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Office of Public Engagement
United States Citizenship and Immigration Services
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Washington, DC 20529
Via e-mail: opefeedback@uscis.dhs.gov

Re: AILA Comments on Current Memorandum: Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38) (Dec. 11, 2009)

Ladies and Gentlemen:

The American Immigration Lawyers Association (AILA) submits the following comments on the USCIS memorandum, "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; AFM Update to Chapters 22.4 and 25.2 (AD 09-38) (Dec. 11, 2009)" (hereinafter "Memorandum").

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. 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. permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Memorandum and believe that our collective expertise provides experience that makes us qualified to offer views that will benefit the public and the government.

I. "Exemplar" Amendments (Section V.1, modifying AFM Chapter 22.4(a)(2))

We applaud USCIS for instituting the "exemplar" amendment process. It has brought the promise of efficiency and certainty to regional center-based I-526 petitions. We welcome this innovation in particular because it is an example of policy that profits both the agency and EB-5 program participants. We have a mutual interest in efficiency and

predictability. We look forward to further policies to foster the congressional goal of expanding job-creating investments in the U.S., and we look forward to continuing to provide helpful feedback to USCIS.

Recommended Changes re: "Exemplar" Amendments

We offer five specific recommendations to advance the potential of the exemplar amendment process:

(1) Provide a greater checklist of items expected to be included in the exemplar amendment in addition to the items mentioned in the Memorandum at page 10 ("copies of the commercial enterprise's organizational documents, capital investment offering memoranda, and transfer of capital mechanisms for the transfer of the alien investor's capital into the job creating enterprise"). The checklist could include: Form I-526 completed for the regional center and project, omitting actual investor information (e.g. Part 1, 6); Targeted Employment Area (TEA) designation documents; and the economist's report;

(2) Provide a separate workflow for exemplar amendments, distinct from other amendments relating to regional center structure. Adjudicate exemplar amendments within a one month timeframe;

(3) Given the problems with USCIS's "material change" concept as discussed below, retract the provision in the Memorandum that suggests that the exemplar amendment approval may be impaired if the "petition has materially changed" on page 12;

(4) Should USCIS retain the "material change" concept, permit regional centers to request a determination on "material change" through the exemplar amendment process. This will alert regional centers as to whether the consequences of "material change" are triggered and permit them to globally amend affected Form I-526s through the exemplar amendment process, with proper consents from the affected petitioners in place; and

(5) Upon approval of an exemplar amendment, issue a Form I-797 approval notice with instructions to attach the I-797 to related I-526 petitions. Permit petitioners to file the related I-526 without project-related documents, relying on the exemplar amendment approval. Minor changes to project-related documents, such as execution of transaction documents and filling in final dates, can be reported to USCIS, so that the final project-related documents are on record.

A greater checklist of required items would better inform the public about necessary elements, and also help adjudicators determine completeness.

A separate adjudicative workflow for exemplar amendments makes sense, given the distinction between "structural" regional center amendments and "exemplar" amendments. Amendments relating to "organizational structure or capital investment instruments," discussed on page 11 of the Memorandum, request approval for changes in regional center structure (i.e. the management and business model structure for regional center operations and projects). In contrast, amendments relating to an "exemplar Form I-526" request approval of an actual project as consistent with a previously-approved regional center structure.

A truncated processing timeframe for exemplar amendments also makes sense, given (1) that USCIS has previously adjudicated the regional center structure as consistent with the Immigrant Investor Pilot Program,[1] so adjudication should focus narrowly on whether the project fits within the approved regional center parameters; and (2) the practical time-sensitive considerations of an actual project's capital needs.

USCIS's "material change" framework, as discussed below, is fundamentally flawed as a matter of law. Therefore, the concept and vocabulary should not infect exemplar amendment adjudication. Rather, it would be helpful for USCIS to promulgate standards ascribing the nature and magnitude of departures from an approved exemplar amendment that would impair approvability of related I-526 petitions.

If USCIS preserves the "material change" concept, the exemplar amendment process can provide an avenue for regional centers to request a determination of "materiality." Given the consequences of "material change" under the Memorandum—requiring new I-526 filings, restarting the two-year conditional period, expelling subsequently-aged out derivative children, and denying a related I-829 if no new I-526 is filed—USCIS should, at the very least, agree to adjudicate whether or not a change is "material." Alternatively, USCIS should promulgate clear, objective standards for when a change is "material."

Permitting petitioners to file a related Form I-526 without preapproved project documents allows USCIS adjudicators to match the filing with the exemplar amendment, saves paper, and binds each petitioner to the approved exemplar amendment.
Enterprise capitalization and job creation are facilitated by efficient adjudication of exemplar amendments. Unlike regional center proposals which are general in nature, an exemplar amendment represents a "live" project. Actual versus hypothetical project documents (including formation documents, offering materials, economist's report, and a business plan) are submitted. As such projects are typically structured to anticipate EB-5 capital, they are time-sensitive. Marketing efforts are often delayed until a promoter has assurance that the EB-5 project is viable from an immigration standpoint. For these reasons, a separate workflow for exemplar amendments with a shorter timeframe makes sense. We note that at the December 16, 2010 USCIS EB-5 Stakeholders Meeting, USCIS reported that the target processing time for amendments generally is four months.

[1] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).

USCIS currently reports processing amendments in one month and we applaud USCIS for exceeding its target. We would welcome USCIS targeting adjudication of exemplar amendments within one month for the reasons provided.

II. "Material Change" (III.B.V.5, and V.6, modifying AFM Chapters 22.4(c)(4)(G) and 25.2(e)(4))

Where exemplar amendments bring the promise of uniformity and predictability, the Memorandum's "material change" framework brings confusion and uncertainty. In addition, as this comment will explore in detail, the concept of "material change" is legally flawed and the remedy proposed in the Memorandum is incorrect both as a matter of law and as a matter of policy.

Recommended Changes re: "Material Change"

For the reasons and authority discussed below, we respectfully recommend that USCIS retract entirely its discussion of "material change" in the Memorandum. We recommend more sound approaches to I-829 adjudication in the section below entitled, "Alternatives to the 'Material Change' Framework."

Reasons for Recommended Change and Authority Supporting the Recommendation

This portion of the comment is limited to demonstrating how the Memorandum violates the plain letter of the Immigration and Nationality Act (hereinafter "INA" or "the Act") governing EB-5 classification and congressional intent, as well as the sound policy goals of providing predictability in the adjudication process.

Legislative Objectives and Statutory Framework of the Immigrant Investor Program

The EB-5 category was created to attract foreign capital investment and create jobs in the U.S. economy.[2] Congress devised a predictable legal regime with the intent of requiring foreign investors to assume investment risk. Generally, where a sufficient amount of capital is invested and at risk, combined with a reasonable plan to create sufficient employment in the United States, the investor satisfies the requirements of the EB-5 category and should be entitled to permanent residence.[3]

The EB-5 category evolved from proposed legislation, and section 204 in the proposed 1989 immigration reform bill was entitled, "Deterring Immigration-Related Entrepreneur Fraud."[4] It required a two-year conditional permanent residence status, requiring

[2] *See* 136 Cong. Rec. S7622, 7626 (daily ed. July 11, 1989); S. Rep. No. 101-55, at 21 (1989).
[3] *See* 8 CFR §204.6(j)(3) requiring investment of capital at risk, and 8 CFR §204.6(j)(4) requiring a plan to create ten jobs.
[4] Immigration Act of 1989, S358 101st Cong. (1989).

investors to have "sustained" the investment.[5] The fraud deterrent provision was adopted in the Immigration Act of 1990[6] as a foundation of EB-5 law. As legacy INS observed in its rule-making process, investors are "admitted as conditional permanent residents as a means to deter immigration-related entrepreneurship fraud."[7] Thus, immigrant investors who satisfy the requirements of the EB-5 category obtain permanent residence on a conditional basis,[8] which is essentially equivalent to permanent residence, but for the conditions.[9]

The conditions on permanent residence can be divided into three groups: (1) the maintenance of status conditions (setting forth grounds for termination of status during a two-year conditional period);[10] (2) the petition filing conditions (providing the timeline and procedural aspects of filing a petition for removal of conditions);[11] and (3) the petition adjudication conditions (specifying the substantive legal standard for adjudication of the petition for removal of conditions).[12]

Congress narrowly crafted the statutory language for petition adjudication conditions. Specifically, Congress indicated that conditions on residence should be removed if there is evidence that the petitioner invested (or is "in the process of investing") the required capital, and has sustained the investment in the new commercial enterprise.[13] Rejecting more rigid approaches, Congress required nothing else specifically of the investor.[14]

While INS later promulgated a regulation requiring evidence that the petitioner "created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees,"[15] it did not go so far as to mandate that 10 jobs be in place within two years or within any other specific timeframe. Indeed, Congress had rejected existing legislative alternatives that would have imposed more rigid time requirements on job creation.[16] Notwithstanding this clear mandate from Congress that removal of conditions not be hindered by a "completed job creation" standard, USCIS recently sought to impose

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[5] *See* S Rep No 55, 101st Cong., 1st Sess. 22 (1989).
[6] Pub. L. No. 101-649, 104 Stat. 4978.
[7] Commentary to Final Rule, 59 Fed. Reg. 26588 (May 23, 1994), *quoting* S. Rep. No. 101-55, 101st Cong., 1st Sess. 22 (1989).
[8] INA §216A(a)(1).
[9] *See* 8 CFR §216.1 "Definition of conditional permanent resident."
[10] INA §216A(b)(1).
[11] INA §216A(c), (d).
[12] INA §216A(d)(1).
[13] *Id*.
[14] An amendment to the statute in 2002 added the general provision of INA §216A(d)(1)(B), requiring the petitioner to be generally "conforming to the requirements of section 203(b)(5)."
[15] 8 CFR §216.6(c)(1)(iv).
[16] Congress rejected an earlier proposal that would have required all jobs to be created within a two-year period of making the investment, *see* 134 Cong. Rec. S2119 (1988), as well as another proposal that would have required all job creation to occur within a reasonable time, but no later than six months after the investor's admission to the United States. *See* S. Rep. No. 101-55, at 21 (1989).

