act] must be expected to remain invested for at least two years." Exhibit A at 1.

71. USCIS acknowledged that the statute was ambiguous as to how to calculate the two-year investment sustainment period, stating "the statute does not explicitly specify when the two-year period under INA 203(b)(5)(A)(i) begins." *Id*. Nevertheless, USCIS decided to "interpret the start date as the date the requisite amount of qualifying investment is made." *Id*. The agency further stated that it "*will* use the date the investment was contributed to the new commercial enterprise and placed at risk in accordance with applicable requirements, including being made available to the job-creating entity" to calculate the two-year period under INA 203(b)(5)(A)(i). *Id.* (emphasis added).

72. USCIS followed the announcement with an additional email stating that "[b]ecause [of] these changes made by the RIA, investors filing petitions for classification after enactment of the RIA *no longer need to sustain their investment throughout their conditional residence*." Email

from USCIS, *USCIS Guidance: EB-5 Reform and Integrity Act of 2022* at 2 (Oct. 11, 2023) (emphasis added), attached hereto as Exhibit D. The agency reiterated that, "[a]lthough the statute does not explicitly specify when the two-year period under INA 203(b)(5)(A)(i) begins, we interpret the start date as the date the requisite amount of qualifying investment is made and believe this interpretation is consistent with the statutory language. In other words, we will use the date the investment was contributed to the new commercial enterprise and placed at risk in accordance with applicable requirements, including being made available to the job-creating entity." *Id.*

E. USCIS's announcement is final agency action

73. As a general matter, two conditions must be satisfied for agency action to be "final," and thus subject to challenge under the APA. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process" and must not be "of a merely tentative or interlocutory nature." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (quoting *Bennett*, 520 U.S. at 177-178)). "And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Id*. Both criteria are satisfied here.

74. *First*, there is nothing tentative or interlocutory about USCIS's announcement. The agency's statement is clear and unequivocal: "the RIA removed the requirement that the investor must sustain their investment throughout their conditional residence" and the agency "*will* use the date the investment was contributed to the new commercial enterprise and placed at risk" to calculate the two-year sustainment period. Exhibit A at 1 (emphasis added).

75. USCIS repeated the same unequivocal language in another email notification later that same day. Exhibit D at 2.

76. USCIS also updated the Question & Answer section of its website to reflect its new interpretation, stating, "we interpret the start date [of the two-year sustainment period] to be the date that the full amount of qualifying investment is made to the new commercial enterprise and placed at risk under applicable requirements, including being made available to the job creating

entity, as appropriate." USCIS, *EB-5 Questions and Answers (updated Oct. 2023)*, perma.cc/7S7G-C27D (last visited Oct. 19, 2023). USCIS further states on its website that "INA 216A . . . no longer requires that the investor sustain their investment throughout their period of conditional residence." *Id*.

77. *Second*, USCIS's action determines the rights and obligations of immigrant investors. Before the action was announced, investors were obligated to sustain their investment through their period of conditional residency to successfully obtain lawful permanent status. After USCIS's announcement, immigrant investors are no longer obligated to do so. And legal consequences—namely, the successful adjudication of an investor's petition—flow directly from that change. *See Bennett*, 520 U.S. at 178.

78. The agency has additionally demonstrated its intent to adjudicate investor petitions under its new interpretation. USCIS states that for Form I-829 petitions from petitioners that filed their initial I-526E petitions after the enactment of the RIA, the agency will rely on its new interpretation "[f]or purposes of determining the date when the two-year period required by INA 203(b)(5)(A)(i) begins." USCIS, *EB-5 Questions and Answers (updated Oct. 2023)*, https://perma.cc/7S7G-C27D.

79. The Supreme Court has "long taken" a "'pragmatic' approach . . . to finality." *U.S. Army Corps. of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 599 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Under this approach, even when an agency does nothing more than "give notice" of its interpretation of a statute, the notice can constitute final agency action without anything more. *Id*.; *see also, e.g.*, *Gomez v. Trump*, 485 F. Supp. 3d 145, 194 (D.D.C. 2020) ("[A]n agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final action fit for judicial review.") (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986)).

