U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Public Engagement (MS 2000)
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U.S. Citizenship and Immigration Services

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Executive Summary

USCIS EB-5 (Immigrant Investor) Stakeholder Meeting

Background

On June 16, 2010, U.S. Citizenship and Immigration Services (USCIS) Service Center Operations (SCOPS) Directorate and the Office of Public Engagement (OPE) hosted a quarterly EB-5 Stakeholder Meeting. They were joined by a USCIS Economist, staff members from the Office of Policy & Strategy, and the Office of Chief Counsel, in addressing stakeholders' questions and topics of interest.

The EB-5 visa program permits aliens who make certain qualifying investments in the United States to obtain an immigrant visa. Aliens seeking an EB-5 visa must generally invest $1 million ($500,000 if the investment is made in a Targeted Employment Area (TEA)) into a new commercial enterprise that will directly create at least ten full time jobs.

In 1992, Congress expanded the EB-5 program by enacting the Immigrant Investor Pilot Program, now known as the Regional Center Pilot Program. Aliens making investments through the Regional Center Pilot Program, may satisfy the job creation requirements by demonstrating the creation of both direct and indirect jobs.

An alien wishing to immigrate on an EB-5 visa must first file a Form I-526 Immigrant Petition by Alien Entrepreneur. Upon approval of the petition, the investor may seek lawful permanent resident (LPR) status by filing an application for adjustment of status or immigrant visa. An investor who obtains LPR status based on the EB-5 program does so, on a conditional basis, and the investor must petition for removal of those conditions after two years by filing a Form I-829 Petition by Entrepreneur to Remove Conditions.

Updates

Responses to previously submitted stakeholder questions and suggested topics were incorporated into presentation materials viewed and discussed at the meeting. USCIS also shared the following

EB-5 Immigrant Investor Program updates and encouraged stakeholders to provide comments and suggestion on various aspects of the program.

- **Judiciary Committee Testimony**

USCIS Director Alejandro Mayorkas testified before the Judiciary Committee about USCIS discussions with Invest in America, an office within the Department of Commerce. It is important to note that discussions with the Department of Commerce were preliminary.

- **EB-5 Study**

USCIS hired a contractor to interview adjudicators, Regional Center promoters, and immigrant investors. Once the Agency's review of the information is complete, a user-friendly report will be shared with the public. The report will include a comparison of the immigrant investor programs in the United States, United Kingdom, Canada and Austria. We also plan to share a high-level estimate of the economic impact of the EB-5 program on the U.S. economy and recommendations for program improvement. At this time, we do not have an estimated publication date.

- **Target Processing Times**

  - Form I-526 Immigrant Petition by Alien Entrepreneur — 5 Months
  - Form I-829 Petition by Entrepreneur to Remove Conditions — 5 Months
  - Newly Filed Regional Center Proposal — 4 Months
  - Amendment to Previously Approved Regional Centers — 4 Months
  - Response to Requests for Evidence (RFE) — 30 days

- **EB-5 Immigrant Visa Statistics**

Figure 1: EB-5 Immigrant Visa Usage*

Year	Approved by U.S. Citizenship and Immigration Services (I-485)	Approved by U.S. Department of State (DS 230)	Total EB-5 Cases Approved*
2010**	32%	68%	1,494
2009	24%	76%	4,218
2008			1,360
2007			806
2006			744

Form Type	2009		
	Receipts	Approved	Denied
I-526	1,028	966	163

I-829	**437**	**335**	**55**
	2010**		
	Receipts	**Approved***	**Denied**
I-526	**1,100**	**955**	**113**
I-829	**438**	**188**	**33**

*Includes visas issued to principal, spouse, and unmarried children less than 21 years of age.
**The fiscal year starts October 1st and ends on September 30th. Numbers shown for 2010 are for October 1, 2009 through May 31, 2010.

- **Proposed Forms**

On June 11, 2010, USCIS announced in the Federal Register two proposed new forms: Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program and Form I-924A, Supplement to Form I-924.

