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May 14, 2012

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

Submitted via e-mail: uscisfrcomment@dhs.gov

**Re: 60-Day Notice of Information Collection Under Review:
Form I-829, Petition by Entrepreneur to Remove Conditions
OMB Control No. 1615-0045
77 Fed. Reg. 14817 (Mar. 13, 2012)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) Notice of Information Collection Under Review: Form I-829, Petition by Entrepreneur to Remove Conditions, published in the Federal Register on March 13, 2012.

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

Background

The law concerning removal of conditions for an immigrant entrepreneur, at INA §216A and 8 CFR §216.6, require a petitioner to present evidence sufficient to demonstrate that he or she:

- Invested, or is in the process of investing, the required capital;
- Sustained the investment; and

- Created, or within a reasonable time will create the required jobs.

Certain details in the current Form I-829 and Instructions, revision dated 7/30/11, do not accurately capture the requirements of the law.

Employment Creation

The employment creation requirement is addressed on page 2 of Form I-829 and page 2 of the Instructions. The existing Form I-829 is deficient for the following reasons:

Regional Centers

First, there is no reference on the form to whether the eligibility of the petitioner is based on a designated regional center. Regional center petitions could be supported by evidence of job creation that does not include actual payroll records. The form should be revised to reflect the differences between individual investor petitions and regional center-based petitions.

A regional center is designated by USCIS on the basis of a proposal for economic growth in the particular geographic area.¹ The general regional center plan is supported by a statistical study or jobs multiplier standard to measure job impacts that result from investments in the regional center area. Based on the territorial focus, the regional center plan, and the job creation methodology, USCIS designates the applicant as a regional center authorized to participate in the EB-5 program, thereby sanctioning the job creation analysis for those who invest in the regional center.

When filing an I-526 petition, a regional center investor is not required to rely on proof of direct job creation. Instead, investors may present proof of indirect job creation based on “reasonable methodologies” that, if already approved by USCIS, are presumed to identify job impacts throughout the economy.² Although the statute and regulations governing removal of conditions do not stipulate the evidence of regional center job creation that the I-829 petitioner should present, there is ample justification for concluding that such evidence would be quite similar to the jobs creation evidence that was filed in support of the I-526 petition.

Several considerations are paramount. The I-829 and I-526 petitions are based on an employment forecasting methodology that has been pre-approved by USCIS. In passing through to conditional residence, the petitioner has relied upon “economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.”³ In many regional center projects, the measurement of job impacts is largely a matter of economic analysis, input-output models, and forecasting. It is not anticipated that job impacts would be measured by

¹ See 8 CFR §204.6(m) for the requirements of regional center designation.

² See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610(c); 8 CFR §§204.6(j)(4)(iii) and (m)(7)(ii).

³ 8 CFR §§204.6(m)(7)(ii) and (j)(4)(iii).

payroll records and I-9 forms relating to specific employees in certain identified companies. Consequently, in view of USCIS's regulations concerning regional center designation and adjudication of regional center-based I-526 petitions, USCIS could not reasonably expect I-829 regional center petitioners to present payroll records and I-9 forms in support of job creation.

In view of the above considerations, Form I-829 should be revised to add two questions on Page 2, Part 5, immediately before the question asking for the number of full-time employees in the enterprise:

Is your eligibility based on designation of a regional center?

Name of regional center:

Troubled Business

The current I-829 also does not accommodate the concept of "saving" jobs in a troubled business. Under 8 CFR §204.6(e), petitions based on an investment in a troubled business confer eligibility if there is sufficient evidence the investment has helped save jobs in the commercial enterprise. Similarly, 8 CFR §216.6(c)(1)(iv) provides that the conditions on permanent residence may be removed based on evidence of maintaining jobs. Accordingly, Form I-829 should be revised at Page 2, Part 5, final question to read:

How many of these jobs were created or saved by your investment?

Investment

Page 1 of the Instructions, under the heading "Evidence of the Commercial Enterprise," second bullet point, too narrowly describes the acceptable forms of evidence for proving the petitioner has invested, or is in the process of investing, the required capital. Audited financial statements may be prohibitively expensive and will not be available to the petitioner in the majority of cases. We recommend that the Instructions place less emphasis on audited financial statements, reflecting that the law permits other forms of acceptable evidence. This bullet point should be revised to read:

Such evidence may include, but is not limited to, an audited financial statement.

New Commercial Enterprise

The "Type of Enterprise" in the first section of Part 5 is irrelevant to the adjudication of an I-829 and should be deleted. This irrelevant query appears to be a remnant of former law, as is evident from Page 1 of the Instructions, under the section entitled "Evidence of the Commercial Enterprise," which directs petitioners to submit evidence that the petitioner "established" a commercial enterprise.

In 2002, Congress eliminated the requirement that the petitioner have “established” a new commercial enterprise.⁴ What remained following the 2002 amendment is the requirement that a petitioner invested, or is in the process of investing, in a new commercial enterprise. Therefore, we recommend the following changes to the form and instructions:

Form: Page 2, Part 5, the query concerning “type of enterprise” should be deleted.

Instructions: Page 1, “Evidence of the Commercial Enterprise,” the first bullet should be deleted.

Effect of Filing Form I-829

Page 1 of the Instructions includes a paragraph entitled “Effect of Filing” Form I-829. It states that filing of the I-829 petition “extends your conditional permanent residence for six months.” Under 8 CFR §216.6(a)(1), conditional permanent resident status “shall be extended automatically, as necessary” until the I-829 is adjudicated. The filing of the I-829, therefore, is sufficient for extending the petitioner’s status until USCIS adjudicates the I-829. Although USCIS may choose to issue certain documents as evidence of lawful status that are limited to six months in validity, the expiration of such documents, or even the failure to obtain such documents in the first place, should not negate the lawful status of the petitioner and dependent family members. We recommend that the first sentence in the section of the Instructions entitled “Effect of Filing” be revised to read:

Filing this petition extends your status until USCIS renders a decision on the petition.

Conclusion

We appreciate this opportunity to comment on Form I-829, Petition by Entrepreneur to Remove Conditions.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁴ Pub. L. No. 107-273, 116 Stat. 1758, Title I, Subtit. B. Ch. 1 §11036 (2002). Under former law, a petitioner “established” a new commercial enterprise by forming a new business, substantially reorganizing an existing business, or substantially expanding an existing business.