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July 26, 2010

Chief, Regulatory Products Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Ave. NW, Room 3008
Washington, D.C. 20529-2210

Re: DHS Docket No. USCIS–2009-0033
Comment to Proposed Rule, "U.S. Citizenship and Immigration Services Fee Schedule" (75 Fed. Reg. 33446 (June 11, 2010)

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as individuals seeking U.S. citizenship.

In response to the 2007 fee review, we strongly urged U.S. Citizenship and Immigration Services (USCIS) to reconsider its proposal to radically increase fees for immigration benefits, citing the appropriateness of some of the proposed uses for the funds, concern about the public impact of the fee increase, doubts about the efficacy of the agency's plans for the funds, and the accuracy of the methodologies used to calculate the proposed fees. In addition, we emphasized that user fees need not be the agency's nearly exclusive source of funding and advocated for greater appropriations support for USCIS activities that fall outside the provision of adjudication and naturalization services. The proposed fee increase was implemented on July 30, 2007.[1]

Three years later, we are now presented with a new set of proposed fee changes. While a number of the concerns expressed in our 2007 comment remain present today, we are also faced with new concerns, in a radically different economic climate.

[1] 72 Fed. Reg. 29851 (May 30, 2007).

CONTINUING NEED TO REQUEST APPROPRIATIONS AND TIMELINESS OF PROPOSED RULE

USCIS proposes this fee increase in order to close a projected $200-million budget deficit for 2010–11. According to USCIS, budget cuts of $160 million were not enough to offset the gap between the agency's projected $2.1 billion in revenue and $2.3 billion in costs. However, a number of the government expenses being underwritten by the proposed fees are not related to the immigration services for which the fees are associated. Expenses not related to the provision of "adjudication and naturalization services"[2] are matters of public benefit and should instead be funded by appropriations.

AILA applauds USCIS for seeking appropriations for FY2011 for a number of USCIS programs, including refugee and asylee processing, military naturalization, E-Verify, SAVE, and grants to support immigrant integration.[3] However, some of the costs anticipated by this fee proposal, particularly those undertaken by the Fraud Detection and National Security (FDNS) Directorate, should not be charged to the fee account. FDNS and law enforcement activities should be paid for through appropriated funds, as should overhead, and investments in infrastructure that fall outside the scope of the Transformation Program.

Moreover, the proposed fee increase is premature and unsound because it is based on the President's FY2011 budget request rather than actual congressional appropriations. In describing the many factors considered in setting the proposed fee levels, USCIS admits that it is missing a critical piece of information: how much funding it will actually receive from Congress. The Service further notes that it:

> has calculated the proposed changes to the fee schedule based on the fee reform steps taken in the FY2010 budget and FY2011 budget request. *These changes may require adjustment if USCIS's appropriation requests are not enacted or are reduced for FY2011.* Accordingly, DHS is proposing a range of fees to account for fee increases that would be necessary if the requested appropriations for FY2011 are not enacted.[4]

Unfortunately, USCIS' "either/or" approach does not reflect the way in which appropriations take place, and the amount of congressional funding actually received by the agency affects numerous aspects of the proposed rule. What if Congress allocates only a third of the requested funding? Will the agency seek to increase fees proportionally to attempt to bridge the gap? Or, will the agency reduce or abandon its plans, for instance, to make improvements in customer service? If a decision to abandon a component of planned changes is made, how does that affect the agency's analysis of the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness Act? All of these are important questions that must be considered within the appropriate context of notice and comment under the Administrative Procedure Act (APA).

The preamble to the proposed rule offers no answers to the foregoing questions. At a time when the Service is moving ahead on several major fronts concurrently and actual congressional funding is unknown, AILA believes that this is not the appropriate time to take notice and comment. At a minimum, should the funding be at all different from the assumptions that serve as the basis of the proposed rule, DHS should confirm that it will provide appropriate notice and comment in compliance

[2] INA §286(m).
[3] Testimony of Alejandro Mayorkas, Director, USCIS, before the House Committee on Appropriations, Subcommittee on Homeland Security (Mar. 16, 2010).
[4] 75 Fed. Reg. 33453 (June 11, 2010) (emphasis added).

with the APA. Consequently, the proposed fee increase is premature and fails to satisfy the notice requirements of the APA.