Proposed Form I-924, has a proposed fee of $6,230, and will be used for initial filings for Regional Center designation as well as amendments to Regional Center applications. USCIS is hopeful that the use of this form will:

- Clarify requirements to meet for Regional Center designation;
- Standardize proposals submitted for Regional Center designation; and
- Facilitate expeditious review and processing of proposals for Regional Center designation.

Proposed Form I-924A, Supplement to Form I-924 will provide a mechanism by which Regional Centers will provide annual information related to their activities. USCIS proposes to publish to its website, a compilation of end-of-year Regional Center data it acquires through Form I-924A Supplement to Form I-924. The information USCIS proposes to post on USCIS.gov will include attributes of affiliated capital investments, such as:

- The geographic areas and industry categories receiving investment capital;
- The dollar volume of regional center affiliated capital invested; and
- The number of jobs created or maintained as a result of the capital investments.

- **EB-5 Premium Processing**

After careful consideration, USCIS has decided not to implement EB-5 Premium Processing for Form I-526 Immigrant Petition by Immigrant Entrepreneur.

Principal Themes

- **EB-5 Inquiries and Contacting USCIS**

USCIS posted an information page to our website entitled EB-5 Inquiries, which provides guidance to stakeholders on when to contact the EB-5 team through their dedicated mailbox: USCIS.ImmigrantInvestorProgram@dhs.gov. This mailbox may be used to:

- Update general contact information;
- Inquire on the status of Form I-526; Form I-829; or a Regional Center proposal, when these are past the posted processing times;
- Notify USCIS of problems with receipts or issues related to biometric processing; and
- Request expedited processing of a case.

Stakeholders may contact the Office of Public Engagement (OPE) by email at Public.Engagement@dhs.gov to raise topics of interest for future engagements. USCIS is also working on EB-5 Frequently Asked Questions which will likely be available to the public in the fall of 2010. Stakeholders were advised that FAQs are used to clarify policy and are not intended to create policy.

- **Public Law Cases**

USCIS has drafted regulations to facilitate the implementation of this law.

In advance of the implementation of P.L. 107-273, USCIS has:

- Reviewed all EB-5 cases affected by P.L. 107-273; and
- Approved EB-5 Public Law cases in instances where the evidence of record shows eligibility requirements, as specified in P.L. 107-273, were met.

- **Economic Analysis**

USCIS' economist discussed issues related to:

- Input-Output models used to demonstrate job creation in Regional Center cases and the nature and source of the information used in these models.
- Helpful hints for reducing the number of Requests for Evidence (RFE)
  - A sound economic analysis should include a properly defined geographic scope of the region in which the investment will be made, and where inputs originate.
  - A quality business plan provides reasoned and defensible estimates for the inputs that are used in the economic analysis, which is fundamental to creating a quality job creation analysis of a given capital investment project.
  - There must be a well-reasoned basis for the initial changes in output employment and earning that are used to predict job growth (economic growth). The estimates provided in the economic analysis and business plan must make sense.
  - To calculate the average number of jobs per industry or average wages per industry or occupation, stakeholders were advised, that to the extent possible, publicly available data should be used.

- **Commercial Enterprises and Capital Investment Projects**

A capital investment project can be the same as a commercial enterprise because a commercial enterprise can be directly involved in the capital investment project. For example, a group of immigrant investors buy a hotel and refurbish and start operating the hotel. All of the jobs are created for the employment of U.S. workers at the hotel that is owned by the commercial enterprise. The same group of immigrant investors may alternatively form a commercial enterprise that is affiliated with a Regional Center and might make an investment in another company that is refurbishing the hotel, making renovations, and is thus indirectly creating jobs.

A Regional Center is not prohibited from using different investment schemes, including both equity investment and loan structures, in different capital investment projects. However, the investment schemes to be used in the capital investment project must be articulated in the Regional Center application.

An EB-5 investor may use existing assets that are not presently in use by a business, to create jobs. For example, if there is a mall sitting fallow, nothing prohibits an EB-5 investor from acquiring that asset for use by a new business in order to create jobs.

In response to inquiries about the possibility of converting from an E-2 to an EB-5, USCIS stated that an E-2 investor, whose business increases in value as a result of reinvested revenues into the commercial enterprise, does not meet EB-5 requirements. Reinvesting revenues into the commercial enterprise is not an infusion of capital, but are considered to be "retained earnings." Further, the legislative history twice refers to EB-5 investments as "new capital" that will promote job growth.[1] Additionally, the reinvestment of a commercial enterprise's revenues cannot be considered part of a qualifying investment.

- **Regional Centers**

Once USCIS approves a proposal for Regional Center designation, the Regional Center does not have the flexibility to accept a project or offer investment options outside its original application area of operation. If the Regional Center wishes to pursue a project outside its original application area of operation, an amendment must be filed with USCIS. There is no requirement to include an exemplar I-526 document when filing an amendment for a Regional Center. We have not seen many of these yet, but we have issued a couple of amended Regional Center approvals. At this time, it is too soon to determine if having the exemplar documents along with the I-526 make it easier to adjudicate the I-526.

In some cases, USCIS may approve a proposal for Regional Center designation when an actual investment project does not yet exist. The approval is therefore based upon a hypothetical investment project. If this is the case, when the immigrant investor files Form I-526 Immigrant Petition by Immigrant Entrepreneur, an analysis will be done to determine if the actual business plan provided in support of the Form I-526 comports with the hypothetical business plan provided in support of the Regional Center application. For example, a Regional Center may have a hypothetical plan to build assisted living facilities. Although the geographic location of these assisted living facilities has not been identified, the hypothetical business plan demonstrates the

[1] *S.* Rep. 55, 101st Cong., 1st Sess. 5, 21 (1989).

logistics and feasibility of building the facilities within the geographic area of the Regional Center. Since the business plan does not relate to an actual project, it is considered a hypothetical investment project.

- **Targeted Employment Areas**

Please note that a state designation of a high unemployment area is one of two options that may be used to demonstrate that an area is a TEA based upon high unemployment. A state-issued TEA is not required to establish that an area is a TEA as the EB-5 petitioner may provide evidence that the area is a TEA directly to USCIS with the Form I-526 petition. Further, state governments do not have the authority to provide TEA determinations based on a finding that the area in which the alien made the capital investment is "rural". EB-5 petitioners must provide evidence that the area is a TEA based upon a definition of rural directly to USCIS with the Form I-526 petition.

A new commercial enterprise is the vehicle where the immigrant investor initially makes the initial capital investment, whether through a Regional Center or a stand-alone commercial enterprise.

A capital investment project can be the same as a commercial enterprise because a commercial enterprise can be involved in the capital investment project. Therefore, to qualify for the reduced capital investment of not less than $500,000, the new commercial enterprise must be "principally doing business" in a targeted employment area. As such, the new commercial enterprise and the capital investment project both must be in a TEA to qualify for the reduced capital investment of not less than $500,000.

Note that in *Matter of Izummi*, the AAO determined that in order to qualify for the reduced investment amount, a new commercial enterprise that lends capital to other job-creating businesses must only lend money to businesses located within TEAs, even if the new commercial enterprise is located in a TEA. Therefore, direct expenditures of capital by the new commercial enterprise should also be principally within a TEA in order to qualify for the reduced capital investment of not less than $500,000.