80. Plaintiff has no adequate alternative to review under the APA. USCIS's communications do not indicate the potential for any further agency process. And "the mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions

of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 566 U.S. 120, 127 (2012).

F. USCIS did not follow the requisite APA procedures

81. Under the APA, agencies must make legislative rules though notice-and-comment rulemaking, which requires publication of the proposed rules in the Federal Register and acceptance of public comments on those rules. 5 U.S.C. § 553.

82. USCIS's action is a "legislative-type rule" because it has the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

83. USCIS's action alters the way a key requirement of the EB-5 program, the sustainment provision, is calculated. This decision plainly "affect[s] individual rights and obligations" (*id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974))), as it will determine how investor petitions are adjudicated and more broadly, what types of investment projects are suitable under the EB-5 program.

84. USCIS issued this rule without publishing a notice of proposed rulemaking in the Federal Register or allowing the public an opportunity to comment, as required by the APA. 5 U.S.C. § 553(b). It is therefore unlawful and must be set aside.

85. Furthermore, it is well established that when an agency seeks to amend or repeal a legislative rule, it must do so via notice and comment rulemaking as well. *See Mendoza*, 754 F.3d at 1024 (guidance that "effect[s] a substantive change in existing law or policy," and "effectively amend[s] a prior legislative rule," is "necessarily" a legislative rule) (internal quotation marks and alterations omitted). "[I]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and of course, and amendment to a legislative rule must itself be legislative." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Otherwise, "the agency could evade its notice and comment obligation by 'modifying' a substantive rule" without following the APA's requirements. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94–95 (D.C. Cir. 1997).

86. USCIS's prior rule defining the two-year sustainment period as coinciding with an immigrant investor's two-year conditional residency was promulgated via notice and comment and published in the Code of Federal Regulations. *See* 8 C.F.R. § 216.6(c)(1)(iii).

87. There can be no doubt that USCIS's action "effectively amends" this preexisting legislative rule. *Mendoza*, 754 F.3d at 1024. Before the release was issued, the two-year sustainment clock began to run when the investor's period of conditional residency began. Now, the clock starts when "the investment was contributed to the new commercial enterprise and placed at risk." Exhibit A at 1. As such, USCIS's effective amendment of the existing regulations is a legislative rule.

88. Moreover, while USCIS's action purports to "interpret" the new provisions of the RIA, it is not an "interpretative rule" that is exempt from the APA's notice-and-comment requirement. 5 U.S.C. § 553.

89. "Interpretative rules are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or 'merely track' preexisting requirements and explain something the statute or regulation already required." *Mendoza*, 754 F.3d at 1021. "To be interpretative, a rule 'must derive a proposition from an existing document whose meaning *compels or logically justifies* the proposition.'" *Id.* (quoting *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010)) (emphasis added). "In that sense, an interpretive rule explains 'pre-existing legal obligations or rights' rather than 'creating legal effects.'" *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir. 2021) (quoting *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020)).

90. Nothing in the RIA "compels or logically justifies" USCIS's conclusion. USCIS itself acknowledges the statutory ambiguity in its action. *See* Exhibit A at 1 ("[T]he statute does not explicitly specify when the two-year period under INA 203(b)(5)(A)(i) begins"). While USCIS may have the regulatory flexibility to revise the sustainment period through a new notice-and-comment rulemaking, nothing in the statute "compels" the agency's decision here.

91. A legislative rule, on the other hand, "is one that does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy." *Mendoza*, 754 F.3d at 1021. At its essence, a rule is legislative, and not interpretative, "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Children's Hosp*., 896 F.3d at 620.

92. USCIS's action goes beyond mere clarification. It adopts a new position that is inconsistent with existing regulations and creates a substantive change in the duration and calculation of the sustainment period. By any measure, it is a legislative rule.

93. The fact that USCIS has characterized its action as an interpretative rule "is not dispositive." *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). "It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power Co.*, 208 F.3d at 1024. USCIS cannot avoid its notice and comment obligations by labeling what is truly a legislative rule an interpretative one.