such a standard as a petition adjudication condition by way of reframing the purposes of the conditional residence period.[17]

Accepting, for purposes of discussion, that job creation "within a reasonable period of time" is a petition adjudication condition, and that consistent with the intent of Congress, the regulation is to be flexibly interpreted, the petition adjudication conditions reflect a narrow legislative objective of imposing a conditional period on the investor so as to deter fraud while allowing broad latitude to the investor to carry out business objectives.[18] Accordingly, the investor is not required to do more than prove he or she (1) has invested or is in the process of investing the required capital; (2) sustained the investment; and (3) created, or will create within a reasonable period of time, the required jobs. With that evidence in hand, the law requires USCIS to approve the petition for removal of conditions.

The Requirement of Continuity of Business Plan Imposed by the Memorandum Violates Statutes, Regulations and Congressional Intent

Considering the plain meaning of the statute and regulation, the petitioner would satisfy the requirement to "sustain" the investment in the commercial enterprise by presenting documentation to indicate the investor has not withdrawn capital from the commercial enterprise, or has at least maintained the minimum threshold investment in the enterprise. The existing regulation states that the "sustained" requirement is satisfied if, in good faith, the investor substantially met the capital requirement, and continuously maintained the investment in the commercial enterprise.[19] Moreover, the comments to the regulation indicate that the "sustained" requirement is to be viewed with "maximum flexibility" and should be accorded a "liberal interpretation."[20]

Notwithstanding these directives to adjudicate removal of conditions with "maximum flexibility," and according to a "liberal interpretation," the Memorandum transforms the petition adjudication conditions to forbid any "material change" in the underlying

[17] USCIS Memorandum, D. Neufeld, "EB-5 Alien Entrepreneurs – Job Creation and Full-Time Positions (AFM Update AD 09-04)" (June 17, 2009) (hereinafter "June 2009 Memo"), adding new language to the AFM and stating that the primary purpose of I-829 adjudication is to determine whether the petitioner "has invested the requisite capital *and created the requisite jobs* through investment" (emphasis added). The June 2009 memo amended the AFM to require that all I-526 petitions include a business plan providing for job creation within two years. The amendment cites 8 CFR §204.6(j)(4)(i)(B), stating that the time requirement "is intended to ensure that aliens seeking to enter the United States on EB-5 visas have a legitimate and feasible plan to create jobs *as required by the statute* within that period of conditional residence." June 2009 Memo, p.3 (emphasis added). But to what statute does this refer? There is no statute that requires job creation within two years or within the period of conditional permanent residence.

[18] Members of Congress repeatedly observed they did not intend to hamstring the fluid business process with onerous, excessive and/or arbitrary standards. *See, e.g.*, 136 Cong. Rec. S17106, S17112 (1990) (Immigration Act of 1990 Conference Report); Letters from U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs, to Gene McNary, INS Commissioner (Apr. 12, 1991 and Aug. 2 1991).

[19] 8 CFR §216.6(c).

[20] Commentary to Final Rule, *supra* note 7 at 26588.

investment or business during the conditional residence period. Discarding the directives that guided legacy INS in its earlier regulatory process, USCIS claims "[t]he structure of the EB-5 program is inflexible" and thus a rigid interpretation is necessary.[21] In a fashion that is similar to its attempt to impose a "completed job creation" standard,[22] the Memorandum attempts to add substantive adjudication standards that have no basis in statute or regulation.

The "material change" concept is found in at least three different USCIS iterations: (1) the Memorandum that directs revisions to the AFM; (2) a decision by the Administrative Appeals Office (AAO) issued April 23, 2010; and (3) pronouncements made in a USCIS Stakeholder Meeting held on June 16, 2010. These three iterations are dissimilar, confusing, ambiguous, and potentially cover a broad array of normal business activity, all adding up to tremendous unpredictability in the EB-5 adjudication process.

In the Memorandum, USCIS announced for the first time that a petition for removal of conditions is not approvable if following the approval of the I-526 there has been a "material change" in any of the following:

- Capital investment structure;
- Job creation methodologies; or
- Eligibility requirements already approved in the I-526 petition.[23]

If there is a material change, then an investor must begin the process anew by filing a fresh I-526 petition, abandoning permanent residence, and if successful with the new I-526, commencing another period of conditional permanent residence. The same memorandum states elsewhere that a new I-526 petition is required where there has been a "material change" in:

- Capital investment project; or
- Business plan.[24]

None of the above five terms has been defined by USCIS.

