



U.S. Citizenship and Immigration Services

EB-5 Immigrant Investor Program
Stakeholder Meeting
Washington, DC
June 16, 2010

I. Introductions



U.S. Citizenship
and Immigration
Services

EB-5 Stakeholder Meeting Presentation

This presentation is intended to provide a guide for discussion at the stakeholders meeting and to explain current USCIS policy and practice. It is not intended to be an official statement of USCIS policy, and does not supersede any existing statutes, regulations, or policy memoranda. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in any way.



II. EB-5 Updates

- Overview of EB-5 Immigration Process
- EB-5 Case Processing Times & Statistics
- EB-5 Visa Usage
- Proposed Form I-924 & Form I-924A
- Form I-526 Premium Processing
- EB-5 Inquiries
- EB-5 Expedite Requests
- EB-5 Public Law Update



General EB-5 Program Overview

Background:

- Section 203(b)(5) of the Immigration and Nationality Act (INA), allocates 10,000 “EB-5” immigrant visas per year.
 - 3,000 visas are reserved for aliens who invest in targeted employment areas (TEAs).
 - 3,000 visas are reserved for aliens who invest in commercial enterprises affiliated with Regional Centers.
- The EB-5 regulations may be found at 8 CFR 204.6 and 8 CFR 216.6, respectively.



EB-5 Capital Investment Structures

EB-5 Investors may be eligible for an EB-5 immigrant visa if they have invested – or are actively in the process of investing - the required amount of capital into one of the following for-profit business-types:

- A new commercial enterprise (created after 11/29/1990);
- An enterprise which will expand to 140% of pre-investment net worth or number of employees, or;
- A troubled business in which jobs will be preserved.



EB-5 Capital Investment Thresholds

- The standard capital investment requirement for an EB-5 investor is \$1 million.
- The capital investment requirement for an EB-5 investor in a Targeted Employment Area (TEA) which is either in a high unemployment area, (calculated as an area with an unemployment rate that is at least 150% of the national average), or a Rural Area (RA) is \$500,000.



EB-5 Job Creation Requirements

- Each EB-5 investor must demonstrate that their capital investment will create/preserve at least ten (10) jobs for qualified U.S. workers within the United States.
- A qualified U.S. worker is a U.S. citizen, LPR, or other qualified immigrants (e.g. asylee or refugee).
- Jobs created for nonimmigrant workers and/or members of the EB-5 investor's family are not qualifying.



Regional Center Pilot Program

- The Immigrant Investor Pilot Program (“Pilot Program”) was created by Section 610 of Public Law 102-395 (October 6, 1992), and has been extended through September 30, 2012.
- EB-5 requirements for an investor under the Pilot Program are essentially the same as in the basic EB-5 investor program, except the Pilot Program provides for investments that are affiliated with an economic unit known as a “Regional Center”. Investments made through Regional Centers can take advantage of a more expansive concept of job creation including both “indirect” and “direct” jobs.



Direct v. Indirect Jobs

- Direct jobs are actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.
- Indirect jobs are those jobs shown to have been created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.



Obtaining Lawful Permanent Resident (Green Card) Status through EB-5

There are four steps to becoming a Lawful Permanent Resident (LPR) through the EB-5 program.

1. Form I-526 immigrant petition approval.
2. Application for an immigrant visa either through adjustment of status (Form I-485) in the United States with USCIS, or through an application for immigrant visa (Form DS-230) with the Department of State (DOS).
3. Upon approval of the Form I-485 or admission on an EB-5 immigrant visa, the alien is granted two-years of conditional permanent resident (CPR) status.
4. A Form I-829 petition to remove the conditions on the LPR status must be filed at the end of the two-year conditional period. If the alien has fulfilled the EB-5 requirements in accordance with the business plan in the approved Form I-526 petition, then the conditions on the alien's LPR status will be removed.