PROPOSED FEE REVISIONS

The proposed rule seeks to increase immigration fees an average of 10% across the board. While a 10% increase in and of itself may not seem high, this comes only three years after a 66% fee increase took effect in July 2007. Any fee increase in such a short period of time is excessive. In addition, certain immigration benefits and forms have been singled out for a proportional fee increase much higher than 10%.

AILA would be remiss if it failed to note that this proposed fee increase comes at a time when quality, efficiency, and consistency of USCIS adjudications remain major problems. In fact, problems with the fundamental fairness of adjudications have escalated since the last fee increase in 2007. Unnecessary and overly-burdensome requests for evidence (RFEs) seeking volumes of financial and payroll documentation from clearly-established companies are rampant. This is true not only in the nonimmigrant context, but also in the I-140, Immigrant Petition for Alien Worker, context for which the Service is proposing a 22% fee increase ($475 to $580). In addition, reports of denials of extensions of stay within the allowed statutory time period for O-1, L-1, and H-1B nonimmigrants with little explanation as to why the individual ceased qualifying for the particular status are extensive. Such actions in connection with clearly meritorious cases create additional work, drain Service resources, and increase the costs of adjudication with little or no added benefit, while harming the interests of U.S. businesses and the U.S. economy. As a consequence, USCIS continues to be plagued by a widespread perception that it is hostile toward its foreign national customers and U.S. petitioners. Any increase in user fees should coincide with a clear plan to improve processing times, training, and officer accountability to ensure quality adjudications.

No Proposed Increase to Naturalization Fee (N-400) and Decrease in Other Fees

First, AILA would like to commend the Service for its careful consideration of each particular category as opposed to simply increasing all fees across the board. We are particularly gratified by the decision to not raise the fees for naturalization applications (Form N-400). It is clear from this decision that USCIS heeded the input of stakeholders during the 2007 fee increase and recognized that naturalization is a public benefit worth subsidizing. We are also pleased to see a reduction in the fee for Form I-129F, Petition for Alien Finacé(e). Petitioners and beneficiaries of this product line not only pay the full adjustment of status fees but are also required to pay consular visa fees. The decision to reduce this fee is fair, just, and a welcome change. AILA would also like to recognize the Service's decision to reduce the fees for the following applications and petitions:

Form I-539: Application to Extend/Change Nonimmigrant Status
Form I-698: Application to Adjust Status from Temporary to Permanent Resident
Form I-817: Application for Family Unity Benefits
Form N-565: Application for Replacement Naturalization/Citizenship Document

Proposed Fee Increase for Employment Authorization (I-765) and Advance Parole (I-131)

AILA has previously expressed concerns regarding the fee structure for Form I-131, Application for Travel Document (advance parole); and Form I-765, Application for Employment Authorization, as well

as the timing and duration of these benefits relative to the cost of filing. With the proposed fee increase associated with these two important benefits, these concerns not only remain but are magnified. Given the extensive backlog in certain employment-based categories, AILA would like to see the Service reinstitute the issuance of multiple-year employment authorization documents (EADs) and consider issuing multiple-year advance parole documents. This would reduce the cost to the Service in terms of adjudications and use of resources, provide beneficiaries greater stability, and reduce the likelihood of unintentional gaps in employment authorization and emergency advance parole filings. This innovation would not unduly tax the Service. The Service previously issued two-year EADs for backlogged adjustment of status applicants,[5] currently issues multiple-year EADs for derivative beneficiaries of E and L nonimmigrants,[6] and currently issues other travel documents with validity periods greater than one year.[7]

On a more fundamental level, we propose that there may in fact no longer be a need for advance parole as a separate document and welcome the Service's comments regarding a combined EAD/advance parole document. If feasible, we urge the Service to implement this innovation as soon as possible, and ask that, similar to the current Form I-131, the instructions include a warning regarding the consequences of departing the United States for persons previously removed or subject to the three- or ten-year bar for unlawful presence under INA §212(a)(9). If advance parole remains a separate benefit subject to a separate fee, the Service should provide the option of "unbundling" advance parole for those individuals potentially subject to inadmissibility under INA §212(a)(9). This would eliminate the unfriendly customer service scenario where an applicant is forced to pay for a benefit which he or she cannot use without triggering serious negative consequences.

Proposed Fee Increase for Notice of Appeal or Motion (I-290B)

To file a motion to reopen or reconsider, an applicant must submit Form I-290B along with a nonrefundable filing fee.[8] The current filing fee of $585 is already unaffordable to many applicants whose applications have been denied by the USCIS. An increase of this fee to $630 will not only impose additional financial hardships on individuals seeking immigration benefits, but will also deter those whose applications may have been denied due to "Service error" from filing a motion to reopen or reconsider for lack of funds.

Although the regulations permit an applicant who cannot afford the fee to request a fee waiver by demonstrating an inability to pay,[9] Form I-290B and the fee or fee waiver request must be filed with the USCIS office that adjudicated the original case within 30 days of the date of the decision.[10] An applicant whose fee waiver is denied runs the risk of having his or her motion to reopen or reconsider denied for failure to submit the proper fee, or for failure to comply with the 30-day filing deadline if due to the timing of the fee waiver denial, the motion or appeal must be resubmitted outside the regulatory time frame.

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[5] USCIS Update: USCIS to Issue Two-Year Employment Authorization Documents, New EADs Limited to Certain Individuals Who Have Applied for LPR Status (June 12, 2008).
[6] INS Memorandum, W. Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determination on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002).
[7] 8 CFR §223.3(a)(1) (reentry permits).
[8] 8 CFR §§103.5(a)(1)(iii)(B), 103.7(b)(1). Notwithstanding the regulations, certain field offices have established local procedures for accepting motions "in service error."
[9] 8 CFR §103.7(c)(5)(i).
[10] 8 CFR §103.5(a)(1)(i).

In May 2009, the CIS Ombudsman recommended that USCIS improve the filing and review process for motions to reopen or reconsider.[11] The CIS Ombudsman's recommendations included "[s]tandardizing and clearly articulating to the public procedures by which an applicant or petitioner may bring a clear Service error to the attention of a USCIS office without incurring the $585 filing fee for a motion to reopen or reconsider."[12] USCIS responded by concurring with this recommendation and committing to publish on its website, the procedure for bringing a simple administrative error to the Service's attention without incurring a fee.[13]

USCIS has published instructions for appealing or moving to reopen or reconsider a decision.[14] However, little information is available on procedures for correcting negative adjudications based on Service error. By regulation, USCIS may at any time reopen a proceeding or reconsider a decision on its own motion.[15] In some cases, an applicant can circumvent the filing fee by submitting a written request for USCIS to reopen or reconsider a case on its own motion. Unfortunately, not all field offices accept such requests, and practices vary depending on the jurisdiction. In addition, because these submissions (when accepted) are often treated as general correspondence, they may take more than 30 days to address. If USCIS then determines there was no clear Service error, the opportunity to formally file a motion may be lost.

The current regulatory scheme does not set forth a clear petitioner or applicant-driven procedure for reimbursement for motions or appeals based on Service error. Requiring applicants to file formal motions and incur the filing fees in these cases imposes a significant financial burden on the applicant. Therefore, an increase in the fee associated with Form I-290B is inappropriate without a corresponding commitment to developing a mechanism for remedying erroneous denials and the establishment of a readily available refund procedure for denial of petitions and applications in Service error.

Proposed New Immigrant Visa Fee

AILA opposes the proposal to add a fee of $165 for immigrant visa processing. We also have serious concerns regarding the coordination, collection and implementation of that fee as described in the fee proposal and the accompanying press release.

Immigrant visa processing is already a costly endeavor as individuals are required to pay a fee of $470 to the Department of State. While we recognize that the processing and issuance of an immigrant visa is not solely accomplished by the Department of State, we are concerned that the imposition of this fee will cause undue hardship on many intending immigrants, and is not clearly justified given the largely

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[11] Motions Matter: Improving the Filing and Review Process for Motions to Reopen or Reconsider (May 15, 2009) (hereinafter "Motions Matter"), available at www.dhs.gov/xlibrary/assets/cisomb_recommendation_42_5-15-09.pdf.

[12] *Id*. at page 2.

[13] USCIS Memorandum, M. Aytes, "Response to Recommendation 42, Motions Matter: Improving the Filing and Review Process for Motions to Reopen or Reconsider" (Aug. 18, 2009).

[14] *See* USCIS website, "Resources," "After I File," "After Receiving a Decision." The posted instructions state:

> **If Your Case Was Denied**—If an unfavorable decision is made (your case is denied and/or you are ordered removed), you will receive a notice explaining why the decision in your case was unfavorable. This notice will also explaining if you can file an appeal. With certain exceptions, you may file motions to reopen or reconsider decisions made in your case. Administrative appeals are only available on certain kinds of cases. If an appeal or motion is available to you; how to file one is explained in the decision we mailed to you. Forms to file an appeal are available in the "Forms" section of this site.

[15] 8 CFR §103.5(a)(5).

administrative nature of the activities that USCIS performs in connection with the issuance of an immigrant visa. Moreover, for immigrant visa cases processed through the U.S. consulates, USCIS already receives $355 (with a proposed 18% increase to $420) in connection with the I-130, Petition for Alien Relative, or $475 (with a proposed 22% increase to $580) for the I-140, Immigrant Petition for Alien Worker, and in many cases $340 (with a proposed 19% increase to $405) in connection with the I-824, Application for Action on an Approved Application or Petition, where consular notification is required. For derivative family members of principals who obtained lawful permanent residence by filing Form I-485, Application to Register Permanent Residence or Adjust Status, the Service will have received an additional $930 (with a proposed 5% increase to $985). The Service has not provided adequate data in the proposed regulation to demonstrate that its work in the immigrant visa process justifies requiring a separate fee.

We are also greatly concerned with the lack of specificity regarding fee collection in what will likely be an extremely complicated process of coordination between DOS, USCIS, and Customs and Border Protection (CBP). USCIS has failed to set forth, or even consider, how this new proposed fee will be collected. Will it be paid to the U.S. consulate overseas? Will it be paid to CBP at the port of entry? USCIS has implemented a great deal of changes in its fee collection process over the past couple of years through the implementation of the "lockbox" system, and is still grappling with the ongoing challenges relating to fee collection and receipting that have been encountered with that system. Simply put, seeking to implement a new immigrant visa fee without also proposing a clear procedure for collecting such a fee will inevitably result in confusion and lengthy processing delays.

Proposed Increase to Premium Processing Fee

AILA has no objections to USCIS adjusting the premium processing fee for inflation based on the Consumer Price Index (CPI), as this is specifically authorized by Congress. However, AILA urges USCIS to widely publish sufficient notice of the final fee well in advance of the effective date of any fee increase for premium processing service. In the proposed rule, USCIS estimates, based on the CPI for urban consumers (CPI-U) that the premium processing fee will be increased from $1,000 to $1,225. Nevertheless, the Service states that the "final fee could be different from this proposed amount, because the CPI-U, upon which the fee adjustment is based, varies monthly."[16] Adequate notice would enable attorneys to reasonably notify their clients of the exact amount of the fee increase and to ensure that I-907 applications are filed with the correct fees.

Proposed New Civil Surgeon Designation Fee

The I-693, Report of Medical Examination and Vaccination Record, must be completed by a USCIS civil surgeon. This form is required for most intending immigrants and for "V" nonimmigrants. USCIS seeks to establish a $615 fee in order for a physician to be designated as a USCIS-approved civil surgeon. Currently, there is no fee associated with the designation. Price gouging, poor treatment of clients seeking completion of the I-693, and misconduct on the part of civil surgeons has been reported by AILA members. While the imposition of a $615 fee may dissuade unscrupulous physicians from pursuing civil surgeon designation, it could similarly dissuade bona fide, ethical physicians from seeking designation. USCIS states that the estimated number of civil surgeon designation requests is 3,410 per year.[17] Although existing civil surgeons will be exempt from having to reapply for designation, AILA is concerned that the rate of new applications could fall significantly below the estimate (particularly given

[16] 75 Fed. Reg. at 33477.
[17] 75 Fed. Reg. at 33466.

the low revenue stream such work provides), resulting in a greatly diminished pool of designated physicians.