Following issuance of the Memorandum and in response to questions from interested parties and stakeholders, USCIS indicated that the material change concept would likely receive further clarification in an upcoming AAO decision. Then, as part of the June 16, 2010 stakeholder meeting, USCIS circulated an April 23, 2010 AAO decision as an instructive decision, although USCIS cautioned that it is not a precedent decision.[25]

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[21] *See, e.g.*, the Memorandum, implementing revisions to AFM §22.4(c)(4)(G), requiring continuity of the "capital investment project."
[22] *See* June 2009 Memo, *supra* note 17.
[23] AFM §25.2(e)(4)(E).
[24] AFM §22.4(c)(4)(G).
[25] On September 8, 2010, the USCIS Office of Public Engagement issued an Executive Summary of the stakeholder meeting held on June 16, 2010. It states that the AAO decision was provided to help

In the AAO decision, which does not use the language of material change, the AAO indicated that an I-829 petition cannot be approved unless there is continuity of the "capital investment project." Consequently, the AAO upheld the I-829 denial where the petitioner had invested in a commercial enterprise that had terminated its loan to one company and extended a loan to a second company during the conditional residence period.

During the June 16, 2010 stakeholder meeting, USCIS distributed additional materials including a power point presentation. A series of slides concerns the subject matter of "material change." One slide pronounces that the "capital investment project" must be the same in both the I-526 petition and I-829 petition. When asked to clarify, USCIS stated that the "capital investment project" is that layer of the business activity that is relevant to the jobs and economic analysis. Another slide proclaims that the "business plan" cannot be materially changed. Finally, as to what is a "material change," one slide indicates that a change is material when the evidence to be presented in support of the I-829 is "significantly different than" the evidence that was presented in support of the I-526.

In summary of these pronouncements, USCIS has imposed a petition adjudication condition that requires continuity of at least five separate factors:

- Capital investment structure;
- Capital investment project;
- Business plan;
- Job creation methodologies; and
- Eligibility requirements already approved in the I-526 petition.

If any of these factors have changed, in the sense that the I-829 documentation would be "significantly different than" the I-526 documentation, the I-829 cannot be approved, the investor must abandon permanent residence, and start the EB-5 process from the beginning.[26]

The material change concept, as articulated by USCIS, is mind boggling when one considers the breadth of activities in the life of the commercial enterprise that could potentially fall within the scope of at least one of the five factors. A static business plan, and for that matter, a static business, is highly unusual. Ordinary changes in the timing or allocation of expenditures by the commercial enterprise might constitute prohibited changes in the "capital investment structure;" adding an unplanned location to a chain of restaurant franchises might amount to a prohibited change in the "capital investment project;" using a different construction company not identified in the plan to construct a

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stakeholders gain insight into the Agency's perspective of what constitutes a "material change." *See* USCIS's Executive Summary: USCIS EB-5 (Immigrant Investor) Stakeholder Meeting, dated September 8, 2010, available at *www.uscis.gov*.

[26] Note that abandonment of permanent residence is an especially harsh outcome given that the "readjustment procedure" provided by USCIS would not benefit aged-out children.

building could be a material "business plan" change; actual expenditures or actual "direct" jobs could be different (and are likely to be different) from what was estimated, raising the question of whether "job creation methodologies" have materially changed; and the investor's management role in the commercial enterprise may have been slightly modified during the conditional residence period, leaving doubt whether previously approved "eligibility requirements" have materially changed. The job-creating business that was the basis for the business plan may be struck by an environmental factor beyond its control, such as a hurricane, flood, fire or other unforeseen event. The economy may take an unprecedented and unanticipated turn as in the recession of 2008–09. An officer of the job-creating business may have an unexpected grave illness or accident. We could go on and on with examples of ordinary changes in business that could derail the adjudication of the I-829 petition and require abandonment of residence status, if the "material change" concept introduced by the Memorandum were left to stand.

The demands of existing in a competitive business environment frequently involve change and adaptation to business circumstances. A company engaged in normal business practice, when confronted with these types of unexpected or unprecedented changes, may (and should) alter the business model to maximize the prospects for success of the investment and create the necessary jobs. In turn, insofar as EB-5 investors are expected to be investors in commercial enterprises that involve real commercial risks, the one certainty of the conditional residence period would appear to be change. Business survival—preserving investment capital—requires change. And yet, USCIS has articulated a material change concept that appears to be at odds with commercial realities. As discussed more fully in the section below, the concept is also inconsistent with adjudication standards in other areas of immigration law that control *eligibility-impacting* changed circumstances.[27]

A listing of changes that might cause the evidence to be "significantly different" in appearance when comparing the I-526 and I-829 petitions is probably endless. But in light of the two specific petition adjudication conditions, proof of investment and sustaining that investment, a list of changes that might affect *eligibility* for removal of conditions is a much shorter list. The "significantly different" evidence standard advanced by USCIS would seem to embrace change of nearly every kind and variety, and thus is undoubtedly inappropriate for a standard that should be grounded in flexibility.

[27] With nonimmigrant visa extensions, deference is accorded a prior approval unless there is a change that affects benefit *eligibility*. USCIS Memorandum, W. Yates, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity" (Apr. 23, 2004). *See also* 8 CFR §214.2(e)(8)(iii) and (iv) (USCIS approval of change required only if there is a "substantive change" which is considered a change that affects E-2 *eligibility*; no additional filing is required if there is no substantive, or fundamental, change in the terms or conditions of employment which would affect E-2 eligibility); 8 CFR §214.2(h)(2)(i)(E) (amended petition for H visa holders for material changes in the terms and conditions of employment or training or the employee's eligibility); 8 CFR §214.2(o)(2)(iv)(D), and 214.2(p)(2)(iv)(D) (providing that additional performances or engagements do not necessarily require amended petition for O and P visa holders). These provisions are founded on fundamental changes that directly affect eligibility for the visa status, not on the multitude of ordinary changes that inevitably occur in the life of the sponsoring petitioner, a real business.