- **The Business Plan in the Form I-526 Provides the Framework for the Eligibility Analysis in the Form I-829 Petition**

There is a significant link between the Form I-526 petition and the Form I-829 Petition by Entrepreneur to Remove Conditions. In the course of processing the investor's Form I-829 petition, USCIS must compare the supporting evidence for the I-829 to the business plan that was submitted in support of the approved Form I-526. Each immigrant investor must file the Form I-526 petition, with initial supporting evidence to establish his or her eligibility for classification as an EB-5 immigrant investor. Initial supporting evidence includes a business plan and in the case of a petition filed by an immigrant investor whose commercial enterprise is affiliated with a Regional Center, an economic analysis. These items describe how the investor is going to satisfy the requirements of the EB-5 program. If the immigrant investor fulfilled the EB-5 requirements as outlined in the business plan that accompanied the Form I-526 petition, then USCIS can

generally remove the conditions and the immigrant investor can live and work permanently in the United States.

When Form I-829 Petition by Entrepreneur to Remove Conditions is filed with USCIS, supporting evidence in general must demonstrate that:

- The required capital investment was made;
- That the capital investment has been sustained; and
- That the requisite jobs have been created or preserved.

One of the primary reasons investors encounter challenges at the I-829 stage is due to the variances between the business plan that was approved at the I-526 stage and the actual capital investment and job creating activities that are documented in the Form I-829 petition. Deviations from the business plan in an approved Form I-526 petition are material to the adjudication of Form I-829 when the evidence demonstrating compliance with the capital investment and/or job creation requirements is significantly different than what was proposed in the approved Form I-526 petition. Note that in *Chang v. United States of America*, 327 F.3d 911 (9th Cir. 2003), the court stated that although the adjudication of the I-829 is not a re-adjudication of the I-526, the Form I-526 approval may not be "decoupled" from the I-829 approval. The court further stated that approval of Form I-829 is predicated by the approval of Form I-526 and the "successful execution of the approved plan."

- **Material Change**

Many of the questions and suggested topics received from stakeholders prior to the June 16th EB-5 Stakeholder meeting, included a request that USCIS further explain what constitutes a "material change." In response to these requests, the Agency provided a redacted copy of an unpublished Administrative Appeals Office (AAO) decision, and advised stakeholders that the unpublished decision is not binding on the Agency's adjudications process, but was provided at the meeting to help stakeholders gain some insight on the Agency's perspective of what constitutes a "material change."

- **EB-5 Readjustment Procedure and USCIS' December 11, 2009 Memo**

USCIS informed stakeholders that the readjustment procedure was developed in response to concerns raised by stakeholders at the September 2009, EB-5 meeting. At the September meeting, stakeholders shared that they or their client(s) might fail to meet the requirement to execute the business plan in the approved Form I-526 petition primarily due to material changes resulting from economic situations that may have led an investment project to fail.

Stakeholders asked USCIS if there were any options for immigrant investors in this type of predicament. In response to this request, USCIS developed the readjustment procedure, which was published in a memorandum on December 11, 2009. USCIS advised stakeholders who choose to file a second Form I-526 petition to contact USCIS and request to withdraw the previous Form I-526 Immigrant Petition by Immigrant Entrepreneur.

There may be other issues that make cases non-EB-5 compliant. Like when an immigrant investor prematurely files the Form I-526 petition, and is not able to meet the job creation requirement within the

required timeframe. USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions, beyond the allowed timeframe. As such, the statutory structure of the EB-5 program and relevant precedent decisions limit an investor's options when a planned investment project fails.

It is important to note that the readjustment procedure is only an option for the investor to consider and not a requirement. When considering this option, investors who have dependent children who are nearing their 21st birthday should consider the time it will take for the processing of a new Form I-526 petition and Form I-485 application because if an investor's unmarried child reaches their 21st birthday, the child is considered to have aged-out and no longer meets the definition of a child for immigration purposes. In effect, the investor's aged-out child is no longer a dependent of the EB-5 investor and therefore not eligible to be granted Lawful Permanent Resident status. The dependent children must meet the definition of child at the time the immigrant visa is issued (approval of the I-485).

- **Other Investment Issues**

An immigrant investor must show how jobs will be created as a result of his or her capital investment. Simply replacing funds to improve a business' debt position does not meet EB-5 requirements unless there was a clear explanation accompanied by an analysis that depicts how, prospectively, jobs would result from an infusion of funds.

