



# Questions and Answers

December 14, 2009

## American Immigration Lawyers Association EB-5 Committee and Invest In the USA (IIUSA)

### Introduction

Below are the questions posed by the American Immigration Lawyers Association and Invest in the USA and the answers provided by USCIS during a stakeholder session held on December 14, 2009.

### Questions and Answers

1. **Question:** What is the status of the idea of instituting premium processing for I-526s?

**Response:** As noted in the September 2009 EB-5 Stakeholder's Q&A, USCIS will not consider instituting premium processing for I-526 petitions until a full year has passed since the consolidation of all EB-5 case processing at the CSC, so USCIS will not take up the examination of this issue until the second quarter of 2010. EB-5 related premium processing will only be instituted if it is determined that sufficient resources are available to adjudicate EB-5 petitions accompanied by premium processing requests in the manner required by the premium processing program.

2. **Question:** What EB-5 memos are being drafted and on what topics? When do you think they will be issued?

**Response:** USCIS has recently published policy and procedural EB-5 guidance regarding a variety of topics which should include TEA determinations, the timing of adjudication of EB-5 eligibility issues, and the procedures for filing amended I-526 petitions, etc.

3. **Question:** At the September EB-5 stakeholders meeting, USCIS officials stated that the agency is in the process of updating EB-5 materials on its web site to include an FAQ regarding the EB-5 pilot program. What is the status of that FAQ?

**Response:** The "Frequently Asked Questions" (FAQ) will be published soon. The draft FAQ is being revised to include new FAQs that relate to the newly published guidance.

4. **Question:** What is the status of the EB-5 study being conducted by the USCIS Office of Policy and Strategy? When will that be finalized?

**Response:** This study is intended to assess the economic impact of the EB-5 program, compare the U.S. immigrant investor program to similar programs in Canada, UK, and Australia, and review the

EB-5 adjudication process. Work on this project began in September 2009. Delays in security clearance processing and data availability resulted in the period of performance being extended from November 30, 2009 to February 28, 2010. While the tasks to be performed as part of the study are now progressing smoothly, the specific date upon which the study will be concluded cannot be determined at this time.

**Statistical/Informational Questions**

5. **Question:** Please provide statistics for I-526 and I-829 filings, approvals and denials for FY 2009 and FY 2010 so far.

**Response:** USCIS only has FY 2009 statistics to provide at this time.

FY 2009	Receipt	Approved	Denied
Form I-526	1028	966	163
Form I-829	437	335	55

6. **Question:** What are the current processing times for I-526 and I-829 petitions?

**Response:** Form I-526 and I-829 petitions are within the established processing time target of five months.

7. **Question:** Please provide the correct URL for the current list of all approved EB-5 regional centers, since the USCIS web site has recently been revised.

**Response:** This is the URL:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d765ee0f4c014210VgnVCM100000082ca60aRCRD&vgnnextchannel=facb83453d4a3210VgnVCM10000b92ca60aRCRD>

The page can be accessed through navigating from the [www.uscis.gov](http://www.uscis.gov) page as follows:

From the main page click on:

- 1) “Working in the U.S.”;
- 2) “Permanent Workers”;
- 3) “Employment-Based Immigration: Fifth Preference EB-5”
- 4) “Immigrant Investor Regional Centers”

8. **Question:** How many EB-5 regional center applications have been approved as of November 15, 2009?

**Response:** There are currently 75 approved Regional Centers. See question #10 for directions to the list of approved regional centers on USCIS’ website.

9. **Question:** How many EB-5 regional center applications are pending at the CSC?

**Response:** There are less than 50 regional center applications pending at the CSC.

10. **Question:** It was reported at the AILA EB-5 conference in San Francisco that over 4,100 EB-5 immigrant visa numbers were used last fiscal year. The USCIS has estimated in the past that over

90% of all EB-5 petitions are filed through regional centers. If so, that means that more than 3,000 EB-5 visas were issued last year for investors investing through regional centers, more than the 3,000 number specified in the EB-5 statute. Please confirm that the USCIS and the State Department have authority to issue more than 3,000 EB-5 visas per year for investors filing through regional centers. Please also confirm that the USCIS has authority to approve more than 3,000 I-526 petitions per year filed through regional centers, and describe how the USCIS interprets the appropriations act "set aside" of 3,000 visas for regional centers in terms of USCIS operations in a fiscal year in which it may receive more than 3,000 regional center-based I-526 petitions and in which the 10,000 limit for the overall EB-5 preference category appears likely to be reached.

**Response:** USCIS interprets the set aside of visas to ensure that a minimum of 3,000 visas are available for regional center based applicants. We do not see the set aside as limiting the number of visas that can be granted to regional center based applicants.