In summary, the Memorandum imposes at least five new petition adjudication conditions that are *ultra vires*, and that unduly burden the EB-5 process with unpredictability and substantial immigration risk. The portions of the Memorandum relating to "material change" should be withdrawn and the AFM revised to reflect such withdrawal.

Alternatives to the "Material Change" Framework

It is difficult to discern the policy objectives behind the "material change" framework. The Memorandum simply asserts on no sustainable legal ground that "the capital investment project identified in the business plan in the approved Form I-526 petition must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two year period of conditional residency." The framework that follows rests on this unsupported premise.

Consistent with other areas of immigration jurisprudence, we propose the following two alternatives where the petitioner can demonstrate either that job creation has already occurred (whether the same or different jobs than originally anticipated), or will occur within a reasonable period of time. If at the I-829 phase, the investor believes that 10 jobs will be created by the time the I-829 is filed or within a reasonable time thereafter, the investor should be permitted to:

- Document compliance with all regulatory requirements with the filing of the I-829 petition; or

- File an optional amended petition if the investor wants to obtain Service approval of the change prior to filing the I-829. The amended petition may be filed as an exemplar amended I-526 to cover all the investors in a pooled offering, with the consent of affected investors, if dealing with a regional center-based investment.

If the investor chooses to file an amended petition, the investor retains the burden of demonstrating in the amended I-526 that the job-creating business received the requisite investment amount and created or will create within a reasonable period of time a minimum of 10 jobs. If approved, the amended petition would be retroactive to the original I-526 filing, would not require adjudication of a new immigrant visa or adjustment of status application, and would permit the investor to proceed to file the I-829 based upon the amended I-526. The filing date for the I-829 would be measured from the conditional residence period following the approval of the original I-526, and the investor would not be required to wait an additional two years from the approval of the amended I-526 to file the I-829.

The adjudicator would determine, at the I-829 stage, whether the investor created or will create within a reasonable period of time 10 jobs, directly or indirectly, and sustained the appropriate monetary investment ($500,000 or $1,000,000) irrespective of any change in the I-526 dimensions discussed in the prior section. If the investment was made and

sustained, and the jobs were created or it is established that they will be created within a reasonable period of time, then absent fraud, the adjudicator should approve the petition even if there has been a business change during the two year period.

Allowing an investor to amend the I-526 in this limited circumstance furthers the interests of the EB-5 program, promotes fairness in adjudications, comports with the realities of the business world, furthers the underlying principles of the Child Status Protection Act (CSPA), and promotes the congressional intent of attracting job-creating investment in the U.S. In addition, allowing an amended I-526 in this circumstance comports with the long-standing USCIS policy to allow amended immigrant and nonimmigrant petitions as a vehicle to review changes to a previously-approved petition.

There is no general rule under the INA prohibiting amendments and, in fact, it is common practice to permit amendments to approved applications in many other contexts. The only issue throughout immigration jurisprudence is whether a change affects statutory and regulatory eligibility for the relevant status, not the multitude of ordinary changes that inevitably occur in the life of a real business. For example, 8 CFR §214.2(h)(11)(i)(A) requires an amended petition when there are changes in the terms and conditions of employment of a beneficiary after petition approval which may affect eligibility for H-IB status.[28] Similarly, 8 CFR §214.2(l)(7)(i)(C) provides for amendment of L-1 petitions when a change occurs which affects the beneficiary's eligibility. The procedure for O-1 beneficiaries is consistent with the H-1B and L-1 procedures.[29] For E-2 nonimmigrants, USCIS approval of a change is needed only if there is a "substantive change," which is considered a change that affects E-2 eligibility; no additional filing is required if there is no substantive, or fundamental, change in the terms or conditions of employment which would affect E-2 eligibility.[30] With respect to immigrant petitions, perhaps the I-140 petition is most analogous to the I-526. USCIS allows for the filing of an amended I-140 for successor-in-interest petitions. Specifically, successor-in-interest entities which need to reaffirm the validity of an I-140 petition and the labor certification filed by a predecessor entity, must file an amended I-140 petition that demonstrates that a qualifying successor-in-interest relationship exists.[31] Of course, post-approval amendments are also allowed for regional center designations, both traditionally and pursuant to the new I-924 form.