94. The fact that Congress amended provisions of the INA when it passed the RIA does not alter USCIS's obligation to engage in formal rulemaking. As explained further below, the RIA is entirely consistent with USCIS's existing sustainment rule (codified at 8 C.F.R. § 216.6(c)(1)), and thus Congress is presumed to adopt the existing rule, not jettison it. *See William v. Gonzales*, 499 F.3d 329, 341 (4th Cir. 2007) (Williams, C.J., dissenting) ("Congress often expressly repeals both statutory provisions, . . . and regulations, . . . and it is reasonable to expect that Congress will speak with greater clarity in overruling long-held agency interpretations."); *id*. (providing, as an example of explicit repeal, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, § 214(c), 116 Stat. 81, 94 (2002), which stated "[t]he regulations on coordinated communications . . . are repealed.").[4] Even if Congress intended USCIS to update its sustainment period regulations,

[4] Congress did not implicitly repeal the USCIS regulations governing the EB-5 program in general or the sustainment period specifically. USCIS did not claim its regulations were implicitly repealed in its announcement, and the agency's online policy manual, which was updated as

because USCIS's new action is a legislative rule, USCIS was still required to promulgate it via notice and comment rulemaking. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action").

95. Thus, USCIS was required to publish a notice of proposed rulemaking in the Federal Register and allow the public an opportunity to comment before amending its prior sustainment rule. It did not do so, and its action must therefore be set aside.

G. USCIS's action is contrary to the statute's plain text and Congress's intent

96. The RIA also forecloses USCIS's new interpretation of the sustainment period.

97. As explained above, USCIS has long required investors to sustain their investment "over the two years of conditional residence." 8 C.F.R. § 216.6(c)(1)(iii). This longstanding rule has incentivized regional centers to invest in high-quality projects that are more likely to generate return for investors, create the necessary number of jobs, and deliver benefits to the community at large. The practical reality is that these large-scale projects require longer investment periods, and as such the industry standard investment term for regional center-backed projects has typically been at least five years, and often longer.

98. When it passed the RIA, Congress added language to the statute to require that an immigrant investor's investment "is expected to remain invested for not less than 2 years." 8 U.S.C. § 1153(b)(5)(A)(i); RIA § 102, 136 Stat. at 1070. This additional language echoes USCIS's

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recently as January 24, 2024, still references 8 C.F.R. § 216.6(c)(1)(iii) and says "[t]he sustainment period is the investor's 2 years of conditional permanent resident status." USCIS, Policy Manual, Vol. 6, Pt. G-Investors, Ch. 7, "Removal of Conditions," § A.2, n.4 (Jan. 24, 2024), perma.cc/VS5F-E7W4.

Moreover, Congress did not remove any existing reference to conditional residence from the statute. Congress removed language from 8 U.S.C. § 1186(b) that arguably required sustainment throughout "the period of the alien's residence in the United States," which had been construed by some to effectively require EB-5 investors to maintain their investment for the rest of their natural lives (a nonsensical result, given all investments conclude eventually). This deletion reinforces Congress's agreement with USCIS's existing sustainment period (over the two years of conditional residence), rather than intent to implicitly overrule it.

longstanding requirement that the investor "continuously maintained his or her capital investment over the two years of conditional residence." 8 C.F.R. § 216.6(c)(1)(iii).

99. Because this additional language is consistent with USCIS's existing regulation and longstanding practice, Congress is understood to have adopted and codified USCIS's existing regulation. *See Washington All. of Tech. Workers v. United States Dep't of Homeland Sec*., 50 F.4th 164, 180 (D.C. Cir. 2022) ("'If a statute uses words or phrases that have already received authoritative construction by … a responsible administrative agency, they are to be understood according to that construction.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012))); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)); *see also Barnhart v. Walton*, 535 U.S. 212, 219-220 (2002). Here, Congress codified USCIS's longstanding administrative requirement by adding language that the immigrant investors' investment "is expected to remain invested for not less than 2 years." 8 U.S.C. § 1153(b)(5)(A)(i). This language directly mirrors USCIS's interpretation in 8 C.F.R. § 216.6(c)(1)(iii). Given that Congress's choice of language is consistent with USCIS's existing regulation and does not revise or repeal it, the existing interpretation is understood to be "the one intended by Congress." *Washington All. of Tech. Workers*, 50 F.4th at 183. This is especially the case where, as here, the existing regulation is perfectly compatible with the text of the RIA.

100. In addition, Congress removed a provision in 8 U.S.C. § 1186b(b)(1) that had explicitly required sustaining the investment "throughout the period of the alien's residence in the United States"—without any reference to *conditional* residence. RIA § 104, 136 Stat. at 1102. This was important because the phrase "throughout the period of the alien's residence" (rather than conditional residence) had been construed by some to effectively require EB-5 investors to maintain their investment for the rest of their natural lives (or at least, the full period of permanent

residence before an investor becomes a naturalized citizen). This interpretation was not only inconsistent with the overall structure of the program but was nearly impossible to comply with given that all investments are eventually concluded in one way or another.[5] In rectifying this particular issue, Congress did not intend for USCIS to abandon its existing sustainment regulation that was entirely compatible with the outcome Congress sought to achieve. Instead, Congress harmonized the statute with USCIS's regulation, which ties the sustainment period to conditional residence, and not to "residence" generally.

101. Moreover, the removal of this provision is further understood as an attempt to address the problem of visa backlogs that plagued investors from certain countries, which resulted in nearly indefinite sustainment periods while those investors waited for visas to become available. IIUSA agrees that requiring investors to sustain their investments for fifteen or twenty years is far longer than any investor (or Congress) envisioned—and is an issue that USCIS should take steps toward remedying through proper notice-and-comment rulemaking.

102. Given that Congress's new statutory language is consistent with USCIS's existing sustainment regulation, the most natural reading of the statute is that Congress intended to retain the existing calculation of the sustainment period, rather than silently jettison it. "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates." *United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002). If Congress had wanted a result inconsistent with binding regulation, it would have written a statute with a different, express result.

103. Indeed, letters from members of Congress, including the original sponsors and lead authors of the RIA, confirm that USCIS's new rule is inconsistent with the text of the RIA and congress's intent. *See* Letter from Senator John Cornyn to Alejandro Mayorkas, Secretary of Homeland Security (Jan. 24, 2023), attached hereto as Exhibit E; Letter from Representative Greg

[5] In addition, the now-rescinded provision was found in a section of the statute that deals with termination of conditional residence status and removal of conditions. *See* 8 U.S.C. § 1186b(b); *id*. § 1186b(d). By contrast, Congress's new language providing that an immigrant investor's investment should be "expected to remain invested for not less than 2 years" appears in 8 U.S.C. § 1153, which allocates EB-5 visas and defines their requirements.

Stanton and Representative Brian Fitzpatrick to Alissa Emmel, Chief, Immigrant Investor Program Office (Feb. 2, 2024), attached hereto as Exhibit F.

104. USCIS's new sustainment period is also unworkable with, and would render superfluous, other statutory provisions that Congress added to the statute at the same time.

105. *First*, Congress added a provision to allow an investor to take an additional year after the two-year conditional residency period to create the required employment, "provided that such alien's capital will *remain invested* during such time." RIA § 104, 136 Stat, at 1102 (amending § 1186b(d)(1)(A)) (emphasis added). This provision is consistent with reading "not less than two years" in the statute as coinciding with the two years of conditional residence.

106. Under USCIS's new rule, however, an investor's required sustainment period could begin and end before the investor begins his or her conditional residence period. It makes no sense to describe an investor's capital as "remaining invested" during a third year of conditional residency if conditional residency is irrelevant to the required sustainment period, and especially if that capital had already been returned to the investor, possibly many years earlier.

