



USCIS American Immigration Lawyers Association (AILA) EB-5 Committee Meeting August 10, 2011

Overview

On August 10, 2011, USCIS Director Alejandro Mayorkas and representatives from the Service Center Operations Directorate, Office of Policy and Strategy, and the Office of Chief Counsel met with representatives from AILA's EB-5 Committee. During this engagement, Director Mayorkas provided an update on the implementation of the EB-5 proposal that was posted for public comment in May 2011. USCIS will be implementing the first phase of our proposal within the next 30 days, allowing for direct email contact with the EB-5 adjudication team to raise and address case questions and issues. Director Mayorkas also provided an update on our review of public comments received in association with the December 2009 EB-5 memorandum. USCIS intends to issue a revised memo in September.

The information below provides a review of the discussion between AILA and USCIS. Please note that this meeting did not announce or create any new statement of USCIS policy, which can only be done through formal processes such as by policy memorandum or regulation.

Principal Themes

- **Effect of State Designation on Targeted Employment Area (TEA)**

Representatives from AILA stated that they believe the authority to designate a TEA is delegated to the states and that this delegation authority is supported in the regulations and reflected in the Adjudicators' Field Manual (AFM). AILA referenced 8 CFR 204.6 (j)(6)(ii)(B) and 8 CFR 204.6 (i), which delegate to the state the authority to designate "a particular geographical or political subdivision" as a TEA. AILA also referenced the AFM at Chapter 22.4(c)(4)(F):

"An attempt by the petitioner to 'gerrymander' a finding of high employment . . . is not sufficient to establish that the area is a high unemployment area unless it is accompanied by a designation from an authorized authority of the state government. . . The designation of high unemployment areas are within the purview of each U.S. State Governor, or if applicable, his or her designee. USCIS personnel have no substantive authority to question or challenge such high unemployment designations. . . ."

AILA is seeking confirmation that a state's designation of a geographic area as a TEA will be given deference and not questioned by USCIS. AILA asserted that USCIS's analysis of the TEA should focus solely on the required unemployment level; the state designation would define the boundaries while investors are required to present the methodology in support of the unemployment level.

- **Bridge Financing and the Job Creation Requirement**

Representatives from AILA are seeking clarification on the effect of the use of bridge financing in an EB-5 investment. AILA noted that nearly 90% of all real estate projects use interim financing, such as construction loans, to begin projects before the EB-5 capital is invested. Once the investors commit their capital, the EB-5 money is then used to repay the interim or bridge financing.

AILA is seeking confirmation that the job creation requirement applies to the “new commercial enterprise” and not to the specific EB-5 investor’s capital. If the job creation requirement applies to the “new commercial enterprise” rather than the specific EB-5 investor’s capital the commencement of job creation based upon bridge or interim financing subsequently replaced by EB-5 capital does not detract from the creation of jobs by the new commercial enterprise. AILA referenced 8 C.F.R. 204.6 (j):

“A petition submitted for classification of alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the U.S. which will create full-time positions for not fewer than 10 qualifying employees.” 8 C.F. R 204.6(j)(4)(i): “the new commercial enterprise will create not fewer than 10 full-time positions. . . .”

- **Exemplar I-526 Petitions**

AILA is requesting confirmation that the approval of an exemplar I-526 petition, Immigrant Petition for an Alien Entrepreneur, will be binding with respect to the particular project at the time of the investor’s I-526 filing as long as the project documentation in the filing is identical. AILA stated that the exemplar petitions are approved because there is sufficient information to approve but, at the time of filing the I-526 petition, an investor’s petition is being questioned because additional information is provided that is not identical to the exemplar.

- **Communication with Stakeholders**

AILA is seeking confirmation that any changes in USCIS’s adjudication policies will be communicated to stakeholders in advance of their implementation.

- **Processing Times**

AILA is requesting that USCIS publish processing times for the Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program.

- **“Blanket” Exemplar I-526**

AILA is requesting that USCIS allow the use of a “blanket” exemplar I-526 petition to address the potential material change issues and to eliminate the decision that investors must make to either file a Form I-829, Petition by Entrepreneur to Remove Conditions, or to file a new I-526 and abandon conditional residence status.

- **“Blanket” Form I-829**

AILA is requesting a “blanket” Form I-829 process that would allow pooled investors to seek confirmation that the I-829 would affirmatively meet the requirements for the removal of conditions for the pooled investors.

Next Steps

USCIS is considering the important issues raised and intends to respond substantively in early September.