Allowing an amended petition is especially appropriate where the statutorily-required jobs have been created before the expiration of the two-year condition removal period. This is the classic example of the use of amended petitions throughout immigration law and in other areas of the law.[32] Specifically, the use of the amended petition would only

[28] *See also* 8 CFR §214.2(h)(2)(i)(E).
[29] *See* 8 CFR §214.2(o)(8)(i).
[30] *See* 8 CFR §214.2(e)(8)(iii), (iv).
[31] *See* AFM §22.2(b)(5)(F).
[32] See AFM § 31.2(e) (H-1B); AFM §33.4(a) (O-1); INS Memorandum, INS Executive Associate Commissioner, Operations (C0214h-C, C0214l-C), "Guidelines for the Filing of Amended H and L Petitions" (Oct. 22, 1992).

be allowed when all regulatory requirements for condition removal *eligibility* are met, but there has been some change in how they are met. An investor would therefore be allowed to file an amended petition only when:

1. A commercial enterprise was established and remains;
2. The alien invested the full amount of the capital;
3. The alien sustained and continuously maintained the capital investment; and
4. The alien created or can be expected to create within a reasonable time 10 full-time jobs (even if there has been some change in the manner in which they are created).[33]

This approach makes good sense and creates fewer burdens on the Service than is the case with new I-526s, I-407s, I-485s and I-829s. However, USCIS appears to believe it is constrained in permitting amendments by the precedent decision, *Matter of Izummi*.[34] *Izummi*, however, dealt with a situation where material amendments were attempted **before** I-526 approval, **not after**, to make a deficient petition approvable. *Izummi* concludes:

> A petitioner must establish eligibility at the time of filing: a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.[35]

With respect to amending petitions, *Izummi* cites two cases: *Matter of Katigbak, supra* and *Matter of Bardouille*.[36] Like *Izummi*, both *Katigbak* and *Bardouille* dealt with applications not yet approved where the petitioners sought to cure factual ineligibility for a benefit that existed at the time of filing. In *Katigbak,* the petitioner did not meet the necessary criteria at the time of application and tried to amend the petition later after obtaining the necessary credentials. In *Bardouille,* the petitioner's children were legitimized after the date of filing.

Consistent with these and earlier cases, there has developed a principle applied by the Service that applications have to be "approvable when filed."[37] This is necessary because permitting individuals to submit petitions which do not qualify at the time of application,

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[33] 8 CFR §216.6(c)(1).
[34] 22 I&N Dec. 169 (Comm. 1998).
[35] *Id*.
[36] 18 I&N Dec. 114 (BIA 1981).
[37] This language actually appears, for example, in 8 CFR §245.10(a)(3): "Approvable when filed means that, as of the date of the qualifying immigrant visa petition under Section 204 of the Act or qualifying labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous …."

knowing that they can later amend, would lead to the filing of deficient petitions just to gain a priority date. Indeed, *Katigbak* recognized this, stating:

> Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.[38]

Based on the issues presented in *Izummi, Katigbak,* and *Bardouille*, and consistent with all principles of legal interpretation, there can be no doubt that *Izummi* is precedent *only* for the proposition that amendments cannot be made to petitions not yet approved and filed to cure initial ineligibility for a benefit. It is wrong in law to apply the case outside the context of its facts, particularly given the string of cases upon which it relied. There is no statement in *Izummi* made outside this context of impermissible amendments.

Neither *Izummi*, nor any other precedent, prohibits amendment of an approved petition based upon facts occurring *after petition approval*. In fact, if the Memorandum is interpreted as prohibiting post-approval amendments based upon post-approval changes, it would establish new precedent without APA rulemaking.

In addition to being consistent with precedent, allowing an amended I-526 and not requiring a new I-526 accomplishes two major policy goals: avoiding separation of families and avoiding the necessity of investors having to file potentially two or more petitions and permanent residence applications based on one investment. Many EB-5 petitions are filed by investors with aging-out children to ensure they will continue to receive derivative treatment throughout the conditional period through removal of conditions. If an amended I-526 is filed based upon post-approval changes, the permanent resident status of derivative children is unaffected. The child who was 19 at the time the original I-526 was filed, and is now 22, will be unable to regain conditional residency under the Memorandum's application of the CSPA if the parent is required to file a new I-526. This result undermines the principles of the CSPA.

For all of these reasons, the impact of requiring a new petition when there has been a "material change" in various, undefined aspects of the initial I-526 petition, negatively affects the desirability and future of the EB-5 program. Such a requirement is nothing short of devastating, and seriously impacts the future of a program that has successfully brought investment dollars to the U.S. for infrastructure construction and created hundreds of thousands of jobs for U.S. workers. In a case where the business plan has changed, but the investment was sustained in the same commercial enterprise and the required jobs were created, the investor has met all requirements to which he or she was subject. Seeking to terminate such an investor's conditional resident status and removing his or her family members from the U.S. is a harsh punishment for the investor who has

[38] *Matter of Katigbak,* 14 I&N Dec. 45 (Comm. 1971).

invested in good faith in a program endorsed by the U.S. government, liquidated his assets overseas, and relocated his family to the U.S.

III. Targeted Employment Area (TEA) Determination Timing (Section V.4, modifying AFM Chapter 22.4(c)(4)(F))

INA §203(b)(5)(ii) defines "targeted employment area"(TEA) as an area which "at the time of investment" is either a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average). The same definition is repeated in the EB-5 regulations at 8 CFR §204.6(e). The Memorandum articulates guidance on how ISOs should identify the appropriate date for determining TEA eligibility, along with other TEA-related issues.