Regional Center Statistics

- There are currently 94 approved Regional Centers (RCs), operating in 34 states, inclusive of the District of Columbia and Guam.
- A complete list of approved RCs is also available online at <http://www.uscis.gov/eb-5centers> .
- Approximately 90-95% of the individual Form I-526 petitions filed each year are filed by Alien Investors who are investing in RC-affiliated commercial enterprises.
- There are approximately 65 RC Proposals pending with USCIS.



Individual EB-5 Petition Statistics FY 2009

	Receipts	Approvals	Denials
Form I-526 Petition	1028	966	163
Form I-829 Petition	437	335	55



Individual EB-5 Petition Statistics

Oct – May FY 2010

	Receipts	Approvals	Denials
Form I-526 Petition	1,100	955	113
Form I-829 Petition	438	188	33



Comparison of FY09 & FY10 Receipts

Petition Type	FY 2009 Filings	FY 2010 (Oct – May) Filings
Form I-526	1,028	1,100
Form I-829	437	438



EB-5 Case Processing

The target case processing time is five months for Form I-526 and Form I-829 petitions.

The target case processing time is four months for new RC Proposals and for amended RC Proposals for Approved RCs.

Responses to requests for evidence (RFEs) for new or amended RC Proposals are matched with the case file upon receipt of the response.

CSC strives to finalize EB-5 cases within 30 days after the responses to the RFEs are received.



EB-5 Visa Usage

Fiscal Year	Total EB-5 Visas Issued
FY10 (Oct – May) 32% I-485 - 68% DS-230	1494
FY09 24% I-485 – 76% DS-230	4,218
FY08	1,360
FY07	806
FY06	744



Proposed Form I-924 & I-924A

- The USCIS Services Fee Schedule “Fee Rule” was published for public comment in the Federal Register on June 11, 2010. [CIS No. 2490–09; DHS Docket No. USCIS–2009–0033]

As explained in the Fee Rule, comments on the Fee Rule and on the Form I-924 and Form I-924A may be submitted:

1. Online: www.regulations.gov Follow the instructions to comment.
2. Mail: Chief, Regulatory Products Division, USCIS, DHS, 111 Massachusetts Avenue, NW, Room 3008, Washington, DC 20529-2210
3. Hand Delivery/Courier: Regulatory Products Division, USCIS, DHS, 111 Massachusetts Avenue, NW, Room 3008, Washington, DC 20529-2210. Contact Telephone Number (202) 272-8377.



Proposed Form I-924

- The Proposed Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program, will be used for the filing of both initial RC applications and amended RC applications. The Form I-924, which will have a proposed filing fee of \$6,230 will:
 - Clarify filing requirements for the RC designation;
 - Improve the quality of RC applications;
 - Better document eligibility for the Pilot Program;
 - Alleviate content inconsistencies among applicants' submissions; and
 - Support a more efficient process for adjudication of the RC applications.



Proposed Form I-924A

- The Form I-924A, Supplement to Form I-924, is the proposed vehicle for a yearly RC reporting requirement.
- Each approved RC will be required to file the I-924A to report RC-related activities for the preceding fiscal year within 90-days of the end of the fiscal year (on or before December 29th of the calendar year in which the fiscal year ended.)
- There is no proposed filing fee for the Form I-924A.
- USCIS plans to publish summarized RC data in order to be responsive to requests for this information from a broad spectrum of USCIS's external stakeholders, to include members of Congress, other federal agencies, state agencies, and major media outlets.



Proposed I-924A, Cont'd

- USCIS plans to publish an aggregation of the data provided each year by all designated regional centers, to include attributes of the RC-affiliated capital investments, such as:
 1. The geographic areas and industry categories receiving investment capital;
 2. The volume of regional center affiliated capital invested, and;
 3. The number of jobs created or maintained as a result of the capital investments.

This summarized data will be published on the USCIS Web site for each fiscal year following the publishing of the Form I-924A.



