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October 11, 2011

Department of Homeland Security
U.S. Citizenship and Immigration Services
Chief, Regulatory Products Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2020

Submitted via e-mail: USCISFRComment@dhs.gov

**Re: 60-Day Notice of Information Collection Under Review:
Form I-526, Immigrant Petition by Alien Entrepreneur
(OMB Control No. 1615-0026), 76 Fed. Reg. 50238 (Aug. 12,
2011)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) Notice of Information Collection Under Review: Form I-526, Immigrant Petition by Alien Entrepreneur, published in the Federal Register on August 12, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Notice of Information Collection and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

First, we applaud this and other efforts USCIS has initiated in the past year to improve the EB-5 immigrant investor program. These efforts have been meaningful and will lead to greater confidence in the EB-5 program on the part of stakeholders, the public, and the international community of investors. We welcome particularly USCIS's commitment to engaging the public in its policy formulation. We hope our participation in this larger dialogue will assist USCIS in building a transparent and stable investment immigration program.

With respect to the subject matter of the Notice, we believe that a revision of Form I-526, Immigrant Petition by Alien Entrepreneur, would assist both USCIS and program participants by eliminating confusion in certain sections, tracking more precisely the regulations in other sections, and incorporating recent policy and procedural changes. We also propose three substantive modifications: (1) the addition of parts relating to the associated regional center, if applicable; (2) the addition of the regional center itself as a party to the form; and (3) the addition of a section for dependents. To facilitate your review of our comments, we have attached a draft proposed Form I-526 containing many of our proposed changes.

Add Parts Relating to the Associated Regional Center

Regional centers have proliferated in number and activity in the past few years. As published in recent USCIS materials, approximately 90 to 95 percent of all I-526 petitions are associated with regional centers. Regional centers form the new commercial enterprise, identify investment opportunities, and engage economists to predict indirect job creation. Despite the significant role of the regional center in the vast majority of petitions, the current form gives the USCIS examiner no information about the associated regional center. To overcome the current form's limitation, USCIS has requested that petitioners type or write the name of the associated regional center in the space on the form above "Part 1" after "START HERE." This clearly indicates that a revision to the form requesting information about the affiliated regional center, if applicable, is warranted. Accordingly, the *proposed new* Part 1, Section 1 requests "Information about the Regional Center."

Similarly, the current Form I-526 would be improved by adding a section setting forth any affiliated exemplar or amendment filing. The exemplar filing, introduced in the December 11, 2009 USCIS memorandum, post-dates the last revision to Form I-526. While we appreciate that the effect, form, and even nomenclature of exemplar (or preapproval) filings are matters of evolving USCIS policy, it would make sense to incorporate a reference to an "associated Form I-924," assuming these filings will continue to be made on Form I-924. Accordingly, the *proposed new* Part 1, Section 1 requests Form I-924 information under "Information about the Regional Center."

Finally, we propose a related structural modification to Form I-526 to divide the form into two parts. The first part would relate to the new commercial enterprise and would collect information generally made available by a regional center. This part would also cover new commercial enterprise information for basic, non-regional center cases. The second part would relate to the petitioner and would collect information about the investor, investment, and whether the investor will adjust status or consular process after petition approval. This proposal would simply reorder the existing parts without eliminating any existing part.

Add the Regional Center as a Party to the Form

Given that Form I-924A requires a regional center to annually provide USCIS with the total number of approved, denied and revoked Forms I-526 and I-829 (*see* Form I-924A, Part 3, items 4 and 5), we propose that the new Form I-526 provide for a regional center to appear as a party to the petition. This would permit a regional center to receive notices of USCIS action on the petition so that it may make accurate reports on Form I-924A. Accordingly, the *proposed new* Part 4 requests “Signature of Regional Center Authorized Representative.”

Recognition of the regional center as a party would also permit the regional center to respond directly to USCIS requests for evidence, notices of intent to deny, and on motions to reopen or reconsider, where Service action refers to the new commercial enterprise, matters proposed to be organized under a new Part 1 on the revised Form I-526. In that connection, we propose that USCIS promulgate guidance regarding which party, the petitioner or the regional center, should respond to a particular Service action, or specify in the notice itself which party should respond.

Add a Dependents Section

We ask USCIS to add a part on Form I-526 to include the petitioner’s dependents. Form I-140, Immigration Petition for Alien Worker contains a Part 7, “Information on Spouse and All Children of the Person for Whom You Are Filing,” for the beneficiary. This section asks whether the dependent will be applying for adjustment of status or a visa abroad. Adopting a similar section in Form I-526 would permit USCIS to include dependent information in its transmittals to the National Visa Center (NVC) and would facilitate dependent visa processing. We have observed that the NVC and the consulates continue to struggle with interpreting the Child Status Protection Act (CSPA) resulting in confusion and processing delays for dependents who are clearly protected under the CSPA. We would be grateful if USCIS would consider including in its transmittal to NVC a determination of dependent coverage under the CSPA.