Recommended Changes re: TEA Determinations

We offer four specific recommendations, discussed in separate sections below. Each section provides the reasons for each recommended change and authority supporting the recommendation.

Irrevocable Commitment of Investment Funds into Escrow Should be Considered "Investment," with the Date Funds are Transferred into Escrow as the Date of Investment for TEA Purposes

On page 16 of the Memorandum, USCIS recognizes the existence of a conflict in current policy defining when an area needs to qualify as a TEA. One on hand, the current regulations found at 8 CFR §204.6(e) states the area must qualify as a TEA "at the time of investment." One the other hand, a precedent AAO decision notes that a TEA qualifies as of the day the I-526 petition is filed.[39] A conflict arises when an area meets the 150 percent threshold "at the time of investment" into the new commercial enterprise, but ceases to qualify by the time the I-526 is filed, or vice versa.

To address this conflict, the Memorandum clarifies that (1) the "time of investment" is determinative if the investment "is made into the *commercial enterprise's job creating project* prior to the filing of the Form I-526 petition" (emphasis added); and (2) the I-526 filing date is determinative if the investment "has yet to be committed to the commercial enterprise's job creating project at the time of filing of the I-526, i.e. is still in escrow or is otherwise not irrevocably invested into the commercial enterprise pending the approval of the I-526 petition."

First, we respectfully request that USCIS amend the Memorandum and AFM Chapter 22.4(c)(4)(F) to be consistent with the EB-5 statute and replace the phrase "commercial enterprise's job creating project" with the statutory term, "new commercial enterprise."

[39] *See Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998).

Second, we respectfully request that USCIS amend the Memorandum to eliminate a new and legally unsupportable distinction (created by this Memorandum) between a contribution of capital that is made by means of an escrow arrangement and one that is made "into the commercial enterprise." This distinction lacks statutory or regulatory basis. USCIS should recognize that an investment is made, for the purposes of satisfying "at the time of investment" testing, upon the alien transferring funds to escrow *or* to the new commercial enterprise. Maintaining the Memorandum's current distinction is contrary to USCIS's stated goal of "promoting predictability in the capital investment process."

The definition at 8 CFR §204.6(e) provides that "*invest* means to contribute capital." When an alien transfers the full amount of the capital contribution into escrow pending I-526 approval, the alien is making an irrevocable commitment of capital in accordance with the definition of "invest." Once the alien transfers the funds into escrow, the alien releases control of the funds completely and does not reserve any right to revoke the investment.

This concept is well-settled in the context of the E-2 visa category. Similar to EB-5 investors, E-2 investors are required to make an irrevocable commitment of funds in order to be considered as having "invested" in the E-2 business. Guidance in the E-2 context provides that the transfer of investment funds into escrow is an irrevocable commitment, even though the release of funds from escrow is conditioned on issuance of the E-2 visa. Where the funds are held in escrow for release only on the visa condition being met, the investment would still constitute a "solid commitment," since the investor would have "reached an irrevocable point."[40]

The suggested revision is completely compatible with USCIS adjudication policy. USCIS policy is and always has been to approve I-526 petitions based upon an "investment" into an irrevocable escrow account. In so doing, USCIS is necessarily concurring that the placement of funds in an irrevocable escrow account meets the regulatory definition of "invest." If an investment into escrow meets the definition of "invest" for I-526 approval, it necessarily meets the definition of "time of investment" for TEA qualification.

Therefore, we respectfully request that the Memorandum be revised to state that a commitment of investment funds into escrow, of which I-526 filing or approval is the sole condition of release, is an irrevocable "investment" into the new commercial enterprise. Accordingly, the date of investment for TEA purposes can be the date that escrow is funded by the investor.

[40] 9 FAM 41.51 N8.1-3.

Evidence of TEA Should Be Deemed Valid for One Year

We respectfully request that USCIS amend the Memorandum to establish a "safe harbor" period recognizing the validity of a state-issued high unemployment certification letter for a period of 12 months from the date of issuance. The current Memorandum provides no guidance regarding the validity of such letters. In the absence of clear USCIS policy on validity periods, all 50 states plus the territories are left to apply their own rules. Anecdotal evidence suggests that the absence of a uniform standard has created significant inconsistencies between state certification periods. Establishing a safe harbor period clearly advances USCIS's stated goal of "promoting predictability in the capital investment process."

A state high unemployment certification letter or other evidence of TEA that is presented with the investor's I-526 should be deemed valid for one year from the date the letter is issued or, in the absence of a letter, from a date in any month within the 12-month period prior to the time of investment, in which the most recent data available from state or federal governmental sources establishes TEA eligibility.

By adopting this one year safe harbor period in the EB-5 context, the Service is merely following policies manifested in many other programs, including the H-1B, H-2B, E-3, and permanent labor certification programs. In the H-1B labor condition application context, where a prevailing wage determination by the National Prevailing Wage and Helpdesk Center (NPC) is used, the validity period must be specified by NPC and may be up to one year.[41] In addition, the data may be up to 24 months old.[42] In the H-2B and E-3 contexts, the validity period of the NPC prevailing wage determination is also up to one year.[43] The regulations governing permanent labor certifications similarly provide for a validity period of up to one year for NPC prevailing wage determinations.[44]

A TEA Determination Should be Applied to All Investors in the Same Project

On page 17 of the Memorandum, USCIS notes that each alien must establish that his or her capital investment qualifies for the reduced investment threshold. We respectfully request that the Memorandum be amended to state that the time of investment of the first investor in a project is deemed to apply to all investors who subsequently invest in the same project. Applying the "time of investment" requirement in this way will provide assurance for a job-creating project that an investment offering based on the $500,000 amount will be applicable to all investors in the same project.