### Case Adjudication/Legal Issue Questions

**11. Question:** At the last EB-5 stakeholders meeting in September, USCIS officials mentioned a new procedure for notifying the agency if an I-526 is approved and subsequently there is a change in the commercial enterprise's business plan, such that an investor needs to invest in a new commercial enterprise in the same or different regional center.

- a. What exactly is the procedure for notifying USCIS of such a change?
- b. Is the procedure different if the change occurs:
  - Before I-526 approval?
  - After I-526 approval but before acquisition of conditional residence?
  - After acquisition of conditional residence but before filing the I-829?
  - After filing the I-829?
- c. Does the procedure differ depending upon whether the 10 jobs have been created by the time the I-829 must be filed?
- d. If an amended I-526 must be filed, does it extend the time for filing the I-829? Does it extend the time for job creation? If the amended I-526 is approved with a new business plan with revised job creation timeline, does this mean that USCIS will accept less than total job creation at the I-829 phase?
- e. If the I-829 is filed, will adjudication be deferred pending action on the amended I-526?
- f. If the I-829 is filed and no amended I-526 has been filed, but the necessary jobs have been created, will the I-829 be denied? If so, can the amended I-526 be accompanied by a new I-829?
- g. Does an amended I-526 require a new filing fee?

**Response:** Please see the newly published Adjudication Field Manual Update AD09-38, which addresses this issue.

**12. Question:** If a business plan provides for investments in multiple job-creating businesses over time, and if the commercial enterprise moves the money from one job-creating business to another consistent with the business plan, does every such movement of funds require an amended I-526?

**Response:** In Matter of Ho, the Administrative Appeals Office held that a "comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." The business plan that is required for the Form I-526 petition is the road map to determining whether the capital investment has been made, that the

proposed capital investment project is feasible, and that the requisite number of jobs have or can reasonably be expected to be created at the Form I-829 petition stage. A business plan that is submitted in support of a Form I-526 petition that is affiliated with a regional center must be in accordance with the USCIS-approved capital investment activities of the regional center. A Form I-526 petition business plan as contemplated above must have sufficient detail regarding the proposed multiple investment activities and must specifically provide for investment in multiple job-creating businesses over time in order for USCIS to determine that it is feasible. The business plan must also demonstrate that the requisite jobs will be created through the succession of capital investments through the commercial enterprise. Such a business plan may help to form the basis for the approval of the Form I-526 petition. In such an instance, an amended petition would not be required as long as the capital investment activities conducted by the EB-5 alien are in keeping with the approved business plan.

- 13. Question:** Can an EB-5 investor use funds unrelated to the EB-5 investment to purchase insurance from a third party (e.g., Lloyd's of London) in which insurance proceeds would be paid to the investor if the commercial enterprise fails to repay the investor? Assume the third party is unrelated to the commercial enterprise or a regional center.

**Response:** Yes, as long as the alien investor's capital is "at risk", and the indemnity policy does not constitute a redemption agreement or a guaranteed buy-back arrangement for the alien investor's investment in the commercial enterprise. A determination as to whether a specific indemnity policy is contrary to the statutory and regulatory requirements has to be made on a case-by-case basis.

- 14. Question:** If an EB-5 investor/petitioner uses a professional employer organization (PEO) to administer payroll for his employees, does this meet EB-5 job creation requirements? As a general matter, a PEO exists only to administer payroll, benefits, communications policies and other administrative employer functions. The petitioner-established commercial enterprise controls the work of the employees, and provides the funds to the PEO to pay the employees.

The EB-5 regulations define an "employee" as one who receives wages "directly from the new commercial enterprise." 8 C.F.R. § 204.6(e). Because the PEO's wage payment to employees comes directly from compensation paid by the commercial enterprise, arguably the commercial enterprise is still "directly" paying the employees. But in another sense, the payment may be deemed indirect in that it is made through the PEO. We urge you to look through the PEO to find that in fact, the employees are paid by the commercial enterprise into which the petitioner has made the required investment. Form should not be elevated over substance.

USCIS previously addressed this issue in the H-1B context. In a December 20, 2000 letter to Kary Ann Woodward, Esq., Efren Hernandez opined that "it is clear that an entity can file an H-1B petition on behalf of an alien even though the alien's salary is paid from another source, provided that an employer-employee relationship exists. The existence of the employer-employee relationship can be demonstrated by evidence establishing that the entity has control over the H-1B nonimmigrant even though the alien's salary is paid from another source." Again, the EB-5 commercial enterprise and only the commercial enterprise controls the employee's work. The EB-5 commercial enterprise is also solely providing the payroll funds.

The USCIS letter in the H-1B context makes sense. We urge USCIS to adopt the same view in the EB-5 context. Many companies find it more economical to hire PEOs to handle the administrative/personnel side of running the company, so that it can focus on the company's core business and technologies. As a result, an industry of PEOs has arisen. By using a PEO, a commercial enterprise can expand more efficiently, having outsourced an aspect of management to professionals specializing in that particular function. Please see the list of benefits provided on the National Association of Professional Employer Organization's (NAPEO) website: <http://www.napeo.org/peoindustry/benefits.cfm>.