When an investment is made in a troubled business, regulations require that the EB-5 entrepreneur preserve all of the jobs identified in the I-526 stage. The number of jobs at the start of the project must be equal to or more than the number of job at the I-829 stage. Preserving "some," of the jobs does not align with EB-5 troubled business criterion.

Preserving jobs and creating jobs should not be confused as being one and the same. Preserving jobs is pertinent when the capital investment is made in a troubled business. Creating ten or more jobs is a key factor when investing in any other type of commercial enterprise.

To be eligible for the removal of conditions, the investor must also demonstrate a sustained investment for the entire time the investor is in EB-5 Conditional Resident status. However, there is no requirement for the capital investment to remain in the project forever. It should be noted that agreements that guarantee a return of capital or buy backs are not EB-5 compliant because the capital investment must be at risk. Also, any return of the immigrant investor's capital must be remitted back at the fair market value of the investment.

The Agency allocated a portion of time to provide stakeholders with the opportunity to ask additional questions and obtain clarification, if needed. Questions and comments were posed by those who attended the meeting in person as well as those who participated by telephone.

Q. Once a response to an RFE is received by the California Service Center and is pending more than 30 days, how should the petitioner follow up with USCIS? If there is no response to emails sent to the mailbox, is there any other recourse other than continuing to wait?
A. The California Service Center is not aware of any cases that have been pending far beyond the 30 day normal processing time. However, please note that when a response to an RFE is received, there is a possibility that the information provided may open up a new line if questioning. If a response to an RFE is mailed and more than 30 days have passed since the information was received by the Agency, we encourage stakeholders to send an email to USCIS.ImmigrantInvestorProgram@dhs.gov to alert us.

Q. If $500,000 is invested in each of two development projects, is that acceptable as long as the full $1 million is all going to the same company?
A. It is possible that this may be a qualifying investment. However, the Agency does not pre-adjudicate cases.

Q. Can USCIS define the term "principally doing business?" If 90% of spending occurs within the targeted employment area and 10% occurs outside, would this meet the definition of a TEA and what is the criterion for determining whether a business is "principally" doing business within the TEA?
This is not the forum to devise policy interpretations. It is a forum to clarify existing policy and this is a good question because it appears there should be some analysis of the term "principally doing business," so we are clear on what "principally doing business" means or should mean, within the EB-5 context. We encourage you to submit your comments and suggestions to the Office of Public Engagement (OPE), by email at Public.Engagement@dhs.gov.

Q. When will petitioners be able to check the status of Form I-829 Petition by Entrepreneur to Remove Conditions?
A. We do not have tangible information at this time. However, we are a few weeks away from unveiling enhancements to My Case Status found at USCIS.gov. In the meantime, applicants may inquire on the status of their Form I-829 Petition by Entrepreneur to Remove Conditions if the case is beyond established processing times by sending an email to USCIS.ImmigrantInvestorProgram@dhs.gov.

Q. If a company secures a third party guarantee to buy an asset, can this guarantee be made to the company with the investor as a beneficiary? Will USCIS reconsider the guarantee issue? The guarantee is not worth much unless backed up by cash.
A. This is not the forum to devise policy. It is a forum to clarify existing policy. We encourage you to submit your comments and suggestions to the Office of Public Engagement (OPE), by email at Public.Engagement@dhs.gov.

Q. If promoters provide false information regarding the return of capital, does USCIS do anything about it? Is there any way for victims to file complaints?
A. If a Regional center is responsible for promoting erroneous information regarding the return of capital, USCIS is interested as it is in the best interest of USCIS and all Regional Centers that the integrity of the program be preserved and that the EB-5 program results in job creation as it was intended. USCIS welcomes suggestions or comments on this topic and encourages stakeholders to send those to the Office of Public Engagement (OPE), by email at Public.Engagement@dhs.gov.