Other Proposed Changes

We propose the following additional changes to provide clarity and greater consistency with regulations and new policies and procedures:

Current Form I-526	Proposed Revised Form I-526	Rationale
Part 3. Information About Your Investment, “Kind of Business”	Part 1, Section 3. Information About the New Commercial Enterprise, “Industry Category & NAICS Code”	Tracks information USCIS collects on Form I-924 for approved regional center activity and exemplar amendments

<p>Part 4. Additional Information About the Enterprise</p> <p>Type of Enterprise (check one)</p> <ul style="list-style-type: none"> <input type="checkbox"/> New commercial enterprise resulting from the creation of a new business <input type="checkbox"/> New commercial enterprise resulting from the purchase of an existing business <input type="checkbox"/> New commercial enterprise resulting from a capital investment in an existing business 	<p>Part 1, Section 4. Additional Information About the Enterprise</p> <p>Type of Enterprise (check one)</p> <ul style="list-style-type: none"> <input type="checkbox"/> New commercial enterprise resulting from investment in a business created after November 29, 1990 <input type="checkbox"/> New commercial enterprise resulting from investment in a business created on or before November 29, 1990 and associated restructuring or reorganization <input type="checkbox"/> New commercial enterprise resulting from investment in a business created on or before November 29, 1990 and associated expansion 	<p>Eliminates confusion by tracking the types of enterprises listed on Form I-526 to the types set forth in 8 CFR §204.6(h)</p> <p>Further discussion on this point below.</p>
<p>Part 4. Additional Information About the Enterprise</p> <p>Composition of the Petitioner's Investment: [5 categories of investment listed] Other \$_____</p>	<p>Part 2. Information about the Petitioner Section 2. Information about Your Investment</p> <p>Composition of the Petitioner's investment: Total cash contributed \$_____ Total value of all non-cash assets contributed \$_____ Other \$_____</p>	<p>Eliminates confusion about which category to select where more than one may apply. For example, U.S. bank account and stock purchase. The original categories track the examples of optional evidence of investment in 8 CFR §204.6(j)(2). Since most investments will be made in cash capital, a clearer and simpler approach would</p>

		be to provide the categories of “cash” and “non-cash assets,” retaining “other” for other forms of qualifying capital.
<p>Part 4. Additional Information About the Enterprise</p> <p>Net worth: When you made the investment Gross \$____ Now \$____</p>	<p>Part 1. Section 4. Additional Information About the Enterprise</p> <p>Net worth: When the investment was made \$____ Now \$____</p>	<p>The current Form contradictorily requests “gross” <i>net</i> worth. We propose that the revised Form simply request net worth when the investment was made and “now.”</p>
<p>Part 5. Employment Creation Information</p> <p>How many of these new jobs were created by your investment?</p> <p>How many additional new jobs will be created by your additional investment?</p>	<p>Part 1. Section 5. Employment Creation Information</p> <p>How many of these new jobs were created or preserved by the petitioner’s investment?</p> <p>How many new jobs in total will be created or preserved by the petitioner’s investment in the new commercial enterprise?</p> <p>The petition is based on an investment in a troubled business <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>The current Form has no place to inform USCIS if the petition is based on a troubled business. The proposed changes would remedy that problem.</p>

The proposed changes to Part 4, “Type of Enterprise,” eliminate imprecision in the current form. To determine whether an investment is in a “new commercial enterprise,” the initial inquiry is whether the investment is in a commercial enterprise that was established after November 29, 1990.¹ If the investment is in a commercial enterprise that was established after November 29, 1990, the requirement is met. If the investment is made in a commercial enterprise established on or before November 29, 1990, the investor must meet one of two tests: the investor must either purchase an existing business and restructure or reorganize it; or must expand the business in such a way as to accomplish a 40% increase either in the net worth or the number of employees of the

¹ See 8 CFR §204.6(e) (definition of “new”).

business.² We note that 8 CFR §204.6(h)(1), with respect to commercial enterprises established after November 29, 1990, references the “creation of an original business.” This regulation is obsolete since it refers to the requirement in the law prior to November 2, 2002 that the investor must “establish a commercial enterprise.” With the removal of that requirement in the 21st Century Department of Justice Appropriations Authorization Act, the alien is no longer required to create an original business; it is sufficient if he invests in and is engaged in a new commercial enterprise.³ Therefore, in order to be consistent with the 2002 amendments to the statute, the I-526 should ask the following questions with respect to a “new commercial enterprise:”

- Was the commercial enterprise in which you are investing established after November 29, 1990?
- If not:
 - Have you restructured or reorganized the commercial enterprise?
 - Have you expanded the commercial enterprise by increasing its net worth by at least 40%?
 - Have you expanded the commercial enterprise by increasing the number of employees by at least 40%?

We thank USCIS for its initiatives to improve the EB-5 program and to elicit greater stakeholder participation toward this end. We appreciate the opportunity to comment on this Notice of Information Collection and look forward to a continuing dialogue with the Department on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Attachment: Draft Proposed Form I-526

² See 8 CFR §204.6(h).

³ See Memorandum from William Yates, Acting Associate Director of Operations, entitled “Amendments Affecting the Adjudication of Petitions for Alien Entrepreneur” (HQ 40/6.1.3) (June 10, 2003).

Classification _____		Fee Receipt
Priority Date _____		To be completed by Attorney or Representative, if any <input type="checkbox"/> G-28 is attached Attorney's State License No. _____
Remarks:		

START HERE – Type or print in black ink.

Part 1. Information About the New Commercial Enterprise

Section 1. Information About the Regional Center (if applicable)

- a. Yes No Is this petition based on a regional center affiliated investment?
If yes: the Regional Center is _____
- b. Yes No Is this petition associated with a Form I-924?
If yes: Case Number _____ Regional Center ID _____
Approved? Yes No Pending

Section 2. Petition Type (Check one)

- a. Investment in non-targeted employment area not within a regional center (C5)
- b. Investment in targeted employment area not within a regional center (T5)
- c. Investment in non-targeted employment area within a regional center (R5)
- d. Investment in targeted employment area within a regional center (I5)

Section 3. Information About the New Commercial Enterprise

Name of commercial enterprise in which funds are invested _____

Street Address _____

Phone # _____ Business organized as _____
with Area Code _____ (corporation, partnership, etc.) _____

Industry Category & NAICS Code _____ Date Established _____ IRS Tax # _____
(e.g. furniture manufacturers) _____ (mm/dd/yyyy) _____

If you indicated in **Part 2** that the enterprise is in a targeted employment area or in an upward adjustment area, name the county and State: County _____ State _____

**If you are in the United States,
provide the following information:**

Date of Arrival
(mm/dd/yyyy) _____

I-94 # _____

Current
Status _____

Date Current Status
Expires (mm/dd/yyyy) _____

Daytime Phone #
With Area Code _____

Section 2. Information about Your Investment

Date of your initial
investment (mm/dd/yyyy) _____

Amount of your
initial investment _____

Your total capital investment
in the enterprise to date _____

Percentage of the
enterprise you own _____

If you are not the sole investor in the new commercial, list on separate paper the names of all other parties (natural and non-natural) who hold a percentage share of oversight, and whether or not the person is seeking classification under section 203(b)(5). **NOTE:** A “natural” party would be an individual person, and a “non-natural” party would be an entity such as a corporation, consortium, investment group, partnership, etc.

Composition of the petitioners investment

Total cash contributed \$ _____

Total value of all non-cash assets contributed \$ _____

\$ _____

Other \$ _____

Total \$ _____

Section 2. Processing Information

Check One:

The person named in **Part 2 Section 1** is now in the United States, and an application to adjust status to permanent resident will be filed if this petition is approved.

If the petition is approved and the person named in **Part 2 Section 1** wishes to apply for an immigrant visa abroad, complete the following for that person:

Country of nationality: _____

Country of current residence or, if now in the
United States, last permanent residence abroad _____

If you provided a United States address in **Part 1**, print the person’s foreign address:

If the person’s native alphabet is other than Roman letters, write the foreign address in the native alphabet:

Are you in deportation or removal proceedings? Yes (Explain on separate paper) No

Have you ever worked in the United States without permission? Yes (Explain on separate paper) No

Part 3. Signature of Petitioner

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking.

Signature of the Petitioner _____ **Date** _____

NOTE: *If you do not completely fill out this form or fail to submit the required documents listed in the instructions, you may not be found eligible for the immigration benefit you are seeking and this petition may be denied.*

Part 4. Signature of Regional Center Authorized Representative

Signature _____ **Print Your Name &** _____ **Date** _____
Title _____

Name of Regional Center _____ **Daytime Phone #** _____
Address _____ **with area code** _____

Part 5. Signature of Person Preparing the Form, If Other Than Above

I declare that I prepared this petition at the request of the petitioner, and it is based on all information of which I have knowledge.

Signature _____ **Print Your Name** _____ **Date** _____

Firm Name _____ **Daytime Phone #** _____
Address _____ **with area code** _____