107. *Second*, Congress also added detailed provisions governing the redeployment of investors' funds and directed USCIS to prescribe regulations "that allow a new commercial enterprise to redeploy investment funds anywhere within the United States or its territories for the purpose of maintaining the investors' capital at risk," subject to certain requirements. *Id.*, 139 Stat 49, 1081 ("Parameters for Capital Redeployment"). Redeployment of an investor's capital is allowed only if the new commercial enterprise has already "created a sufficient number of new full-time positions to satisfy the job creation requirements of the program for all investors in the new commercial enterprise." *Id.*

108. If, as USCIS's new rule suggests, there is no independent need for an investor to sustain his or her investment longer than two years, there would be no need for redeployment at all. Congress's new redeployment provisions would be superfluous in practice. *See, e.g.*, *Cares Community Health v. U.S. Dep't of Health & Human Services*, 944 F.3d 950, 960 (D.C. Cir. 2019)

("[T]he canon against surplusage ensures that effect is given to all statutory provisions, so that no part will be inoperative or superfluous, void or insignificant.").

109. *Third*, Congress added additional integrity measures in the RIA, including new requirements governing investors' source of funds. *See* Pub. L. No. 117-103, 136 Stat 49, 1092-1093, § 103, div. BB (Mar. 15, 2022). A two-year sustainment requirement that begins when the "investment is made to the new commercial enterprise" has the potential to undermine these critical integrity reforms, as investors' capital may be returned before the approval of an investor's I-526E petition and in many cases not sustained through the beginning of the conditional residence period. Under USCIS's new rule, EB-5 investors could conceivably have their capital contribution returned to them before there is an adjudication of the lawfulness of the source of their funds—a situation Congress could not have intended given the RIA's additional provisions governing the integrity of the funds entering the United States.

110. *Finally*, a two-year sustainment period is inconsistent with the purpose of the RIA. Congress passed the RIA to revitalize the Regional Center Program and bring "much-needed investment capital and the permanent jobs that can come with it, to inner city and rural areas where it is normally difficult, if not impossible, to attract investment capital." 168 Cong. Rec. S1105-01 (daily ed. Mar. 10, 2022) (statement of Sen. Grassley).

111. Congress added "specific visa set-asides for rural area projects, high unemployment area projects, and infrastructure projects," the latter of which is "limited to true public infrastructure projects-that is, those that benefit the public and the American people." *Id.* Congress specifically reserved visas for immigrants who invest in rural and infrastructure projects, and further incentivized those investments by providing for a lower investment amount and, for rural projects, priority processing of related petitions. *See* RIA § 102-103, 136 Stat. at 1072, 1075. As explained above, many of the types of projects Congress incentivized, including infrastructure projects and projects in urban, high unemployment areas (which tend to be large multifamily residences or commercial projects) usually rely on investments with a duration of five or more

years, which further suggests that Congress did not intend to deviate from existing USCIS policy and longstanding practice when it adopted the RIA.

112. Thus, limiting investment holding periods to only two years is inconsistent with Congress's goals. Indeed, USCIS's new rule risks *disincentivizing* the very types of investment projects that Congress intended to encourage.

113. Regardless of whether USCIS's new rule conflicts with the statute, USCIS's action is contrary to law for a second, independent reason: it conflicts with USCIS's own rules.

114. "It is axiomatic … that an agency is bound by its own regulations." *Nat'l Env't Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (citation omitted). Thus, "[a]lthough it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect." *Id.* "The *Accardi* doctrine requires federal agencies to follow their own rules." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (referencing *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). A party may challenge "an agency's failure to abide by its own regulations . . . [and] such claims may arise under the APA." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018).

115. As explained above, USCIS's existing rule defining the two-year sustainment period as coinciding with an immigrant investor's two-year conditional residency was validly promulgated and is still in force. *See* 8 C.F.R. § 216.6. Because USCIS's new definition of the sustainment period conflicts with its own valid, in-force regulations, it must be set aside. *See Damus*, 313 F. Supp. 3d at 337 ("[A] federal agency must follow its own procedures" and an agency action that "violate[s] this governing maxim . . . would amount to an unlawful action under the APA.") (quotation marks omitted). This doctrine applies even if USCIS's action is not considered a legislative rule. *See C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 224 (D.D.C. 2020) ("Rules that fall within *Accardi*'s ambit include 'internal agency guidance' that are 'intended' to be 'binding norm[s]'" (quoting *Damus*, 313 F. Supp. at 336)).