EB-5 Premium Processing

After careful consideration, USCIS has decided not to implement EB-5 Premium Processing for Form I-526 Petitions, due to:

- The need for further streamlining of the RC designation and Individual Petition adjudicative processes.
- IT infrastructure issues.
- Lack of sufficient EB-5 adjudicative resources to meet statutory and regulatory Premium Processing Service Requirements.



EB-5 Inquiries

- USCIS has published a page entitled “EB-5 Inquiries” on the www.uscis.gov website that outlines how the public may make inquire on EB-5 related matters.
- This webpage may be accessed from the USCIS homepage as follows:
- Home > Working in the United States > Permanent Workers > Employment-Based Immigration: Fifth Preference EB-5.



EB-5 Inquiries, Cont'd

The “EB-5 Inquiries” page clarifies:

- The EB-5 inquiries that are appropriate to send to the EB-5 mailbox at Uscis.immigrantinvestorprogram@dhs.gov, and;
- Other avenues that can be used to send questions or inquires to USCIS that are not suitable for the EB-5 mailbox.
- Note: USCIS plans to post the EB-5 FAQs for public comment by September.



EB-5 Expedite Requests

- Public Law No. 102-395 provides for priority to be given to Regional Center-affiliated individual petitions. However, the statute does not provide criteria for USCIS to use to determine how petitions filed under the regional center program should be given priority over one another.
- USCIS has national expedite criteria for all petitions and applications, which are posted on the USCIS website.
- The petitioner must demonstrate that one or more of the expedite criteria have been met to be granted an expedite.



EB-5 Expedite Requests, Cont'd

- The Director of the CSC follows the national expedite criteria when determining whether to grant an expedite request for an EB-5 petition.
- One of the national expedite factors is the “severe financial loss to a company or to an individual.” Most of the EB-5 related expedite requests that CSC receives are based on this factor.
- Most EB-5 petitions contain escrow agreements which specify that the capital investment may not be released into the investment project until the approval of the Form I-526 petition.
- USCIS would be inundated by expedite requests if expedite requests were granted based upon these self-imposed financing arrangements.



EB-5 Expedite Requests, Cont'd

- Expedite requests for EB-5 cases should be directed to the EB-5 program mailbox at:
Uscis.immigrantinvestorprogram@dhs.gov .
- USCIS believes that the most equitable approach is to adjudicate EB-5 petitions in accordance with our first-in, first out procedures.



Public Law 107-273 Update

- The 21st Century Department of Justice Appropriations Authorization Act Public Law No. 107-273, 116 Stat. 1757 (Nov. 2, 2002) requires a special analysis of the capital investment in multiple commercial enterprises and the resulting job creation in certain petitions that were approved after January 1, 1995 and before August 31, 1998.
- The DHS Regulatory Agenda indicates that the Proposed Rule for the Implementation of the Provisions of P.L. 107-273 will be published in July of 2010.



Public Law 107-273 Update, Cont'd

- USCIS has:
 1. reviewed all of the EB-5 cases affected by P.L. 107-273.
 2. Approved pending EB-5 Public Law cases in the instances where the evidence of record shows that the alien has met the eligibility requirements specified under the P.L. 107-273.
- 581 EB-5 Public Law cases remain. These cases are being held in abeyance pending the finalization of the regulations implementing the provisions of the public law.
- USCIS will dedicate a special team of officers to the handling of these cases once the regulations are published.



III. EB-5 Economic Analysis

- Input-Output Basics
- The Big Picture
- Sources of Information
- Critical Issue
- Common Pitfalls



Input-Output Basics

- Input-Output models represent a regional economy by quantifying flows to and from industries & institutions.
- From the model we derive multipliers that estimate economic impacts of changes in the regional economy.
- These multipliers predict economic changes in terms of output, employment, & income.