Proposed Rule Establishing a New $6,230 Filing Fee To Request Regional Center Designation under the Immigrant Investor Pilot Program

USCIS proposes to establish a new filing fee of $6,230 for the adjudication of regional center designations under the Immigrant Investor Pilot Program. If adopted, this will be the most expensive filing fee associated with any USCIS petition.

As background, an individual or entity interested in participating as a regional center in the pilot program must file a Regional Center Proposal, asking USCIS to approve the proposal and designate the entity as a regional center. The proposal must provide a framework within which individual alien investors affiliated with the regional center can satisfy the EB-5 eligibility requirements and create qualifying jobs. In the proposed rule, USCIS states that:

> [the] fee study found that these designations are exceptionally labor intensive for USCIS. Historically, the cost of this designation process has been borne by all fee-paying applicants and beneficiaries. Accordingly, to refine the cost accounting and fee structure, and to make the distribution of costs more equitable, DHS proposes a new fee of $6,230 per request for designation.[18]

AILA conditionally supports the creation of a new, one-time filing fee to be paid by an individual or entity that submits a new proposal requesting designation as a regional center. Our support, however, is predicated upon USCIS taking immediate steps to address several fundamental problems that plague the administration of the EB-5 program and discourage larger program participation. These include, but are not limited to the following:

Prompt Processing

USCIS has a poor historical record for the prompt adjudication of new regional center proposals and amendments within the EB-5 program. AILA is pleased to see that USCIS has, over the past year, generally reduced regional center proposal adjudication times down to about five months. As a condition of supporting the new filing fee, USCIS must agree to further reduce adjudication times for new regional center proposals and amendments to existing proposals.

Create a Consultative and Collaborative Environment during the Form I-924 Application Review Process

Preparing a qualified application for a new regional center designation, or an amendment to an existing designation, requires the stakeholder to formulate and present a complex proposal involving immigration law, tax and securities law, corporate and partnership law, and finance, accounting, and econometric modeling just to name a few areas. The comprehensive applications typically exceed several hundred pages in length and involve dozens of exhibit items. The creation of the new Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program, is a good first step by USCIS to provide stakeholders with direction for formulating regional center applications, but merely

[18] 75 Fed. Reg. at 33457.

introducing a new form fails to provide a missing key requirement—dialog. AILA strongly urges the agency to enact policies allowing the examiner and the regional center applicant to more effectively communicate during the review process. Allowing and encouraging a constructive and efficient dialog between the parties will significantly reduce overall review times, help identify defects, resolve questions, and provide corrections and clarifications. If stakeholders are required to pay $6,230 to cover USCIS adjudication costs, USCIS must agree to support direct dialog with the applicants. The current practice explicitly prohibits direct dialog in favor of the traditional process of mailing multiple Requests for Evidence (RFEs). The traditional process for this program, which the USCIS predicts may result in as little as 100 applications per year, is exceptionally inefficient, results in unnecessary processing delays and wastes the resources of all parties.

Create a Consultative and Collaborative Environment with Stakeholders in Establishing Policy and Guidance

Many of the problems within the EB-5 program are derived from the agency's inability to promulgate regulations on substantive aspects of the program, forcing adjudicators to devise their own policies and principles. The lack of regulations on key subjects deprives adjudicators of clear guidance, and contributes to an atmosphere that falls short on establishing and implementing an agency-wide commitment to the principles of fair and consistent adjudications. The result is a lack of transparency in adjudication standards. In the absence of regulations, USCIS management has relied upon moderating the agency's interpretations through policy memoranda. AILA understands why USCIS so heavily relies on policy memoranda to establish consistent and clarified adjudication standards. Though USCIS has recently conducted a stakeholder engagement on the EB-5 program, and has met with AILA and other EB-5 stakeholder organizations in the past, those efforts unfortunately fall short of a meaningful collaborative or consultative process with stakeholders that would help establish and enforce reasonable policy interpretations within the highly complex EB-5 program. If stakeholders are to be required to pay a new filing fee of $6,230, USCIS must endorse and support direct dialog with stakeholders regarding the introduction of new policies, possible corrective action for ineffective policies, systemic and training issues with adjudicators, self-policing and enforcement actions, and more.

