



Executive Summary

USCIS EB-5 (Immigrant Investor) Stakeholder Quarterly Engagement

Overview

On December 16, 2010, U.S. Citizenship and Immigration Services (USCIS) Service Center Operations (SCOPS) Directorate and the Office of Public Engagement (OPE) hosted the EB-5 Immigrant Investor Quarterly Engagement. OPE advised participants that the session was for USCIS to listen to the views and information of individual stakeholders and not for the purpose of obtaining group or consensus advice.

In addition to providing various updates on statistics, processing times and the recently instituted EB-5 related forms, USCIS also responded to input received from the public prior to the engagement. USCIS also announced the posting of USCIS' 2009 EB-5 memorandum to the agency's website for a period of 30-days in which the public will have an opportunity to provide input.

Updates

- **EB-5 Statistics and Case Processing Times**

With the end of fiscal year on September 30, 2010, USCIS shared that the agency received 1,955 Form I-526 Immigrant Petition by Immigrant Entrepreneur, and 768 Forms I-829 Petition by Entrepreneur to Remove Conditions. Approval rates for I-526s increased to 89% from 86% in fiscal year 2009. In 2010, the approval rate for Form I-829 Petition by Entrepreneur to Remove Conditions declined to 83% from a previous 86%. Although USCIS has not conducted an analytical study to identify factors that contributed to an increase in I-829 denial rates to 17% in FY 2010 from a previous 14% in FY 2009, some of the most common reasons the agency encounters are, but not limited to the investor not sustaining the investment for the entire two year conditional legal permanent status period, and not creating the required 10 full time jobs for U.S. workers.

Ninety percent of I-526s are filed through regional centers. USCIS also shared EB-5 visa usage in fiscal year 2010 by country of chargeability and highlighted that at 41%, Chinese investors received the highest number of EB-5 visas.

USCIS shared regional center filing receipts and final case actions in fiscal year 2010 highlighting that that 110 initial regional center proposals were received, 36 regional center proposals were approved while 30 were denied. Also received in fiscal year 2010 were 42 amended regional center proposal filings, typically to modify the scope or activity to be conducted in a previously approved regional center.

In fiscal year 2010, a total of 1,885 immigrant visas were issued which is a decrease from the previous 4,218 in fiscal year 2009. USCIS indicated that in 2009, the regional center pilot program was poised to expire and as a result, USCIS placed a heightened focus on adjudicating I-526 petitions and getting them over to the U.S. Department of State. Since 85% of I-526 petitions that USCIS approves are sent for consular processing, USDOS also had some ambitious procedures in place to give these applications priority on their end.

In terms of processing times, USCIS leadership establishes target processing times for EB-5 related petitions and thus far, current processing times are at or within one month of the target processing times as noted: Form I-526, currently processed within the five month target processing time frame; the target for Form I-829 is 5 months and these are currently processed in 6 months. Initial regional center proposals have a 4 months target processing time, and currently USCIS is processing these within 5 months. Regional center amended proposals have a four month targeted processing time; however, USCIS is currently processing these within one month. Furthermore, USCIS matches responses to request for evidence (RFE), to the corresponding case and strives to finalize the case within 30 days of receipt of the RFE response. If cases are beyond the processing time, customers may inquire on the status of the case via email at USCIS.ImmigrantInvestorProgram@dhs.gov.

USCIS strives to work cases using the first-in-first-out method, and does not have specific expedite procedures to give preferential treatment to projects that include exemplars. At this time, the agency does not plan to further stratify EB-5 workflows to give priority to cases that include exemplars.

The agency reminded participants that it strictly adheres to USCIS' National Expedite Criteria in order to determine if a case should be worked ahead of others cases. Additionally, assigning a regional center to a specific ISO would not foster efficient processing of cases because personnel have various responsibilities and are sometimes reassigned to other units or retire. The result would be a convoluted process that would complicate workflows and not support the agency's commitment to process cases using the first-in-first-out method. If we identify fact patterns or common issues amongst cases, these are grouped together for processing to ensure consistency.

USCIS reminded stakeholders that Immigration Services Officers (ISOs) and a supervisor were added to the EB-5 team at the California Service Center. Training efforts have included formal classroom training, hands-on EB-5 case review and discussions, and a review of Forms I-924 and I-924A. Experienced EB-5 Immigration Service Officers are serving as mentors in this training initiative. It should be noted that USCIS does not express aggregate EB-5 adjudicators in terms of the number of people involved because service centers have a lot of priorities and while we have a certain segment of staff that are predominantly focused on EB-5 adjudicators are also called upon to perform other duties. However, the EB-5 team has tripled with the addition of ISOs.

