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

Submitted via www.regulations.gov

Re: Proposed Rule: Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998
76 Fed. Reg. 59927 (Sept. 28, 2011)
Docket No.: DHS–2009–0029

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits this comment in response to the Department of Homeland Security's (DHS) proposal to amend the EB-5 regulations to add 8 CFR §216.7. This proposed rule is intended to implement Public Law 107-273 pertaining to I-829 petitions that have been pending for more than a decade.

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. Since 1946, our mission has included 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 proposed EB-5 rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

Fundamental Objections

AILA applauds USCIS for its efforts in facilitating closure for many stranded EB-5 investors and their families who are affected by Public Law 107-273. We do, however, raise a strong fundamental objection to the proposed rule for two reasons: (1) the rule has been introduced more

than eight years after the explicit deadline set forth in Public Law 107-273 for the promulgation of implementing regulations; and (2) it does not support the purpose of Public Law 107-273. The purpose of the law was to provide a workable remedial solution for investors who sought immigrant visas in the early and mid-1990s under the EB-5 program pursuant to the rules that were in effect at the time. These investors were later adversely impacted by retroactive interpretations of the regulations, and as a result, their cases have been pending for more than a decade, despite having acted in good faith at all times.

Failure to Meet the Statutory Deadline

Section 11033 of Public Law 107-273, enacted on November 2, 2002, provides: "The Immigration and Naturalization Service *shall* promulgate regulations to implement this chapter not later than 120 days after the date of enactment of this Act."[1] Despite a congressional mandate that implementing regulations take effect no later than March 2, 2003, no proposed rules were published until September 28, 2011. This egregious failure to meet the statutory deadline has adversely impacted the intended beneficiaries of this law. Therefore, the proposed rule should be rewritten to take into account both the initial remedial intention of the bill, and the harm caused to investors by the delay.

As a result of the delay, it will be impossible for many intended beneficiaries to seek the anticipated relief due to advanced age, the impact of the recent economic decline, or a combination thereof. Many who were well postured to invest eight years ago have lost the financial ability to do so now. The extensive delay in promulgating regulations has destroyed the spirit of the legislation. Therefore, administrative mechanisms must be created to enable these investors to maintain lawful immigration status. USCIS should ask Congress to enact remedial measures to provide relief for those who have been adversely impacted by the egregious delay in promulgating regulations. Moreover, USCIS should provide those seeking to reinvest with an extended time frame to do so, given the current state of the economy. Because it took USCIS eight years longer than mandated to issue regulations, we suggest that USCIS provide affected investors a period of eight years to recover and/or seek investment funds for purposes of reinvestment.

Contravention of Statutory Purpose

The investors impacted by Public Law 107-273 and the proposed rule are those who have filed I-829s, whose I-526 petitions were approved after January 1, 1995 and before August 31, 1998. Therefore, as of the date the proposed rule was published, 12 years have passed since investors at the tail end of that timeframe made their initial EB-5 investments. This has occurred despite Congress's clear mandate to act swiftly to help this class. The expectation was that I-829 petitions for the affected investors would be adjudicated within 180 days of the statute's enactment, or no later than May 1,

[1] Emphasis added.

2003.[2] Congress never intended for the questions outlined in the statute to be evaluated 12 or more years after an initial investment, when the new commercial enterprise might no longer be in existence, or when documentation that might be needed or requested by USCIS would be difficult, if not impossible to retrieve. For example, one question raised by the statute is whether an investor could qualify for removal of conditions on a "second determination" based on investments in other commercial enterprises, if the investor was not able to qualify on an "initial determination" based on the original investment. To qualify on a second determination, the investor must show that 10 jobs were created by the cumulative investments, and that those jobs were in existence on the date the second determination is made. How will these investors prove their cases? The Internal Revenue Service only requires businesses to keep documentation for five years. In the wake of the global recession and the normal obstacles imposed by the passage of time, the delay has effectively doomed investors to failure. Moreover, investors who were in their fifties at the time of filing their I-526 petitions may now be retiring and in their seventies and simply unable to make a fresh investment to sustain a second determination. And in some cases, spousal or other derivative benefits are affected. USCIS must evaluate not only who will be impacted, but how individuals are impacted by this delay.

The purpose of Public Law 107-273 was to provide an expedited remedy for good faith investors who found themselves stranded due to a federal agency's midstream policy change. The proposed rule is contrary to the spirit of the law and misses the boat. The rule is designed to deny benefits to individuals who acted in good faith based on legal interpretations by lawyers and/or regional centers that were later retroactively determined to be incorrect. The preamble states that the proposed rule "focuses primarily on limitations on eligibility"[3] and that Public Law 107-273 is a "significant departure from the strict rules normally applicable to the removal of conditions," intended to provide aliens who had "failed to comply with these strict requirements of the existing EB-5 statutes and regulations" an opportunity to "cure the deficiencies" in their initial petitions that occurred because of retroactive regulatory interpretations.[4] The proposed rule is designed to be administered with a furrowed brow knowing the likely outcome will be the denial of removal of conditions, and the removal of these good faith investors from the United States. This result is clearly not in line with the statute.

Proposed Definition of "Material Misrepresentation" Is Troubling

Public Law 107-273 requires a finding that the investor made no "material misrepresentation" in the initial I-829 petition. In an attempt to implement this part of the statute, proposed 8 CFR §216.7(c) sets forth an overreaching definition of "material misrepresentation" that is contrary to decades of established case law. This definition will certainly be the subject of extensive litigation which will further prolong this decade-long nightmare. Four elements of the proposed definition stand out as problematic:

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[2] *See* Public Law 107-273, Section 11031(c)(1)(A).
[3] 76 Fed. Reg. 59927, 59930 (Sept. 28, 2011).
[4] 76 Fed. Reg. at 59933.

Material Misrepresentation Findings are "a Matter of Discretion"

The proposed rule provides that the determination of falsity and materiality are a matter of discretion. No explanation is provided as to why such determinations would be discretionary rather than being premised on objective evidence that must be explained and disclosed by DHS in its adjudications. Falsity is an issue of fact. Removing the requirement of factual support for a critical determination is completely unjustified and cuts against the principles of transparency and accountability in adjudications. Materiality is not discretionary; it is fact-based. To provide otherwise is contrary to the clear statutory language and case law.

Material Misrepresentation May be Found "without Regard to the Petitioner's or Any Other Person's Intent"

Removing intent as an element of misrepresentation flies in the face of established law and cannot be sustained. Intent is critical to a finding of misrepresentation. Given the consequences of misrepresentation, including a bar to admissibility under INA §212(a)(6)(C)(i), to allow such a finding without regard to intent is unlawful and would result in a denial of due process.

The definition does not distinguish between misrepresentations made by the investor and misrepresentations made by the investment project or an affiliated regional center. Investors should not be penalized for any misrepresentations alleged in the latter category, as they are not the fault of the investor. For example, if a visa petition submitted by an employer contains a material misrepresentation, and the beneficiary has no knowledge of its content, the beneficiary cannot be held accountable for the misrepresentation. To find an investor inadmissible as a result of a misrepresentation made by the project is a violation of due process.

Material Misrepresentation May Include an Omission of Fact

What is most troubling is the attempt to expand the long-standing definition of misrepresentation beyond affirmative acts to include omissions. Proposed 8 CFR §216.7(c) states: "Material misrepresentation also includes any omission of fact that has the effect of making any material representation in the petition to remove conditions or accompanying documentation false." We strongly oppose this language given the fact that misrepresentation has always required a willful act. For example, 9 FAM 40.63 N4.1, which elaborates on the term "misrepresentation" as used in INA §212(a)(6)(C)(i) states, "Misrepresentation requires an affirmative act taken by the alien." Moreover, N4.2 states, "In determining whether a misrepresentation has been made, it is necessary to distinguish between misrepresentation of information and information that was merely concealed by the alien's silence. Silence or the failure to volunteer information does not in itself constitute a misrepresentation for the purposes of INA 212(a)(6)(C)(i)." The language permitting an omission of fact to form the basis of a material misrepresentation finding must be removed from the proposed definition.

No Opportunity to Rebut a Finding of Materiality

Proposed 8 CFR §216.7(a)(4)(v)(A) sets forth the procedures and consequences of an adverse determination based on a material misrepresentation. However, the rule does not provide any opportunity for an investor to rebut a finding of materiality. The proposed rule should be amended to provide that where USCIS makes a finding of material misrepresentation, the investor may rebut the finding under a preponderance of the evidence standard, before his or her status is terminated.

Mischaracterization of USCIS Policy on Changes in the Commercial Enterprise

We note that the preamble contains a mischaracterization of USCIS policy on changes in the job-creating business (commercial enterprise) after I-526 petition approval. The preamble states: "Section 11031(c)(1)(A) does not preclude the consideration of capital investment in or job creation from commercial enterprises not identified in the initial Form I-829," an option that ordinarily is not available to EB-5 conditional resident aliens.[5] The initial Form I-829 referenced in the preamble is presumably based upon the business as presented in the approved I-526. By suggesting that business changes could not be made from the initial I-829, USCIS intimates that no changes may be made to the approved I-526 business plan. However, there is no clear law or policy barring business changes not envisioned in an approved I-526 business plan because economic events and circumstances are unpredictable where capital and job creation requirements are otherwise met.

Conclusion

In conclusion, AILA recommends the following changes to proposed 8 CFR §216.7:

- Revise the definition of material misrepresentation to be consistent with 9 FAM 40.63 N.4 and BIA precedent.
- Provide for a mechanism that would allow investors to rebut a finding of materiality, by a preponderance of the evidence, before their status is terminated.
- Provide for the generous adjudication of Public Law 107-273 cases, in light of the long delay in the promulgation of proposed regulations caused by the Service, to the severe prejudice of affected investors. DHS should provide investors with legal remedies that allow them to remain in the U.S. and must continue to provide discretionary benefits to these aliens, including work authorization and travel documents, until they are able to obtain immigration benefits via other avenues, if possible. DHS must allow these persons to continue to extend their temporary green cards and ADIT stamps so they may continue to live and work in the U.S.

[5] *Id.*

- Delete the mischaracterization of USCIS policy concerning business changes after I-526 petition approval that is contained in the preamble.

We appreciate the opportunity to comment on this proposed rule and look forward to a continuing dialogue with USCIS on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION