

1 surrounding demand for EB-5 visas following the enactment of the EB-5 Reform and Integrity Act
2 of 2022 (“RIA”).

3 4. In furtherance of those objectives, Behring filed a FOIA request with USCIS on
4 March 14, 2024, seeking records relating to **data** about EB-5 filings and adjudications, as well as
5 **staffing information** on various types of EB-5 benefit applications. See **Exhibit A** (FOIA
6 request). As explained in the FOIA request, this data is crucial for Behring to be able to analyze
7 potential visa retrogression and to help enhance transparency and integrity in the EB-5 Program.
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9 5. USCIS acknowledged receipt of the FOIA request and assigned the request **receipt**
10 **number COW2024002271**.

11 6. USCIS has not produced any documents in response to Behring’s FOIA request.

12 7. Through this lawsuit, Behring seeks to compel USCIS’s response to its March 14,
13 2024 FOIA request.
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15 JURISDICTION

16 8. This Court has jurisdiction pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B). The Court
17 also has jurisdiction under 28 U.S.C. § 1331.
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19 9. The Court has the authority to grant declaratory relief pursuant to the Declaratory
20 Judgment Act, 28 U.S.C. § 2201, *et seq.*
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22 VENUE AND INTRADISTRICT ASSIGNMENT

23 10. Venue is proper under 5 U.S.C. § 552(a)(4)(B).

24 11. Pursuant to Local Rule 3-2(c) and (d), assignment to the San Francisco or Oakland
25 Division is proper because a substantial portion of the events giving rise to this action occurred in
26 this district and division and because Plaintiff Behring is headquartered in Contra Costa County.
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PARTIES

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2 12. Plaintiff Behring Capital LLC (“Behring”) is an industry leader under the EB-5
3 Immigrant Investor Program. As such, Behring seeks the most up-to-date information about post-
4 RIA EB-5 filings and USCIS staffing levels so that it can accurately advise potential investors
5 about supply and demand for EB-5 visas. Behring therefore has a compelling need for, and a vital
6 interest in, the information sought in the FOIA request.
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8 13. Defendant USCIS is a component of the Department of Homeland Security. It is
9 also an “agency” within the meaning of 5 U.S.C. § 522(f)(1). USCIS has possession, custody, and
10 control over records responsive to Behring’s FOIA request.
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STATEMENT OF FACTS

A. Statutory Framework

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14 14. FOIA promotes open government by providing every person with a right to request
15 and receive federal agency records. 5 U.S.C. § 522(a)(3)(A).
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17 15. In furtherance of its purpose to encourage open government, FOIA imposes strict
18 deadlines on agencies to provide responsive documents to FOIA requests. 5 U.S.C. § 552(a)(6)(A).
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20 16. An agency must comply with a FOIA request by issuing a determination within 20
21 business days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i).
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23 17. The determination “must at least inform the request of the scope of the documents
24 that the agency will produce, as well as the scope of the documents that the agency plans to
25 withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 771
26 F.3d 180, 186 (D.C. Cir. 2013).
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1 18. An agency may be entitled to one ten-day extension of time to respond to a request
2 if it provides written notice to the requester explaining that “unusual circumstances” exist that
3 warrant additional time. 5 U.S.C. § 552(a)(6)(B).

4 19. An agency must immediately notify the requester of its determination whether to
5 comply with a request, and the reasons for it, and of the right of such person to appeal an adverse
6 determination. 5 U.S.C. § 552(a)(6)(B)(ii).

8 20. An agency’s failure to comply with any timing requirement is deemed a
9 constructive denial and satisfies the requester’s requirement to exhaust administrative remedies. 5
10 U.S.C. § 552(a)(6)(C)(i).

11 21. A FOIA requester who exhausts administrative remedies may petition the court for
12 injunctive and declaratory relief from the agency’s continued withholding of public records. 5
13 U.S.C. § 552(a)(4)(B).

15 **B. Factual Background**

16 22. Under the EB-5 Program, 8 U.S.C. § 1153(b)(5), foreign investors can obtain
17 lawful permanent residency in the United States if they invest substantial capital in a job-creating
18 business.