As increased job creation is a primary goal of the EB-5 program, investment that is made by the initial investor in a project will begin the process of improving economic conditions and lowering the unemployment rate in and around the project area. Changes

[41] 20 CFR §655.731(a)(2)(ii)(A).
[42] 20 CFR §655.731(b)(3)(iii).
[43] 20 CFR §655.10(d).
[44] 20 CFR §656.40(c).

in population size or unemployment rates within the area resulting from the initial investment into a project should not redound to the detriment of subsequent investors. To do so would create the illogical and unreasonable outcome of penalizing investors for furthering the goal of increasing job-creating investment in the U.S. Moreover, a policy that penalizes investors would hamper the inflow of capital from alien investors at the outset, and would undermine predictability in the capital investment process.

The Definition of "Rural Area" Should be Stated in the Disjunctive

We respectfully request that USCIS revise page 17 of the Memorandum to reflect a disjunctive reading of the "rural area" definition, consistent with the prior version of the AFM. INA §203(b)(5)(iii) defines rural area as "any area other than an area within a metropolitan statistical area *or* within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." The regulation at 8 CFR §204.6(e) similarly provides that a rural area is "not within *either* a metropolitan statistical area (as designated by the Office of Management and Budget) *or* the outer boundary of any city or town having a population of 20,000 or more."

The "either/or" language used in the INA and CFR to define "rural area" is disjunctive. Thus, it can be interpreted as providing that either criterion may be satisfied to qualify as rural. This is evidenced by the fact that USCIS has previously adopted the disjunctive interpretation in the prior version of the AFM. Nonetheless, the Memorandum reflects a conjunctive reading, stating that an area must both have a population less than 20,000 "and" be outside a metropolitan statistical area (MSA) to qualify as rural. A conjunctive reading of the statute is not compelled by the statutory or regulatory language. Moreover, reading "outside an MSA" as a requirement for rural area eligibility frustrates the job creation and economic growth goals of the EB-5 program, as it results in the disqualification of many underdeveloped and underpopulated areas within MSAs in need of investment.

As explained by the Office of Management and Budget (OMB) in its most recent bulletin published on December 1, 2009, an MSA is a region that has at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. About 84% of the U.S. population falls within MSAs, which would limit "rural area" eligibility to just 16% of the U.S. under USCIS's restrictive interpretation.[45]

The fact that a city or town is part of an MSA grouping based on being "adjacent" to at least one urban area with population of 50,000 does not mean that the population of the city or town is 20,000 or more, or that the economy of the city or town is well-developed. Nevertheless, under USCIS's restrictive interpretation of "rural area," an undeveloped municipality that is sparsely populated, but happens to be grouped into an MSA for

[45] 2008 OMB Bulletin No. 10-02, Appendix, p. 2.

statistical purposes, does not qualify as a TEA for the EB-5 program, irrespective of the fact that EB-5 investment in such an area would further congressional intent of attracting foreign capital to blighted and underpopulated areas. If the area's unemployment rate does not reach the 150 percent threshold due to workforce ratios that reflect lack of development, the area will have no way of attracting EB-5 investors through the $500,000 amount.

The danger of viewing the MSA prong as indispensible to rural area classification under the EB-5 program is addressed by the OMB Bulletin, which offers the following caveat about the use of MSAs:

> In periodically reviewing and revising the definitions of these areas, OMB does not take into account or attempt to anticipate any nonstatistical uses that may be made of the definitions, nor will OMB modify the definitions to meet the requirements of any nonstatistical program. Thus, OMB cautions that Metropolitan Statistical Area and Micropolitan Statistical Area definitions should not be used to develop and implement Federal, state, and local nonstatistical programs and policies without full consideration of the effects of using these definitions for such purposes. These areas are not intended to serve as a general-purposes geographic framework for nonstatistical activities, and they may or may not be suitable for use in program funding formulas.
>
> OMB recognizes that some legislation specifies the use of Metropolitan Statistical Areas for program purposes, including the allocation of Federal funds, and will continue to work with the Congress to clarify the foundations of these definitions and the resultant, often *unintended consequences* of their use for nonstatistical purposes.

The agency responsible for MSA designation has recognized potential problems with utilizing MSAs as a litmus test for nonstatistical purposes, of which TEA eligibility is one. By insisting that the MSA and population prongs in the definition of "rural area" be read conjunctively, USCIS disqualifies large areas of the U.S. that would benefit from TEA eligibility regardless of whether doing so contravenes the goals of the EB-5 program.

Conclusion

AILA appreciates the opportunity to comment on the Memorandum and we look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION