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The Real Estate Roundtable



February 24, 2017

The Honorable John F. Kelly  
Secretary of Homeland Security  
Washington, D.C. 20528

Re: Notice of Proposed Rulemaking regarding EB-5 Program

Dear Secretary Kelly:

We congratulate and welcome you to your post as Secretary of Homeland Security.

We are a consortium of stakeholders comprised of U.S. enterprises utilizing the EB-5 visa program and representatives of such enterprises and investors. As you know, the EB-5 program allows foreign investors to obtain conditional residency by contributing capital to U.S. job-creating projects. On January 13, 2017, the Department of Homeland Security (“DHS”) published a notice of proposed rulemaking to significantly raise the required investment levels (82 FR 4738) (the “NPRM”). Comments are due April 11, 2017.

Before your confirmation, we wrote to President Trump requesting withdrawal of these “midnight rules” proposed by the last Administration. (Please see attached letter dated January 20, 2017). At this juncture, our groups believe that proposed immigration rules should not advance in the regulatory process unless they are drafted under your, and the White House’s, imprimatur. Accordingly, we re-state our request to withdraw the January 13 NPRM from the prior Administration.

Every signatory to this letter understands that the EB-5 Regional Center Program is not perfect; we all agree that this program needs to be reformed. Furthermore, all of the above-signed organizations agree that the best way to reform the program is through the legislative process. This is not to say that the agency in charge of administering the program has no role in providing more clarity to delineate proper stakeholder behavior through the regulatory process. Nevertheless, the agency should not be moving forward with proposed rules that will

jeopardize the ability of the program to continue to draw foreign direct investment to the U.S. The issue of raising minimum investment levels alone will undermine the program's functionality. The levels suggested in the NPRM are substantially higher than what has been discussed in Congress and there's no transition period for stakeholders to adjust their business practices. This type of shock will be detrimental to the EB-5 program's future viability.

The Obama Administration bifurcated the EB-5 rulemaking process by issuing the aforementioned NPRM that seeks to address arguably the most controversial issues associated with the program, as well as issuing an Advance NPRM that seeks public comment on several very important issues before the agency addressed those issues in a proposed rule. This was unfortunate because in order for a lasting solution to be reached on EB-5 reform, all of these important issues which are interconnected must be addressed together; the agency's attempt to separate some issues from others is not helpful towards achieving meaningful reforms. The agency should be addressing all of the issues in the NPRM and the ANPRM together.

Fortunately, the agency has the ability to rectify this problem. Our collective request for DHS is to withdraw the NPRM and amend the Advanced NPRM to include the issues addressed in the NPRM, namely the designation of Targeted Employment Areas and minimum investment levels, as issues for public comment. In doing so, the agency should also extend the comment period for the ANPRM 60 days to June 10, 2017, given the agency's express desire for comments supported by the data. Our organizations wish to provide the agency with reliable estimates as to the likely impacts of its proposal; in order to do so, the comment period needs to be significantly longer than it currently is. This collaborative approach would not only better inform the agency of stakeholder concerns and how to best improve the integrity and operability of the program, it will also be enlightening for the many members of Congress who are in a position to make real lasting changes to the EB-5 Regional Center Program.

As you know, the Regional Center Program needs to be reauthorized by April 28, 2017. We all remain optimistic that we a legislative solution that addresses these issues can be achieved. If such a compromise is reached, the Department of Homeland Security can avoid using valuable agency resources on a regulatory effort that covers issues that will be addressed by Congress.

For these reasons, we respectfully request that that the NPRM be withdrawn. To that end, we also urge the agency to amend its Advanced NPRM on EB-5 to fold the issues discussed in the NPRM into the ANPRM and extend the ANPRM's comment date to June 10, 2017. We thank you in advance for your consideration and look forward to working with you on EB-5 program enhancements.