H. The rule is arbitrary and capricious

116. USCIS's action is also arbitrary and capricious, for multiple reasons.

117. *First*, an agency must base its actions "on a consideration of the relevant factors" and "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In other words, "[a]n agency decision is arbitrary and capricious if it is not reasonably explained." *Antilles Consolidated Educ. Ass'n v. Fed. Labor Relations Auth.*, 977 F.3d 10, 15 (D.C. Cir. 2020).

118. Here, USCIS provided almost no explanation for how it determined when the sustainment period should begin. It did not consider any alternatives or evaluate how best to harmonize the sustainment period with the other provisions of the statute, or the goals of the EB-5 program writ large. Put simply, the rule lacks any reasoned explanation whatsoever. When an agency "fail[s] to provide any coherent explanation for its decision . . . the agency's action [is] arbitrary and capricious for want of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 69 (D.C. Cir. 2012).

119. Incredibly, USCIS's action does not even acknowledge that it departs from the existing USCIS regulation that has been in place for nearly 30 years. That alone renders the action arbitrary and capricious, as "an agency changing its course . . . [must] supply a reasoned analysis." *State Farm*, 463 U.S. at 42. And "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations*, 556 U.S. at 515. Yet that is precisely what USCIS has done here.

120. *Second*, an agency must account for the "serious reliance interests" that have built up around its "longstanding policies" when it takes any action to depart from those policies—legislative rule or not. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). USCIS

provided no account or consideration of the serious reliance interests of either regional centers or individual investors under the government's longstanding Regional Center Program.

121. Here, there are enormous investment-backed reliance interests premised on USCIS's prior, longstanding regulation requiring investments to be sustained during an investor's period of conditional residency. On the basis of these longstanding policies, investors have committed hundreds of millions of dollars to fund currently active projects across America that will ideally create significant jobs. USCIS's abrupt policy shift has put those and future projects in jeopardy. "[B]ecause [USCIS] was not writing on a blank slate, it was required to assess whether there were reliance interests"—including those of investors, Regional Center operators, and other industry stakeholders—and "determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915 (quotation marks and citation omitted; emphasis altered); *see also id.* at 1913-1914 ("[C]onsideration [of potential reliance interests] must be undertaken by the agency in the first instance, subject to normal APA review."). But USCIS did none of that required analysis here.

122. Finally, agency action must reflect "reasoned decisionmaking." *State Farm*, 463 U.S. at 52. As explained above, USCIS's new sustainment rule will render certain statutory provisions that Congress added to the statute in the RIA either unworkable or superfluous in practice. USCIS failed to acknowledge, let alone account for, these apparent contradictions. This renders its action arbitrary and capricious "for want of reasoned decisionmaking." *Fox*, 684 F.3d at 80 (the process by which the agency reached its judgment was neither "logical" nor "rational" and was therefore arbitrary and capricious).

123. USCIS's action is therefore procedurally defective and must be set aside.

I. USCIS's unlawful action harms Plaintiff and its members

124. USCIS's announcement has already had significant effects on regional centers, including the ones operated by Plaintiff's members. It puts at risk the sustainability of the industry and, consequently, billions of dollars of investments in the United States, along with the thousands

of American jobs those investments were specifically designed to create. And the rule is ultimately to the detriment of the investors that Plaintiff's members serve.

125. There are currently hundreds of millions of dollars of investments being raised by the industry through regional centers—many of which are predicated on, and designed to comply with, USCIS's prior definition of the two-year sustainment period. USCIS's abrupt 180-degree change destabilizes the status of these investments. Regional centers have current and future legally binding commitments with developers that have been or may be jeopardized as investors seek to withdraw their capital to find "short-term" projects instead or choose to invest in "short term" projects at the outset.