The Big Picture

- Using multipliers to estimate impacts requires the user to provide detailed information including: geographic scope, industry data, and initial changes in output, employment, & earnings.
- This information stems from a well-reasoned business plan.
- Use publicly available sources for data.



Where to get more information?

- Bureau of Economic Analysis
- Census Bureau
- Bureau of Labor Statistics (LAUS)
- Small Business Administration
- National Industry Associations



Critical Issue

The business plan and economic analysis
should be

TRANSPARENT and REPRODUCIBLE



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Common Pitfalls

- Defining the study area incorrectly
- Comparing apples to oranges
- Averaging multipliers
- Treating employment impacts as FTE
- Double counting direct impacts



IV. Stakeholders Suggested Topics & Questions

- Capital Investment Projects & Commercial Enterprises
- Targeted Employment Areas (TEAs)
- Material Changes Post-Filing Form I-526
- 121109 Memo's EB-5 Readjustment Procedure
- Economic Analysis/Job Creation
- Troubled Business



Capital Investment Projects & Commercial Enterprises

- What is a *commercial enterprise*?
 - A new commercial enterprise (created after 11/29/1990);
 - An enterprise which will expand to 140% of pre-investment net worth or number of employees, or;
 - A troubled business in which jobs will be preserved.
- What is a *capital investment project*?
- Is a *capital investment project* the same thing as a *commercial enterprise*?
- Can an RC-affiliated commercial enterprises use both equity investment and loan structures in capital investment projects?



Capital Investment Projects & Commercial Enterprises, Cont'd

- May an E-2 investor grow his business and eventually qualify as an EB-5, as the business increases in value enough to meet the EB-5 Investment Threshold?
 - 8 CFR 204.6(e) defines *capital*.
 - Legislative History: S. Rep. 55, 101st Cong., 1st Sess. 5, 21 (1989) twice refers to EB-5 investments as “new capital” that will promote job growth.
 - The reinvestment of a commercial enterprise’s revenues cannot be considered part of a qualifying investment. *See generally De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); *Kenkhuis v. INS*, No. 3:01-CV-2224-N (N.D. Tex. Mar. 7, 2003).



Targeted Employment Areas (TEAs)

- Can a project involve a TEA consisting of rural areas in multiple counties and even multiple states within a regional center jurisdiction?
 - 8 CFR 204.6(e) defines *rural area*.
- Are state-issued TEA designations required in order to demonstrate that an area is a TEA based upon high unemployment?
 - 8 CFR 204.6(j) Initial Evidence to accompany (Form I-526) petition.
 - 8 CFR 204.6(j)(6)(ii)(A) Evidence of TEA
 - 8 CFR 204.6(j)(6)(ii)(B) Letter from State-designated official that meets the requirements of 8 CFR 204.6(i).



TEAs, Cont'd

- Do both the new commercial and the capital investment project have to be in a TEA in order to qualify for the reduced capital investment?
 - The new commercial enterprise must be "principally doing business" in a targeted employment area. 8 C.F.R. 204.6(j)(6).
 - 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.
 - Similarly, 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 amount.



Material Changes Post-Filing Form I-526

- What is the relationship between an approved Form I-526 petition and the Form I-829 petition in establishing EB-5 eligibility?
 - Each alien investor must file a Form I-526 petition to establish his or her eligibility for classification as an EB-5 alien investor.
 - If approved, the business plan (and the economic analysis in the case of an RC-affiliated new commercial enterprise) provided in support of the Form I-526 petition describes how the investor is going to satisfy the requirements of the EB-5 program, and, therefore, removal of conditions at the Form I-829 petition stage
 - *Chang v. United States of America*, 327 F. 3d 911 (9th Cir. 2003) In *Chang* 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 Form I-829 approval is predicated by the Form I-526 approval and the “successful execution of the approved plan.”