We also understand that some USCIS employees receive pay checks issued by the Department of Agriculture, and that many of the employee management functions are administered by professionals in CBP. Such employers are still clearly USCIS employees, however.

**Response:** The PEO concept may possibly be acceptable within the EB-5 context in certain instances. However, as the scope and nature of PEO contractual relationships vary greatly, the approvability of such an arrangement for EB-5 purposes would have to be decided on a case-by-case basis through a review of the specific evidence of record.

- 15. Question:** Please consider accepting a declaration from the employer of the created jobs concerning the number of full-time positions employed and an attestation that the employer has properly completed Forms I-9 concerning such employees. USCIS can coordinate with ICE to perform any desired audits of I-9s to discover and sanction any violations or any identity theft by workers who may turn out to be unauthorized. A policy requiring investors to present I-9 forms and not to receive credit for jobs filled by workers who misrepresented themselves as authorized is beyond the scope of the EB-5 program. USCIS demands for individual workers' I-9s, especially in an indirect employment context, would seem to violate guidance issued by the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices. Please comment.

**Response:** The initial evidence to provide in support of EB-5 petitions regarding whether the jobs were created is identified in 8 CFR 204.6(j)(4) and 8 CFR 216.6(a)(4)(iv). 8 CFR 103.2(b)(2) provides the regulatory framework for the submission of secondary evidence and affidavits. Note that the EB-5 statutory requirement at INA §203(b)(5)(A)(ii) clearly requires that the EB-5 investment must create full time employment for "not fewer than 10 United States citizens or alien lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States." With respect to direct jobs, it is the EB-5 investor's burden to demonstrate that the jobs created by the investment qualify under this statutory provision.

- 16. Question:** To the extent USCIS will require individual I-9 forms, will an I-526 or I-829 be denied where the requisite 10 full-time positions have been created but, unbeknownst to the investor, one or more of the employees occupying those positions at any given time may not in fact be a permanent resident or citizen? Will the investor be given an opportunity to replace any such worker before final adjudication of the petition? Is it sufficient that the full-time positions are created?

**Response:** As noted, above, it is not sufficient that the EB-5 alien simply create at least 10 full-time jobs. Congress through enacting INA §203(b)(5)(A)(ii) clearly requires that the EB-5 investment must create full time employment for "not fewer than 10 United States citizens or alien lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the

United States.” With respect to direct jobs, it is the EB-5 investor’s burden to demonstrate that the jobs created by the investment qualify under this statutory provision. EB-5 investors’ should determine whether the jobs that they have created are EB-5 compliant before filing the Form I-829 petition.

**17. Question:** What steps, if any, must an investor take to ascertain the citizenship or permanent residence of a direct employee beyond the proper completion of an I-9 form?

**Response:** The burden is on the EB-5 investor to demonstrate that the incumbents in the direct jobs to be credited for EB-5 purpose have been created for qualifying employees, e.g. United States citizens, LPRs, refugees or asylees. As noted above, EB-5 investors’ should determine whether the jobs that they have created are EB-5 compliant before filing the Form I-829 petition.

**18. Question:** At the EB-5 stakeholders meeting in September, USCIS officials indicated that they are consulting with the Treasury Department’s Office of Foreign Asset Control (OFAC) to determine when an OFAC license may be required in EB-5 matters. What is the status of this issue? Does USCIS or OFAC have any general guidance to educate us on this issue?

**Response:** USCIS has engaged OFAC on issues related to several cases that are currently pending with USCIS. USCIS cannot speak about the particulars of those cases in this forum. Prospectively, EB-5 investors who may be subject to limitations governed by OFAC should reach out to OFAC to obtain a license or clarification that no license is required before filing a petition with USCIS.

**19. Question:** Pursuant to 8 C.F.R. § 204.6(i), please confirm that a targeted employment area (TEA) may consist of a geographic area designated by a governor's delegate, that is described by a collection of wards, census tracts, and/or other political descriptions (such as sets of city blocks), even when the precise location of a particular commercial enterprise is located in a ward or census tract that does not by itself have an unemployment rate of 150% of the national average.