PROPOSED AMENDMENT TO 8 CFR §204.6 (REGIONAL CENTER REPORTING/TERMINATION)

USCIS proposes to amend 8 CFR §204.6 "Petitions for Employment Creation" by revising paragraph (m)(6) to read as follows:

> *204.6(m)(6) <u>Termination of participation of regional centers</u>. To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis, on a cumulative basis, and/or as otherwise requested by USCIS, using a form designated for this purpose. USCIS will issue a notice of intent to terminate the participation of a regional center in the pilot program if a regional center fails to submit the required information or upon a determination that the regional center no longer serves the*

purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

AILA supports the recent efforts by USCIS to generally improve the processing times for new regional center applications. Over the past 18 months, USCIS has more than doubled the number of approved regional centers authorized to participate in the EB-5 pilot program. As of July 1, 2010, USCIS had approved approximately 100 regional centers. Moreover, the current application period for new regional centers seeking designation is reported by USCIS to be approximately five months. With the implementation of the proposed Form I-924 and new associated filing fee, AILA hopes USCIS can further reduce processing times.

But designating new regional centers is only part of USCIS' responsibility as steward of the Immigrant Investor Pilot Program. AILA strongly believes that USCIS must also establish procedures ensuring that all approved regional centers are actually leading to the movement of investment funds into job creation activities. Ongoing regional center accountability to USCIS will result in greater public confidence in the EB-5 program and eliminate regional centers that fail to promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

USCIS proposes to amend §204.6(m)(6) with the stated goal of creating regional center accountability as follows:

1. *Data Collection*: Requires that all regional centers collect and report annual data to USCIS using Form I-924A;

2. *Designation Termination*: Establishes the authority of USCIS to terminate a regional center's designation under the pilot program if the regional center "no longer serves the purpose" of the program.

Recognizing that AILA strongly supports the establishment of new rules creating regional center accountability, the proposed amendment to 8 CFR §204.6(m)(6) has several important defects as follows:

Data Collection

Over the past three years, USCIS has twice asked regional centers to collect and report comprehensive data regarding their operations, including statistics about individual investment projects, investors, and job creation/preservation activities. AILA urges USCIS to conclude its review of that data, and to publish its findings. Moreover, AILA applauds USCIS for its plans to publish summarized regional center data and select aggregate statistics about each regional center's annual activities. Such public reporting creates transparency and accountability, shows which regional centers are actively engaged in investment/job creation activities and their affiliated visa processing statistics, and reveals which regional centers are inactive. The absence of public statistics about regional center activities creates the potential for misrepresentation, shelters regional centers that are inactive, and creates general program confusion. AILA also urges USCIS to realize its pledge to promptly publish the aggregate information about each regional center's annual activity, such as the answers to questions #1, 4, and 5 on Form I-924.

Designation Termination

As described above, AILA strongly supports USCIS' efforts to create public accountability and transparency for all designated regional centers. For this reason, AILA also supports the establishment of formal procedures by which USCIS has the legal authority to review, sanction and terminate a regional center in appropriate circumstances.

The proposed rule seeks to amend 8 CFR §204.6(m)(6) to provide USCIS with specific authority to terminate a regional center's designation under the pilot program if the regional center "***no longer serves the purpose of promoting economic growth***, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." AILA believes the proposed language is problematically vague because the proposed rule fails to put a regional center on notice of the practices that are either prohibited or required in order for the regional center to continue to "serve the purpose of promoting economic growth."

In lieu of the vague "no longer serves the purpose" language proposed by USCIS, AILA recommends that the agency adopt a more objective and empirical rule to ensure ongoing regional center compliance. For example, USCIS should adopt a rule that termination proceedings will be commenced if a regional center does not file a single I-526 petition within a fiscal year. The rebuttable presumption then requires the regional center to provide USCIS with credible evidence of significant and ongoing activities consistent with the regional center's original business plan.