20 23. Obtaining full permanent residency in the United States through the EB-5 Program
21 involves several steps. First, the investor must file Form I-526 or I-526E with USCIS’s Immigrant
22 Investor Program Office (“IPO”). *See* 8 C.F.R. § 204.6(a). If the I-526 petition is approved, the
23 investor must then apply for adjustment of status with USCIS, or seek an immigrant visa from the
24 State Department abroad. Upon a grant of adjustment of status or entry to the United States on an
25 EB-5 visa, the investor and his or her dependents obtain lawful permanent residence on a
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1 conditional basis. Finally, within the 90-day period preceding the investor’s two-year anniversary
2 of obtaining conditional residency, the investor must file Form I-829 with the IPO to remove the
3 conditions on the investor’s permanent residency. *See generally* 8 C.F.R. § 216.6.

4 24. In 2022, Congress enacted the EB-5 Reform and Integrity Act (“RIA”)—the first
5 major statutory overhaul to the EB-5 Program since regional centers were created in the early
6 1990’s.

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8 25. Among other things, the RIA created new categories of EB-5 visas (including visas
9 for “rural” and “infrastructure” projects) with their own visa “set asides.” Under the Government’s
10 interpretation, upon enactment of the RIA, these “set asides” were not subject to any visa backlogs.
11 However, as post-RIA EB-5 visa petitions are approved and investors acquire EB-5 visas, these
12 set-aside visa numbers are expended, creating a potential for visa backlogs in these set-aside visa
13 categories.

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15 26. In order to better predict (and thereby accurately advise investors and potential
16 investors) as to the demand and potential backlogs in these new “set aside” categories, among
17 other related matters, Behring filed a FOIA request seeking **records relating to data** for pending
18 EB-5 visa petitions, USCIS staffing levels, and related adjudications timetables. *See Exhibit A*
19 **(FOIA request)**.

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21 27. Obtaining these records is critical to Behring’s ability to accurately advise investors
22 and potential investors, as well as the EB-5 stakeholder community writ large. The policies
23 requested have a direct bearing on EB-5 investors—especially those from countries most likely to
24 face visa backlogs and retrogression, to understand the probability that they will be subject to
25 backlogs prior to obtaining residency in the United States. The disclosure of such records,
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1 moreover, is critical to meet the goals of the RIA, which include increasing transparency and
2 accountability under the EB-5 Program and to combat fraud and misrepresentation. Without these
3 records, investors cannot make informed decisions about which set-aside categories (and therefore
4 which projects) are the best investment vehicles given their individual circumstances.

5 28. USCIS has issued Behring an acknowledgement letter for the FOIA request and
6 assigned the request a control number (**COW2024002271**). *See Exhibit B.*

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8 29. To date, however, USCIS has produced no records in response to Behring's FOIA
9 request.

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11 **CAUSES OF ACTION**

12 **Count I:**

13 **Failure to Respond to Request Within Statutory Timeframe**

14 30. Plaintiff incorporates paragraphs 1 through 28, as if fully stated in this Count.

15 31. USCIS has failed to respond to Plaintiff's March 14, 2024 FOIA request within the
16 statutorily mandated timeframe, in violation of FOIA, 5 U.S.C. §§ 522(a)(6).

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18 **Count II:**

19 **Failure to Produce Responsive Records**

20 32. Plaintiff incorporates paragraphs 1 through 28, as if fully stated in this Count.

21 33. USCIS has failed to make reasonable efforts to search for records responsive to
22 Plaintiff's March 14, 2024 FOIA request in violation of FOIA, 5 U.S.C. § 552(a)(3).

23 34. USCIS failed to disclose and produce any records responsive to Plaintiff's March
24 14, 2024 FOIA request in violation of 5 U.S.C. § 552(a)(3)(A).

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26 **ATTORNEYS' FEES**

27 35. Plaintiff incorporates paragraphs 1 through 34 herein, as if fully stated in this Count.

1 36. Plaintiff is entitled to recover its reasonable attorneys' fees and litigation costs in
2 connection with this lawsuit. 5 U.S.C. § 552(a)(4)(E)(i).

3 **RELIEF REQUESTED**

4 **WHEREFORE**, Plaintiff respectfully requests that this Court enter judgment on its behalf
5 and:
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7 a. Declare USCIS's refusal to disclose the records request by Plaintiff to be unlawful
8 and in violation of FOIA;
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10 b. Order USCIS to immediately release and deliver to Plaintiff all records responsive
11 to Plaintiff's request;

12 c. Enjoin USCIS from withholding records responsive to Plaintiff's request;

13 d. Award Plaintiff costs and reasonable attorneys' fees incurring in bringing this
14 action;
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16 e. Grant such other relief as the Court may deem just and proper.
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18 Dated: April 29, 2024

Respectfully submitted,

19 /s/ Ira J. Kurzban

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