- **Data Challenges and Individual Petition Statistics for Regional Centers**

USCIS has received data requests from external EB-5 stakeholders for case filing volumes and final case actions in Form I-526 and Form I-829 petitions that are affiliated with a specific designated regional center. Since the Agency has determined that providing this data does not conflict with the Privacy Act, USCIS will post this data to its website on a quarterly basis and provide the same at the end of each fiscal year, starting with petitions filed during fiscal year 2011 (October 1, 2010 through September 30, 2012).

The agency stated that one of the challenges in collecting the requested information has been that forms I-526 and I-829 do not collect information about the affiliated regional center. USCIS began capturing the affiliation between a regional center and the individual petitions about one year ago; however, the data is only visible to the Agency when the case is assigned to an Immigration Services Officer (ISO), not while it is in the queue. As such, when a petition is filed, the Agency does not readily see the regional center affiliation. To address this blind spot, USCIS has devoted resources to capture regional center affiliation information. Once the data is validated, it will be posted to the agency's website. By June 2011, USCIS plans to post data for the first quarter in fiscal year 2011, which includes October 2010 through December 2010.

Another challenge is the agency's inability to capture approval and denial rates for non-regional center affiliated cases also referred to as "stand alone" I-526 cases. For example, in fiscal year 2010, 11% of I-526 petitions and 17% of I-829 petitions were denied. At present USCIS does not currently capture data in a manner that would allow for the denial rates of RC-affiliated and non-RC-affiliated to be distinguished from one another.

- **Revisions to Form I-526 and Form I-829**

In fiscal year 2011, USCIS plans to revise Form I-829 and I-526 to facilitate the capture of regional center affiliation. Stakeholders are encouraged to think about the changes they would like to see made to these forms and to comment on proposed draft forms when they are posted on www.regulations.gov per the Office of Management and Budget procedures.

- **Form I-924 & Form I-924A**

On November 23, 2010, USCIS implemented Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program, for an entity to request designation as a Regional Center. On that date, USCIS also implemented Form I-924A, Supplement to Form I-924 (Form I-924A), to help customers with yearly regional center reporting requirement. These forms are posted on the agency's website at www.uscis.gov with corresponding instructions.

In all FY 2010, USCIS received 110 initial regional center proposals and 42 amended regional center proposals. In the week prior to the implementation of the new forms, USCIS received 100 regional center initial and amended proposals, which equates to 65% of all regional center filings in FY 2010. USCIS advised participants that the adjudication of this high volume of case filings will have an impact on processing times for Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program.

USCIS reminded participants that reporting fiscal year 2010 data is not required. Therefore, there is no need for a regional center to file Form I-924A until after the close of fiscal year 2011. If a

customer receives a USCIS request for fiscal year 2010 data, they should forward the request to the EB-5 team at USCIS.ImmigrantInvestorProgram@dhs.gov for further review. The agency encouraged regional centers to thoroughly review Form I-924A and become familiar with the data that will be required. Stakeholders will be able to collect fiscal year 2011 data as the year transpires, thereby minimizing the time to prepare Form I-924A at the end of fiscal year 2011.

- **EB-5 Inquiries and EB-5 Mailbox Auto-Reply**

USCIS reminded participants that the “EB-5 Inquiries” webpage found at www.uscis.gov provides a myriad of information and outlines the type of inquiries that can be posed to the EB-5 team at USCIS.ImmigrantInvestorProgram@dhs.gov. An email to this account will provide an automatic email reply that provides customers with links to various USCIS EB-5 pages and other EB-5 public information sources, including links to Forms I-924 and I-924A.

- **EB-5 Frequently Asked Questions (FAQs)**

USCIS has been actively developing EB-5 Frequently Asked Questions (FAQs) on a variety of related topics. By the middle of January 2011, USCIS plans to publish EB-5 FAQs, and will update these on an ongoing basis. In reviewing stakeholder input provided prior to EB-5 quarterly engagements, the agency found that some questions are better suited to be addressed in FAQ format rather than as a talking point in a quarterly EB-5 engagement.

- **Exemplar Projects**

To get a certification on a specific project, a designated regional center may file an amendment to the regional center for an exemplar project. A regional center seeking regional center designation may also file an exemplar with the initial Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program.

Principal Themes

- **Maintaining / Creating Jobs in a Troubled Business (Direct and Indirect)**

USCIS shared that every EB-5 investor must create at least 10 jobs for U.S. workers as a result of his or her capital investment. Sometimes, investors may meet the job creation requirements through job maintenance in a “troubled business.” For non-regional center affiliated investments, job creation may only be credited through the creation or maintenance of jobs directly within the commercial enterprise in which the alien investor makes his or her investment. However, an EB-5 capital investment that is made in a commercial enterprise that is affiliated with a designated regional center may be credited with jobs created indirectly through a loan or capital investment made by the commercial enterprise to a third party enterprise. In such cases estimates of job creation must be supported by a detailed business plan and associated economic analysis.

A stakeholder asked the agency if invested capital may be used to increase the capital of a troubled bank or other financial institution, assuming the job creation or retention criteria is met. In response, USCIS reminds stakeholders that the investment of EB-5 capital into a “troubled” bank or financial institution may be a qualifying investment for EB-5 purposes. However, a determination regarding whether the investment will qualify either under the basic EB-5 program or through the Regional Center-affiliated program can only be made based upon the review of the record of proceeding in an actual EB-5 Form I-526 petition or Form I-924 Regional Center application.

- **Office of Foreign Assets Control (OFAC)**

USCIS stated that the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments. There are also certain U.S. Transactions with Iran which are known as the “Iranian Transaction Regulations” (ITR). To carry out ITR provisions and learn how ITR requirements may impact lawful source of funds requirements in EB-5 petitions, USCIS met with OFAC. In some cases, investors are required to apply and receive a license from OFAC or a letter stating a license is not required prior to the filing of their Form I-526 petitions.

- **Federal Agency Oversight of EB-5 Investments and Operations**

The agency informed participants that many federal government agencies are involved in the oversight of business entities and capital investment instruments that are utilized for investments within the United States, to include the Security and Exchange Commission (SEC). As such, the SEC is the appropriate source to provide guidance regarding compliance with SEC statutory and regulatory requirements. Furthermore, USCIS typically has no role in regulating aspects of EB-5 capital investment unrelated to immigration.

- **Sustaining the Capital Investment**

USCIS stated that the EB-5 investor must sustain the capital investment throughout the two year period of conditional permanent residence. An EB-5 investor may sell the investment after the removal of the conditional status. In cases where the investment was sustained for the required two years of conditional residency, the sole act of selling the investment prior to the adjudication of the investor’s I-829 is not a basis for a denial of the I-829. However, in many cases with this type of fact pattern, the required 10 jobs may not have been created or the record may not show that the requisite jobs will be created in a reasonable amount of time, which may result in a denial of the I-829 petition. USCIS also reminded participants that any pre-arrangement for the sale of the investment must be based upon the fair market value of the investment at the time it is sold.

- **EB-5 Status Issues**

Notice to Appear (NTA): A stakeholder suggested that USCIS conduct a more thorough review of computer systems before issuing a Notice to Appear (NTA) when I-829s are denied because in some cases, the investor has departed the United States and reentered on a temporary nonimmigrant visa. USCIS stated that NTAs are not issued when system checks and case file review show the investor has departed the United States. However, an NTA may be issued if investors, who are subject to applicable grounds of removal, reenter the United States.

Temporary I-551 Stamp: In response to a question about the immigration status of an investor whose I-829 has been denied, but whose passport has an I-551 temporary stamp, USCIS stated that the lawful permanent resident status of an immigrant investor is terminated as of the date of the director's written decision. However, in cases where the I-829 has been denied and an NTA has been issued, but no final order of removal has been entered, USCIS collects the expired conditional permanent resident card. If a temporary I-551 stamp is desired, a request may be made at a local USCIS Field Office. If the temporary extension is granted, the alien will be authorized to work and may travel outside the United States.

Follow To Join: USCIS was asked about "follow to join" within the EB-5 context. USCIS stated that USCIS has received and adjudicated solo-filed derivative I-485s based on the principal alien's (PA) approved EB-5 related I-485/I-829. USCIS has also received Form I-824 applications, which have been approved and forwarded to the consulate. If the conditions have already been removed from the PA's lawful permanent resident (LPR) status, then the derivative should be granted LPR status without conditions. USCIS noted that Form I-90, Application to Replace Permanent Resident Card, cannot be used to obtain lawful permanent resident status. As such, it is not the correct form to effectuate "follow to join" procedures.