**Response:** The regulation at 8 CFR 204.6(i) provides that a state government may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150% of the national average rate.) The following reasoning for involving states in this process was noted in legacy INS’ final rule implementing the initial EB-5 regulations, *Employment-Based Immigrants*, [56 FR 60897]:

Twelve commenters called for the Service to change the definition of targeted employment area. **The Service cannot, of course, alter the statutory definition of targeted employment area.** The Service has concluded, however, that the designation of smaller geographic or political areas within metropolitan statistical areas or within cities or towns with a population of 20,000 or more as areas of high unemployment would comport with the intent of Congress regarding targeted employment areas. **[emphasis added]**

This part of the rule contains a method for the designation of such geographic or political areas as areas of high unemployment. Under the final rule, a state government may delegate to any agency, board, or other appropriate state governmental entity the authority to certify that geographic or political subdivisions of non-rural areas within the state qualify as areas of high unemployment. The

delegation must be reported to the Immigration and Naturalization Service through the Associate Commissioner for Examinations prior to the issuance of any area designation. The evidence of such area designations that a state provides to a prospective alien entrepreneur should include a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained.

This part is not intended to place any unnecessary burden upon any state. With respect to geographic and political subdivisions of this size, however, the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government. This part of the rule is merely intended to afford the states a method by which particular areas of high unemployment within their boundaries may qualify as “targeted,” and to allow alien entrepreneurs the opportunity to invest in such areas under the targeted employment area guidelines, including lowered investment amounts.

Based upon the reasoning provided in the final rule, state-issued TEA designations under 8 CFR 204.6(i) must be in accordance with the statutory definition of targeted employment in INA §203(b)(5)(B), which requires that a targeted area either be “rural” or an “area of high unemployment.” Further, 8 CFR 204.6(i) does not provide states with the authority to make TEA designations regarding whether a certain area qualifies as “rural”. Any state TEA designation must involve the assembly and evaluation of data in a manner sufficient to arrive at a defensible finding of high unemployment within the bounds of the area to be designated in a manner that is in keeping with the statutory requirement. That is why 8 CFR 204.6(i) provides that state designations be accompanied by a description of the boundaries of the geographic areas, and explain the method or methodologies by which the unemployment statistics were obtained. While state governments clearly have the authority to make TEA designations, states governments do not have the authority to designate areas as high unemployment that do not in reality qualify as a targeted area under INA §203(b)(5)(B).

It appears that this question solicits confirmation from USCIS that state-sanctioned attempts to “gerrymander” a finding of high unemployment that is not in accordance with the statutory requirement, through the cobbling together of various portions of political subdivisions so that an investment in a commercial enterprise in a location that is not a high unemployment area would ultimately qualify as one, is an acceptable business practice for EB-5 purposes. On its face, this supposition blatantly frustrates the congressional intent behind INA §203(b)(5)(B). As such, USCIS cannot confirm that this is an acceptable business practice for states to use in making TEA designations.

**20. Question:** An EB-5 investor invests in a company that operates several retail outlets. The company’s headquarters office is in a designated TEA, but the retail stores directly owned and operated by the company are not in TEAs. Assume 5 jobs will be created in the headquarters location and 5 jobs will be created at retail stores that are not in TEAs. How much money must the investor invest: \$500,000 or \$1 million?

**Response:** This question cannot be answered in the abstract without a clear presentation of the facts in the record of proceeding. Whether a particular case with this fact pattern can be approved is dependent upon a review of the specific evidence of record.

## Regional Center Questions

**21. Question:** Optional project pre-approval procedures: If an existing regional center has a new project, is there a procedure in existence to have USCIS pre-approve the project before EB-5 investors invest in the project? USCIS officials mentioned the possibility of such a procedure at the September EB-5 stakeholders meeting, and indicated at AILA's October 19 EB-5 conference that the USCIS will now accept and adjudicate such requests. Details remain lacking, however. For example:

- What exactly is the procedure? USCIS officials appeared to indicate two alternatives: filing a “dummy” I-526 petition or filing an amendment to the regional center. How do these procedures differ?
- Is there currently a form and a fee? If not, how does a regional center file a request to have a project pre-approved? How will the CSC mailroom know how to handle such requests without a fee or form?
- What documents need to be submitted? Is a comprehensive I-526 business plan sufficient, or does the regional center need to also submit the corporate documents the investors will read and sign as part of the project?
- What is the processing time, given that investment projects are very time sensitive?
- If USCIS believes changes are necessary before the project is approved, is there a procedure for dialogue to discuss the feasibility of the changes and possibly to clarify any ambiguities or misunderstandings?
- What form will the pre-approval take? Will the USCIS issue a letter confirming the pre-approval or an approval notice on Form I-797?
- What is the effect of project pre-approval? We suggest that the approval be attached to the investors' I-526 petitions without the need for the investor to submit all of the documentation that was submitted by the regional center to have the project pre-approved, akin to the Blanket L approval notice. Does USCIS agree?

**Response:** Please see the newly published Adjudication Field Manual Update AD09-38, which addresses this issue.

**22. Question:** At the October 19, 2009, AILA EB-5 conference in San Francisco, CSC officials indicated that an acceptable EB-5 investment in a regional center context may consist of an equity investment in a commercial enterprise that in turn makes a loan with the invested capital to a borrower. CSC officials also appeared to state at the conference that the commercial enterprise could receive a guarantee from a third party that the borrower would repay the borrowed funds to the commercial enterprise. Please confirm that this is acceptable. It should be, since even a third party may not be able to pay the guarantee (e.g., AIG). Similarly, the borrower may not be able to repay the commercial enterprise, even if it receives money from the third party (e.g., General Motors). Also, does it matter whether the third party guarantor is a private insurer, bonding company, or a government entity?

**Response:** Yes, there is currently nothing in the statute or regulations to preclude the guarantee from the third party as long as the alien investor's capital is still “at risk”, and the arrangement does not constitute a redemption agreement or a guaranteed buy-back arrangement for the alien investor's investment in the commercial enterprise. A determination as to whether a specific third party guarantee is contrary to the statutory and regulatory requirements has to be made on a case-by-case basis.

**23. Question:** For regional center projects, do indirect jobs created outside the regional center's geographic area count? For example, a regional center may be approved for Los Angeles County. The regional center's first project may be a bakery located in Los Angeles County, and direct jobs are created in that county. The economic model, however, may not specify where indirect jobs are created. The flour distributing company that has to hire an additional employee to transport flour to the Los Angeles bakery may be located in Riverside County, for example. We believe that an indirect job in such circumstances should count for EB-5 purposes. Please confirm.

**Response:** Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note), as amended states that: "A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones." While the regulation at 8 CFR 204.6(m)(3) provides that each regional center must describe "how the regional center focuses on a geographical region of the United States," USCIS interprets the statutory and regulatory prescribed focus to mean that the economic analysis methodology used by regional centers should also be focused on job creation within the bounds of the regional center. [See also Matter of Izummi.] As a result, a regional center should file an amended proposal seeking an expansion of the geographic area of the regional center if it wishes to include job creation within its economic models in areas outside of the bounds of the regional center.

Note: Regional economic impact models have limitations; one of the biggest is that they ARE regional in nature, so if most of the direct inputs are not locally produced the user of the model must account for this in their calculations. Problems occur when people misuse models like RIMS II by using data that is not limited to the area that is the focus of the regional center, but then claim job creation within the bounds of a regional center. The BEA defines geographic region as the area that will supply the majority of the direct inputs of production (including labor). So, if in the above example, if the RIMS II data for Los Angeles County was used in the economic impact analysis it will not tell you about an indirect job in Riverside County or any other County. The use of economic data, such as RIMS II input/output tables for areas outside of the bounds of the regional center does not accurately assess the impact of economic activity within the regional center.

**24. Question:** We understand that the USCIS generally wants "relocated" jobs discounted from the final job count set forth in regional center economic reports. Is the ban on "relocated" jobs limited to jobs relocated within the regional center? For example, if a large architecture firm moved offices from New York City to San Francisco, would those relocated jobs count for EB-5 purposes since San Francisco would benefit from an increase in jobs? What if a large employer attests in writing to the USCIS that it must (because of shortage of office space or other reasons) relocate jobs to another state unless new office space (partly funded with EB-5 investment money) is constructed in the regional center? Can the jobs staying in the regional center be counted towards the EB-5 job creation requirements? (Assume this is not a troubled business.)

**Response:** USCIS is unaware of any statutory or regulatory requirement, or of any vetted and published policy guidance that addresses the "discounting of relocated jobs" within a regional center's economic analysis. As noted in the response to question #26, USCIS expects regional centers to comply with the statutory requirement regarding "concentrating pooled investment in defined economic zones" by limiting the focus of the economic impact of capital investment projects conducted within the regional center to the approved geographic boundaries of the regional center.

This question asks that if a large architecture firm moved offices from New York City to San Francisco, would those relocated jobs count for EB-5 purposes since San Francisco would benefit from an increase in jobs? The answer is no, because jobs that were in existence prior to the alien investor's capital investment into the commercial enterprise cannot be credited towards the requisite creation of 10 jobs per each alien investor. If the business qualifies as a "troubled business", then the relocated jobs could be considered as part of the existing job threshold in determining whether the architecture firm's jobs were retained pursuant to 8 CFR 204.6(j)(4)(ii).

**25. Question:** Please confirm that an investor in a troubled business in a regional center can count the indirect jobs associated with the preservation of the jobs that are preserved in the troubled business.

**Response:** In theory, Yes. However, a determination as to whether a specific business plan and supporting economic analysis is compliant with the statutory and regulatory EB-5 requirements has to be made on a case-by-case basis.

**26. Question:** Where a new commercial enterprise such as a large mixed-use commercial real estate development wishes to file a regional center application after some EB-5 investors have already invested in the same project under the regular EB-5 program, please confirm that it is permissible for a regional center proposal to be submitted for the new commercial enterprise in this situation as long as the economic impact analysis report indicates that the number of direct jobs already allocated to EB-5 investors under the regular program are not "double-counted" for subsequent investors under the regional center program.

**Response:** Yes, as long as the jobs are not "double-counted."

**27. Question:** At the September EB-5 stakeholders meeting, USCIS headquarters staff stated that in the EB-5 regional center context, a "fund of funds" (i.e. mutual fund) model may not be feasible if it involves investment funds being disbursed across a large number of projects that makes it hard to trace job creation. Please confirm that by contrast, as long as all of the EB-5 money is invested into a single job-creating project, it is permissible for investment funds to be invested into a holding company, which then invests into a non-wholly owned subsidiary formed to operate and develop the job-creating project, notwithstanding 8 C.F.R. § 204.6(e), which provides that the definition of "commercial enterprise" includes "a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries."

**Response:** Yes. However, a scheme such as this may not be feasible unless the regional center properly documents the scheme at the regional center proposal stage. If a regional center wishes to build such complexity into its capital investment scheme, then any such initial or amended regional center proposal should contain sufficient documentation and analysis for each category of projects in order to demonstrate EB-5 compliance with the required capital investment and job creation. The scheme must be designed in a manner that is sufficiently transparent to enable USCIS to track each individual EB-5 investor's capital investment into the commercial enterprise and into the job-creating investment projects to enable USCIS to make a determination as to whether each alien's investment was sustained and to determine the allocation of jobs amongst the multiple EB-5 investors.

**28. Question:** Will USCIS recognize investment in a fund that will capitalize or lend money to numerous business projects with one or more companies and allow the investors in the fund to aggregate the job creation of all of the projects (as long as no job is allocated to more than one investor)? If not, why not, and on what legal basis? And if not, how similar or related must a set of economic activities be to be considered one project for purposes of the job-tracking requirement?

**Response:** See the answer to question #30.

## I-526 Questions

**29. Question:** Please clarify what constitutes a “new commercial enterprise” and “creation of an original business” for purposes of 8 C.F.R. § 204.6(h). That regulation states that the establishment of a new commercial enterprise may exist in three circumstances, including the “creation of an original business.” 8 C.F.R. § 204.6(e) defines “new” as being established after November 29, 1990. Assume a company was created in 1991 and has been in existence ever since. An EB-5 investor plans to invest in the company now. Does the investor's investment qualify under 8 C.F.R. § 204.6(h)(1) (creating an original business) without needing to meet the requirements of expansion of an existing business under 8 C.F.R. § 204.6(h)(3) or restructuring/reorganization under 8 C.F.R. § 204.6(h)(2)? Is it correct that expansion of an existing business under 8 C.F.R. § 204.6(h)(3) or restructuring/reorganization under 8 C.F.R. § 204.6(h)(2) are only necessary to meet when the business entity was created after November 29, 1990? Also, must evidence of restructuring or expansion be submitted with the I-526, or should this evidence be submitted with the I-829?

**Response:** Section 11036 of the 21st Century Department of Justice Appropriations Authorization Act, Public Law No. 107-273, eliminated the requirement that an EB-5 alien must be involved in the establishment of a new commercial enterprise. Rather, the amended statutory requirement only requires that the alien investor must invest in the new commercial enterprise. As a result, while the regulation at 8 CFR 204.6(h) is longer in effect with regard to the establishment of the new commercial enterprise, the regulatory requirement regarding what constitutes a “new commercial enterprise” remains in effect.

This question has several parts to it, as follows:

- a. **Question:** 8 C.F.R. § 204.6(e) defines “new” as being established after November 29, 1990. Assume a company was created in 1991 and has been in existence ever since. An EB-5 investor plans to invest in the company now. Does the investor's investment qualify under 8 C.F.R. § 204.6(h)(1) (creating an original business) without needing to meet the requirements of expansion of an existing business under 8 C.F.R. § 204.6(h)(3) or restructuring/reorganization under 8 C.F.R. § 204.6(h)(2)?

**Response:** The alien investor does not have to have been involved in the creation of the commercial enterprise as noted above. Yes, the alien’s investment would qualify without the need to show that the “new” commercial enterprise was “expanded” or “restructured/reorganized” under 8 CFR 204.6(h)(2) and (3).

- b. **Question:** Is it correct that expansion of an existing business under 8 C.F.R. § 204.6(h)(3) or restructuring/reorganization under 8 C.F.R. § 204.6(h)(2) are only necessary to meet when the business entity was created after November 29, 1990?

**Response:** The expansion of an existing business under 8 C.F.R. § 204.6(h)(3) or restructuring/reorganization under 8 C.F.R. § 204.6(h)(2) are only necessary to meet when the commercial enterprise was created **before, not after**, November 29, 1990?

- c. **Question:** Also, must evidence of restructuring or expansion be submitted with the I-526, or should this evidence be submitted with the I-829?

**Response:** The evidence must be submitted with the Form I-526 petition, and if the transaction is not yet completed at the time of the filing of the Form I-526 petition, then additional evidence must be provided in support of the Form I-829 petition to show that the commercial enterprise that was established prior to November 29, 1990 was expanded, or restructured/reorganized in accordance with 8 CFR 204.6(h)(2) and (3).

- 30. Question:** Please confirm how USCIS treats job creation where the new commercial enterprise purchases the assets of a distressed corporation for the purposes of revitalization. For example, if the new commercial enterprise purchases a commercial property, such as a shopping mall, that at the time of purchase has only 20% of its tenants in operation because the other 80% went out of business, please confirm that the job creation requirement would be met by showing that alien investment into the new commercial enterprise resulted in the creation of 10 jobs per investor, provided only that the job count does not include jobs associated with the tenants that were in operation at the time the shopping mall was purchased.

**Response:** It is not possible to confirm whether the job creation requirement would be met, based on the limited information provided above. Such a case would have to be evaluated by a review of the specific evidence in the record, which may or may not establish that the job creation requirement would be met. Further, based on this fact pattern, such an investment would have to be made through a petition affiliated with a regional center as the job creation appears to depend on the crediting of indirect jobs.

- 31. Question:** What factual scenarios have been approved as a "restructuring or reorganization" sufficient to create a new commercial enterprise under 8 C.F.R. § 204.6(h)(2)? For example, if an EB-5 investor buys a company that was created before Nov. 29, 1990 and then folds it into his own holding company as a subsidiary, is that a restructuring or reorganization? If not, what counts as a restructuring or reorganization?

**Response:** USCIS does not maintain records independent of the individual EB-5 case files that document the factual scenarios that have been approved for a particular EB-5 eligibility requirement. However, it was held in Matter of Soffici, that the petitioner in that case did not show the degree of restructuring and reorganization required by 8 CFR 204.6(h)(2). In that case, the commercial enterprise was a hotel that had always been operated as a Howard Johnson and was still a Howard Johnson at the time of the issuance of the decision. Matter of Soffici also held that a few cosmetic changes to the decor and a new marketing strategy for success did not constitute the kind of restructuring contemplated by the regulations, nor did a simple change in ownership. It is not possible to state whether the abbreviated scenario outlined above would be qualifying. The question may not be answered in the abstract without a review of the specific evidence of record.

- 32. Question:** Please confirm that if a new commercial enterprise's business operations involve acquiring (out of bankruptcy or bank foreclosure portfolio) and renovating an incomplete or abandoned commercial building, completion or renovation of the building by the new commercial enterprise will be treated as a new business for EB-5 purposes. If not, what arrangements would be necessary to allow the project to be treated as a new commercial enterprise?

**Response:** See the response to question #32 for a description regarding what constitutes a “new” commercial enterprise. Acquiring assets that are not currently being used in business operations by any other entity is unrelated to whether a commercial enterprise is “new” for EB-5 purposes.

**33. Question:** 8 C.F.R. § 204.6(j)(1) states that an I-526 petition must be accompanied by evidence that the EB-5 investor has invested “or is actively in the process of investing” the required money. Similarly, 8 C.F.R. § 216.6(a)(4)(ii) requires an investor at the I-829 stage to show that he has invested or “was actively in the process of investing” the required capital. The quoted language would seem to indicate that an investment of \$100,000 cash before filing the I-526 petition, plus a promise to pay another \$400,000 (payable before the I-829 must be filed) would satisfy the EB-5 regulations. What is the USCIS’ position on this question?

**Response:** EB-5 capital investment and job creation requirements typically involve a separate analysis. However, if the job creation is predicated on the infusion of EB-5 capital into a given capital investment project in order to realize indirect job creation, then the economic analysis would have to account for the timing of the infusion of capital in order to demonstrate that the indirect jobs would be created within a reasonable time. Any “promise to pay” due at a date in time post-filing of the I-526 petition must meet the requirements for promissory notes specified in Matter of Izumii and Matter of Hsiung, and must show that at the time of filing the I-526 petition that the capital is at risk, the lawful source of the capital, and that the alien has legal ownership of the capital per Matter of Ho.

**34. Question:** Please explain how USCIS applies the preponderance of the evidence standard in adjudicating lawful source of funds in I-526 petitions.

**Response:** As we stated at a previous stakeholders meeting, in adjudicating all eligibility requirements in EB-5 related petitions, officers use the preponderance of the evidence standard. It is difficult to answer this question in the abstract without looking at the specific evidence of record.

As we stated previously, if for example, an officer issues an RFE related to the lawful source of funds, the petitioner should respond to the request in a timely manner. The petitioner may choose not to provide all of the requested evidence and request a decision on the merits if he or she believes that eligibility has been established by the evidence already in the record or that the request is not proper. See 8 CFR 103.2(b)(11).

Separately from the adjudicative process, if there are repeated cases in which you believe that an RFE is improvidently issued, you may send an e-mail to the EB-5 mailbox. USCIS will investigate the matter and, if necessary, will take appropriate action.

### **I-829 Questions**

**35. Question:** Based on the USCIS June 17, 2009 memo regarding EB-5 job creation, it is our understanding that USCIS has accepted the use of economic models that are based on infusion of capital into a particular industry. Please confirm that if such a model is used to calculate job projections at the I-526 stage, an investor would receive credit for job creation at the I-829 stage simply by establishing that he/she invested the requisite amount into the new commercial enterprise, and that the new commercial enterprise spent that capital, regardless of any data about actual job creation.

**Response:** This form of capital investment involves more than simply investing a certain amount of investment dollars into a particular industry. An important aspect to any economic analysis model is the feasibility and quality of the business plan that is the basis for determining the appropriate inputs into an economic model, such as RIMS II, IMPLAN, etc. If the infusion of capital occurs according to the approved business plan and economic analysis, and the capital investment scheme comes to fruition in the manner outlined in the business plan, then the economic data provided in support of the Form I-526 petition regarding indirect job creation may be sufficient to demonstrate the creation of the indirect jobs without the submission of further data about job creation at the Form I-829 petition stage.

- 36. Question:** What factors are considered in determining whether the necessary jobs will be created within a “reasonable time” in adjudicating an I-829 petition, per 8 C.F.R. § 216.6(a)(4)(iv)? Section 25.2(e)(4)(D) of the Adjudicator’s Field Manual lists some factors in making the reasonable time determination, but how do CSC adjudicators apply those factors in actual cases? For example, what if a regional center has an approved job creation methodology, proof that the investment has gone into the project, and has leased up the project but the tenants have not moved in when the I-829 is filed? What if the project is almost but not completely leased? Will USCIS approve an I-829 in such a case? If so, what documentation would be required?

**Response:** CSC adjudicators follow the guidance put forth in the Adjudicator’s Field Manual (AFM) at section 25.2(e)(4)(D), which states:

In making the “reasonable time” determination, officers should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526 , the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner.

If after considering the evidence, the officer determines that the jobs are more likely than not going to be created within a reasonable time, Form I-829 should be approved consistent with 8 CFR 216.6(d)(1) if the petitioner is otherwise eligible to have his or her conditions removed. If, however, the officer determines that the jobs will not be created within a reasonable period of time, Form I-829 should be denied consistent with 8 CFR 216.6(d)(2) .

CSC adjudicators apply the factors outlined above when analyzing the facts in each individual case using the preponderance of evidence standard. Note: It is not possible to answer “what if” questions such as this question in the abstract. Whether a particular case will be approved is dependent upon the determination of eligibility, based upon the specific evidence of record.

- 37. Question:** If an I-829 petition is denied because of a determination that the jobs will not be created within a reasonable time or because the investor was not aware of the need to file an amended I-526 petition, will the investor be placed into removal proceedings in order to renew the I-829 before an immigration judge? What are USCIS’ procedures to place an EB-5 investor in removal proceedings? We have heard stories of EB-5 investors waiting months before a notice to appear is issued. During that time, what is the investor’s status until the removal proceedings are initiated? If the investor or a family member is outside the United States, what document will be issued to enable the investor or family member to be reunited with the remainder of the family or to appear in the removal proceeding?

**Response:** In accordance with 8 CFR 216.6(d)(2), if after review of the petition, the director denies the petition, he or she shall place the investor in removal proceeding by issuing a Notice to Appear (NTA). The investor may seek review of the petition during removal proceedings. Petitions are sent to CSC's NTA unit after the denial of the petition. The NTA unit prepares the NTA and issues it to the investor via mail. The investor's lawful permanent resident status and that of his or her dependent spouse and children are terminated as of the date of the director's written decision. Generally an NTA is not issued if USCIS determines that an investor or a family member is out of the United States and their status is terminated. If an investor or a family member is out of the United States at the time that their status is terminated, then he or she will be put into removal proceedings at the time of their application for admission. An alien investor retains conditional resident status and is entitled to proof of that status while he or she obtains review of the USCIS termination in removal proceedings.

**38. Question:** Many USCIS Field Offices refuse to stamp passports of people who have pending I-829s with temporary evidence of permanent resident status with I-551 stamp, on the ground that I-829 receipt notice should suffice for work and travel purposes. However, this view does not take into account the fact that CPB often wants to see temporary stamps. Will you issue a memo to all USCIS Field Offices telling them that all pending I-829 applicants should get their permanent resident stamps in their passports?

**Response:** USCIS is in the process of updating the language regarding this issue on the Form I-829 receipt notice which will resolve this issue.