126. USCIS's interpretation will have perverse and destabilizing effects on the immigrant investor market. The existing regulation—that is, the longstanding policy that has governed the EB-5 program for decades—incentivizes regional centers to invest in longer-term, professionally managed, high-quality projects that are generally more likely to preserve investor capital and generate positive returns. USCIS's action, by contrast, has resulted in a sharp and immediate—literally, overnight—plunge in demand for such projects as investors began to demand two-year projects. This result has directly harmed, and continues to harm, IIUSA members in the process of marketing *hundreds of millions* of dollars of longer-duration offerings in compliance with and reliance on USCIS's prior sustainment rule, as well as those who have spent substantial time, money, and other resources negotiating and planning for new projects.

127. Even if USCIS's two-year sustainment interpretation were lawful (which it is not), that policy's sudden announcement and immediate effect leaves IIUSA and its members in the lurch, which is precisely the outcome the APA's notice-and-comment process is designed to prevent. An orderly transition to a well-reasoned new sustainment regulation—one that both maintains fidelity to congressional intent and avoids imposing excessive redeployment requirements—would benefit both investors and regional centers by maintaining a robust, stable investment environment, which works to the interests of all those with current investments in EB-5 projects, as well as those considering such investments in the future.

128. Regional centers take on significant economic risk to sponsor investors, develop investment offerings, and oversee investment projects, all of which are done with an eye toward satisfying the existing rules of the program that USCIS has historically developed.

129. The existing policy also advances manifest congressional objectives. High-quality projects with an investment horizon of at least five years, for example, generally result in greater economic growth and job creation than shorter-term projects. Achieving the ends of the EB-5 program is thus consistent with USCIS's longstanding, legacy policy regarding the sustainment period.

130. Indeed, as a practical matter, the types of investment projects that are most likely to create the most job growth require capital to be invested for at least five years. This is especially true for infrastructure projects, which Congress specifically incentivized in the RIA. *See* RIA §§ 102, 103, 136 Stat. at 1072, 1075 (adding new incentives for qualifying rural and infrastructure projects).

131. In all, USCIS's longstanding policy worked to the advantage of the American people, who reap the benefits of foreign capital investment and the resulting job creation.

132. In undermining this policy, USCIS immediately injured all who participate in the EB-5 program, including the regional centers that are IIUSA members. These entities will have fewer investors enroll in their projects, causing immediate economic harm. And the destabilizing effect of USCIS's new rule will jeopardize current and prospective investment projects. Moreover, USCIS's unlawful action renders these currently planned projects less attractive to new investors, putting Plaintiff's members at a competitive disadvantage and possibly in breach of their existing commitments.

133. To the extent that a recalibration is in order—indeed, IIUSA recognizes that the passage of time and enactment of the RIA could be cause for a considered rulemaking—the APA mandates a deliberative process, where all stakeholders may contribute comments. IIUSA, and its regional center members, are harmed by being denied the ability to comment on—and thus help shape—the rules that will govern this industry. In just the same fashion, investors and would-be

investors are similarly harmed, as USCIS has further refused to allow their participation in its policymaking action.

134. USCIS's abrupt reversal of policy is thus contrary to Congress's goals in passing the RIA, which was designed to reinvigorate and strengthen the Regional Center Program, reduce fraud and abuse, increase investment in infrastructure projects, and create jobs in rural and high-unemployment areas. Changing the sustainment period risks *disincentivizing* the very types of investment projects that Congress designed the Regional Center Program to encourage.

CLAIMS FOR RELIEF

Count I
Administrative Procedure Act:
Failure to comply with the APA's rulemaking procedures

135. Plaintiff incorporates and re-alleges the foregoing paragraphs as though fully set forth herein.

136. USCIS's action is a "legislative rule" subject to the APA's procedural requirements because it has the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). USCIS's announcement "affect[ed] individual rights and obligations." *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). The agency modified the immigrant investor's sustainment period, which is a legal prerequisite to successfully obtaining lawful permanent residency.