- **Targeted Employment Area (TEA)**

A participant inquired on how to identify a TEA so that investors can qualify for the \$500,000 investment threshold. USCIS stated that the investor's Form I-526 petition must show that the area in which the capital investment has been made qualifies as a "rural" area or an area of "high unemployment as of the date of filing of the Form I-526 petition or the date of the capital investment, whichever occurs first. For additional information regarding the statistics to use in making TEA determinations, stakeholders may contact the Local Area Unemployment Statistics (LAUS) division within the U.S. Bureau of Labor Statistics (BLS) as the BLS has published technical bulletins on this topic.

Moreover, two avenues by which someone can establish an area as a TEA are by providing the statistical documentation directly to USCIS or by obtaining a TEA determination from the state in the area in which the investment is going to be made. In every case, the TEA determination is made as part of an I-526 petition adjudication.

- **Investors**

A stakeholder commented that a major concern with investing through a regional center is that the regional center may not be able to create the required jobs. Like in the family-based conditional resident status, it would be beneficial for a waiver to exist. USCIS reminded stakeholders that Congress did not provide a waiver for EB-5 investors, so the agency does not have the statutory

authority to grant such a waiver. The agency has tried to provide some means for redress. The basic framework of the EB-5 program is that all requirements must be met or the I-829 petition must be denied and the EB-5 investor and dependents are placed into removal proceedings.

The Agency stated that many investors and promoters have capital investment strategies that include pooled investment in stand alone I-526 cases or regional center cases where there are escrow agreements in place, contingent on the approval of the I-526 petition. However, USCIS does not require these investment strategies. At the I-526 stage, the agency is focused on analyzing whether the investment will create the required jobs within the conditional permanent residence period and in some limited instances within a reasonable time thereafter. What is most compelling at the I-526 stage is to have a solid business plan that transparently describes how the requisite jobs are going to be created within that timeframe. Also, in terms of specific position or job to be created, the requirement is for the jobs to be permanent full-time (35 hours per week minimum), and there is no preference given to a specific position over another.

The agency was asked how a regional center application can include both RIMS II and IMPLAN as possible models to be used for future job calculations, since the type of economic models depends on the economist who will be preparing those future reports. USCIS' economist stated that economic models are usually specific to a particular project or region and indicated that USCIS does not require the use of multiple models.

A stakeholder asked USCIS to confirm if it is permissible to utilize EB-5 funds to pay off a loan on a capital investment project as long as it is clearly described in the business plan and will result in job creation. USCIS shared that there have been some instances where the plan presented has been approvable, and there have also been other instances where timing is a factor. If the project has essentially concluded and EB-5 capital is simply going to replace debt in which the jobs are already created through non EB-5 capital, this does not make a compelling argument that jobs were created as a result of the investment. Also in all instances whether it's an equity position or a loan instrument into a project, the agency is looking for EB-5 job creation. Therefore, like in all EB-5 cases, the evidence must demonstrate that the loan is EB-5 compliant and that jobs would be created within a reasonable period of time.

- **EB-5 Study**

A stakeholder asked for an update on the status of a report that USCIS is producing on the economic impact of the EB-5 program on the U.S. economy. USCIS stated that this study has been conducted by an independent contractor in collaboration with USCIS. While a final draft is in the internal review process, USCIS is also developing a number of summary documents to convey the key findings. Along with the release of the study, USCIS anticipates releasing a paper which will offer suggested changes to improve the EB-5 program with the goal of both increasing participation and providing more assurances to immigrant investors. These suggested changes might be done through a policy memorandum and/or regulatory action or a combination.

- **Listening Session**

The quarterly engagement concluded with a listening session to allow stakeholders an opportunity to provide feedback and input on issues they would like USCIS to consider. Suggestions included:

- Quicker adjudication of Form I-526;
- Recognizing induced/direction construction jobs;
- Hosting a separate conference call on the EB-5 program with state agencies;
- Providing a definition of what constitutes a “principal place of business”;
- Allowing for the use of exemplars which would reduce the need to rely on escrow;
- Hosting a separate call for approved regional centers to discuss what USCIS is looking for and how regional centers can be more efficient for I-526 filings;
- Providing more information on its website about Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program; and
- Providing guidelines for regional center practitioners on “material change”

Next Steps

- By June 2011, USCIS plans to post regional center affiliation data for the first quarter in fiscal year 2011.