Material Changes Post-Filing Form I-526, Cont'd

- What must be established at the Form I-829 petition stage?
 - INA 216A(d) and 8 CFR 216.6(c) require in general that an I-829 petition must demonstrate that the:
 - Alien invested the requisite capital;
 - That the capital investment has been sustained, and;
 - That the requisite jobs have been created/preserved.
- When is a deviation from the business plan in an approved Form I-526 petition material to the adjudication of the alien's Form I-829 petition?
 - When the eligibility requirements at INA 216A(d) and 8 CFR 216.6(c) have not been met as provided in the approved plan in the Form I-526 petition. When the evidence demonstrating compliance with the capital investment and/or job creation requirements is significantly different than what was proposed in the Form I-526 petition.



121109 Memo Readjustment Procedure

- Stakeholder concerns raised at the DC Sep 2009 Stakeholders' meeting prompted USCIS to develop the optional readjustment procedure.
- The statutory structure of the EB-5 program and relevant precedent decisions limit an alien's options when a planned investment project fails.
- The capital investment project identified in the business plan in the approved Form I-526 petition must serve as the basis for determining eligibility for the removal of conditions at the Form I-829 petition stage.



121109 Memo Readjustment Procedure, Cont'd

- The business plan in the Form I-526 petition may not be materially changed after the petition has been filed.
 - 8 CFR 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. *Matter of Izummi*, 22 I&N Dec. at 175.
- Likewise, a petitioner must demonstrate compliance with INA section 216(A) and 8 CFR 216.6(c) by executing the approved business plan set forth in the Form I-526. *Chang*, 327 F.3d at 927.
- USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions beyond the timeframes outlined in INA section 216A(d)(2) and 8 CFR 216.6(a) and (c).



Filing of New Form I-526 Petition – Prior to Gaining CPR Status

- An alien may opt to file a new Form I-526 petition, and if approved, use the new petition as the basis for applying for adjustment of status or for an immigrant visa with DOS.
- It would be helpful if the alien would request to withdraw the previous Form I-526 petition.



Filing of New Form I-526 Petition – After Gaining CPR Status

- An EB-5 alien may opt to file a new Form I-526 and readjust status as a CPR, should the new Form I-526 be approved.
- Note: In order to readjust, the EB-5 alien and his or her dependents must abandon the CPR status and apply for a new EB-5 visa either via an adjustment of status application or through the DOS immigrant visa application process.
 - INA 245(f) prohibits the adjustment of CPRs under INA 245(a). However, if an alien is no longer a CPR through termination or abandonment, the bar to adjustment no longer applies. Cf., *Matter of Stockwell*, 20 I & N. Dec. 309 (BIA 1991)
- EB-5 dependents must still be eligible to be classified as EB-5 dependents at the time of the filing of new Form I-485 application, i.e the dependents must be the spouse or unmarried child under the age of 21 years of the EB-5 principal alien.



Economic Analysis/Job Creation

- Is there any requirement that Regional Center applicants must demonstrate that jobs will be created through exports?
 - Public Law 106-396 eliminated this requirement.
- Please confirm whether there is any change in policy concerning the use of evidence showing compliance with RC-affiliated capital investment and/or job creation requirements pursuant to the “reasonable methodologies” approved in the Form I-526
 - The plan approved in the Form I-526 will be the plan evaluated at the I-829 stage.



Economic Analysis/Job Creation, Cont'd

- If a commercial property was once operational but is now vacant (e.g. not being used in a for-profit business, such as a vacant manufacturing plant), can EB-5 investment be used for renovation and for bringing new operational activities onto the rehabilitated property in order to create new jobs for EB-5 purposes?
- If an RC is approved for certain industries/business areas to operate, how flexible should it be/or not be in accepting a project outside its original application's areas of operation?



Troubled Business

- Can EB-5 Investment be used to reduce (replace) overly expensive and burdensome debt of a troubled business qualify?
- If less than all jobs are saved, can EB-5 investors at least get credit for the jobs that were in fact saved?
 - 8 CFR 216.6(c)(iv)



Questions?



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