Tracking earlier comments above in the "Data Collection" response, reports of termination proceedings brought by USCIS against a regional center should be available to the public in the annual disclosure report compiled by USCIS regarding all regional centers.

AILA urges USCIS to enumerate and discuss the factors it will consider when evaluating whether to sanction or terminate a regional center.

CORRECTIONS AND CLARIFICATIONS TO PROPOSED FORM I-924

In addition to providing a vehicle for fee collection, USCIS proposes the establishment of Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program, as a means to "standardize" the application process and to "clarify the requirements for a regional center document, improve the quality of applications, better document eligibility for the pilot program, alleviate content inconsistencies among applicants' submissions, and support a more efficient process for adjudication of applications."[19]

AILA supports USCIS' efforts to standardize and generally improve this process. However, the instructions accompanying Form I-924 contain many significant errors, omissions, or conflicting statements that will have the unintended effect of decreasing the efficiency of the process and degrading the quality of the applications. For example:

[19] 75 Fed. Reg. at 33465.

A. On page 1 under the heading "What is the purpose of this Form?" the instructions read:

> 2. Request approval of an amendment to a previously approved Regional Center. An amended regional center designation request may include requests for determinations relating to any or all of the reasons for filing an amendment request noted below.
>
> A. An amendment request may be filed to seek approval of changes to the regional center's:
>
> 1. Geographic area;
> 2. Organizational structure or administration;
> 3. Affiliated commercial enterprise investment opportunities, to include changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities;
> 4. Affiliated commercial enterprise's organizational structure and/or capital investment instruments or offering memoranda.
>
> B. An amendment may also be filed to seek a preliminary determination of EB-5 compliance for:
>
> 1. Documentation provided as an exemplar Form I-526, Immigrant Petition by Alien Entrepreneur prior to the filing of Form I-526 petitions by individual alien entrepreneurs with USCIS;
> 2. An actual investment project where an exemplar investment project that is materially the same as the actual investment project was previously approved for use by the regional center for EB-5 capital investments.

In consideration of this section, however, AILA seeks clarification as follows:

1. Is it USCIS' policy that an amendment request "may" or "must" be filed if seeking a change to the regional center's "geographic area?"

2. Is it USCIS' policy that that an amendment request "may" or "must" be filed if seeking "any change" or "any material change" to the regional center's "organizational structure or administration?" Note that on page 8 of the instructions under the heading "Processing Information," USCIS writes: "Designated Regional Centers must notify USCIS within 30 days of the occurrence of any material change in the structure, operation, or administration of the Regional Center. Notification can be made by sending an e-mail to the EB-5 Program mailbox."

3. What is the purpose or meaning of Section 2(A)(3) under the heading "What is the purpose of this Form?" This section reads "[a]ffiliated commercial enterprise investment opportunities, to include changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities." Please clarify the meaning of "affiliated commercial enterprise investment opportunities," as this appears to be a new term or concept to the EB-5 program.

4. What is the purpose or meaning of Section 2(B)(2) under the heading "What is the purpose of this Form?" This section reads "[a]n actual investment project where an exemplar investment project that is materially the same as the actual investment project was previously approved for use by the regional center for EB-5 capital investments." Please clarify.

B. On page 1 under the heading "What is the purpose of this Form?" the instructions describe the "safe harbor" provision as follows:

> Note: Affirmative determinations regarding EB-5 and Immigrant Pilot Program compliance made in the adjudication of Form I-924 regional center designation or amendment applications will generally be given deference and will not be re-addressed in the adjudication of individual EB-5 petitions, as long as the underlying facts upon which the favorable determination was made remain unchanged. Any affirmative determination made in the adjudication of a Form I-924 regional center application may be re-addressed by USCIS during the adjudication of an EB-5 petition if:
>
> 1. Documentation relating to the regional center's capital investment structure or job creation methodologies, or an exemplar Form I-526 petition has materially changed since the most recent approval of the regional center designation;
> 2. The record contains evidence of fraud or misrepresentation; or
> 3. The evidence of record indicates that the previously favorable decision to approve the Form I-924 application for an initial regional center designation (or amendment), or the preliminary determination that the exemplar Form I-526 petition or investment project is EB-5 compliant was legally deficient.