137. The APA requires an agency to provide public notice of proposed legislative rules and an opportunity for comment, unless the agency "for good cause" finds that notice and comment "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b).

138. Notice-and-comment rulemaking is therefore required for legislative rules in all but the most exceptional circumstances. *See State of New Jersey, Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). This procedure "ensure[s] the agency has all pertinent information before it when making a decision." *Mendoza*, 754 F.3d at 1023 (citation omitted).

139. USCIS did not publish a notice of proposed rulemaking in the Federal Register prior to its abrupt change in policy. Nor did it give the public an opportunity to comment on its action.

140. There was no good cause for bypassing notice and comment. Delay here would have merely maintained the status quo and allowed USCIS time to thoughtfully implement the RIA.

141. Therefore, USCIS's action was issued "without observance of procedure required by law" and must be "set aside." 5 U.S.C. § 706(2)(D).

Count II
Administrative Procedure Act:
Agency action contrary to law

142. Plaintiff incorporates and re-alleges the foregoing paragraphs as though fully set forth herein.

143. The APA requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction [or] authority" or "otherwise not in accordance with law." 5. U.S.C. § 706(2)(A), (C).

144. "[I]t is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.' … If 'Congress has spoken directly to the precise question at issue' and 'the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Air All. Houston v. EPA*, 906 F.3d 1049, 1060 (D.C. Cir. 2018) (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984)). Thus, agency action that contravenes the statute must be set aside.

145. USCIS's new interpretation of the sustainment requirement is inconsistent with its own, existing regulations, the statutory text of the RIA, and Congress's manifest intent.

146. Because USCIS acted contrary to the statutory text, its action was in excess of statutory authority and must be set aside. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013).

147. USCIS's action is also unlawful because USCIS has "fail[ed] to abide by its own regulations," which amounts to an "unlawful action under the APA." *Damus*, 313 F. Supp. 3d at 337.

Count III
Administrative Procedure Act:
Arbitrary and capricious agency action

148. Plaintiff incorporates and re-alleges the foregoing paragraphs as though fully set forth herein.

149. The APA authorizes courts to set aside agency action that is arbitrary and capricious. 5 U.S.C. § 706(2).

150. USCIS's action unilaterally and without notice destabilized hundreds of millions of dollars of investment that were predicated on the prior sustainment rule.

151. Moreover, the agency's action has the effect of undercutting other provisions of the RIA, rendering Congress's new provisions governing redeployment, the additional third-year extension, and the RIA's integrity provisions either irrelevant or unworkable in practice.

152. USCIS's interpretation will also have perverse and destabilizing effects on the immigrant investor market. USCIS's interpretation is additionally at odds with the RIA's new incentives for infrastructure projects, which require longer hold periods on average.

153. For a rule to surpass the arbitrary and capricious standard, the agency must also engage in a reasoned cost-benefit analysis and at least consider each "important aspect of the problem." *State Farm*, 463 U.S. at 43. USCIS, however, did not engage in any reasoned analysis at all.

154. Likewise, when an agency reverses policy, it must both acknowledge and explain the reasons for that departure, and "assess whether there were reliance interests [based on the

existing agency policy], determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915. "It would be arbitrary and capricious to ignore such matters." *Id.* at 1913.

155. Here, USCIS departed dramatically from its prior policy with neither an acknowledgment of the change nor any analysis or account of the serious reliance interests of regional centers and investors in USCIS's nearly thirty-year interpretation of the sustainment provision.

156. Therefore, USCIS's action is arbitrary and capricious and must be held unlawful and set aside. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff IIUSA respectfully request that the Court enter judgment in its favor and that the Court:

(a.) Declare that USCIS's rule was promulgated without observance of the procedures required and is otherwise arbitrary and capricious and contrary to law;

(b.) Set aside USCIS's action changing the calculation of the sustainment period;

(c.) Award Plaintiff attorney's fees and costs; and

(d.) Award Plaintiff such other and further relief as the Court may deem just and proper.

Dated: March 29, 2024

Respectfully submitted,

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