These provisions are critical to the successful operation of the entire EB-5 program. AILA applauds the new USCIS policy that has historically caused major problems, namely the senseless readjudication of structural issues in subsequent I-526 filings for the same affiliated regional center project. As embodied in the new I-924 instructions, USCIS states that approvals "will not be re-addressed in the adjudication of individual EB-5 petitions, as long as the underlying facts upon which the favorable determination was made remain unchanged."

However, AILA is very concerned that the "safe harbor" provision is rendered meaningless when USCIS has the right to take the following actions:

- USCIS can readjudicate a prior regional center approval, including an exemplar, if the agency determines the project has experienced a "material change." AILA's primary objection is not the right of USCIS to reexamine a prior decision upon the occurrence of a "material change," but rather the agency's failure to define "material change." In the absence of a well-defined legal standard, stakeholders have no ability to reasonably assess if any change which occurs is "material," or if the change is insignificant necessitating no further action.

- AILA agrees that a prior decision may be subject to readjudication if the record contains clear evidence of fraud or misrepresentation.

- AILA strongly disagrees with the proposed USCIS policy that a prior decision may be subject to readjudication if the record contains evidence that the approval was "legally deficient." If USCIS receives a bona fide application and after review issues an approval, the Service must be legally bound to honor that approval in the absence of a finding of fraud or misrepresentation. The Service is reminded of *Chang v. United States of America*, 327 F. 3d 911 (9th Cir. 2003), where the court held that during the adjudication of Form I-829, USCIS could not review whether the initial plan submitted with Form I-526 was qualifying, but could only review whether the alien sustained that plan.

C. On page 3 under the heading "Initial Evidence Requirements," Section 2 contains a note that reads: "An alien filing a Regional Center-affiliated Form I-526 must still establish that the investment will be made in a TEA at the time of filing of the alien's Form I-526 petition, or at the time of the investment, whichever occurs first, to qualify for the reduced $500,000 capital investment threshold." AILA strongly §opposes this interpretation of determining when an "investment" has occurred for EB-5 purposes. AILA suggests that USCIS reconsider this policy, which is unsupported by the regulations, in favor of a fair and reasonable interpretation that recognizes that an investment has occurred as of the date of receipt of capital into an irrevocable escrow.

D. On page 4, Paragraph 4, the last sentence is incomplete and appears to be missing one or more words. The sentence reads: "Submit a plan of operation for the Regional Center which addresses how investors will be recruited and how the Regional Center will conduct its due diligence to ensure that all immigrant investor funds affiliated with its capital investment projects will (____) from lawful sources."

E. On page 4, in the "Note" section, the instructions read: "The EB-5 alien investor's capital investment in a 'troubled business' must maintain the number of existing employees at no less than the pre-investment level for the period following his admission as a conditional permanent resident." Is it USCIS policy in a "troubled business" setting, that "pre-investment level" employees refers to those employees that exist as of (a) the actual date the alien's investment capital is placed into an irrevocable escrow; (b) the date of receipt of the I-526 petition (priority date); (c) the date the funds are released from escrow if triggered by I-526 approval; (d) the first day of conditional resident status; or (d) another date? Please clarify the instructions.

Conclusion

AILA strongly supports the agency's decision to maintain the current fee for naturalization applicants and for reducing fees associated with several other petitions and applications. We also support the imposition of a fee for EB-5 regional center designation, conditioned upon USCIS taking immediate steps to address a number of administrative problems that plague the EB-5 program and discourage program participation. However, the proposed fee increase is flawed in other respects. It oversteps USCIS' authority regarding what programs and activities may be funded by fees, and creates an undue financial hardship for petitioners and applicants at a time when the quality, consistency and fundamental fairness of USCIS adjudications is more problematic than ever. We strongly urge USCIS to seek appropriated funding for non-adjudicatory functions, and to develop and present a comprehensive plan for improving the rampant problems associated with benefits adjudications.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION