



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

August 10, 2021

Todd Young
Acting Chief
Immigrant Investor Program Office
U.S. Citizenship and Immigration Services
131 M Street NE
3rd Floor, Mailstop 2235
Washington, D.C. 20529

Re: Request for clarifying guidance regarding adjudication of Form I-765 and I-131 applications for EB-5 investors with pending regional center-affiliated I-485 applications

Dear Mr. Young:

On behalf of the American Immigration Lawyers Association (AILA), we write to respectfully request U.S. Citizenship and Immigration Services (USCIS) to issue guidance to its adjudicators as soon as possible to clarify the agency's policy with respect to adjudicating Forms I-765, Application for Employment Authorization and Forms I-131, Application for Travel Document filed by EB-5 regional center investors with pending regional center-affiliated Forms I-485, Applications to Register Permanent Residence or Adjust Status. Specifically, AILA urges USCIS to continue accepting and adjudicating Form I-765 and I-131 applications for EB-5 investors with pending regional center-affiliated Form I-485s as such applications are eligible for adjudication and upon approval, the employment authorization document (EAD) and advance parole (AP) travel document may be issued, notwithstanding the temporary lapse in authorization of the EB-5 Immigrant Investor Regional Center Program. As discussed in more detail below, this policy is supported by the regulations, past precedent, and case law. Such clarifying guidance is urgently needed as certain EB-5 investors are being prevented from obtaining Form I-765 employment authorization benefits, and in turn such investors are having to forgo employment opportunities in the United States that could help rebuild our economy as our nation struggles to recover for the COVID-19 pandemic.

I. Background

Until its most recent update on July 1, 2021, U.S. Citizenship and Immigration Services (USCIS) has maintained a consistent benefits adjudication policy related to lapses in the EB-5 Immigrant Investor Regional Center Program. For example, the program expired at the end of the day on December 21, 2018 due to a lapse in congressional authorization to continue the program. At the time, USCIS announced its policy on the USCIS website, which stated:

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*We will continue to receive regional center-affiliated Forms I-526, Immigrant Petition by Alien Entrepreneur, and Forms I-485, Application to Register Permanent Residence or Adjust Status, after the close of business on Dec. 22, 2018. As of Dec. 22, 2018, we will put unadjudicated regional center-affiliated Forms I-526 and I-485 (whether filed before or after the expiration date) on hold for an undetermined length of time.*¹

During the period in which the EB-5 regional center program remained lapsed, USCIS continued to accept regional center-affiliated I-485 application and adjudicate underlying I-765 and I-131 applications.

The precedent of the agency's 2018 policy is important because the statutory authorization related to the EB-5 Regional Center Program expired again on midnight on June 30, 2021. In advance of that sunset, on June 24, 2021, AILA contacted USCIS to confirm its intentions, in the event of a lapse, to continue its December 2018 policy relating to the filing and holding in abeyance of all regional center applications (i.e., Forms I-526, I-485, I-829, I-924 and I-924A).

On June 30, 2021, USCIS published notice on its website confirming that the agency would apply the same policy that the agency had adopted in 2018 for Forms I-485 received on or after July 1, 2021, noting that:

*We will continue to accept Form I-485, Application to Register Permanent Residence or Adjust Status, based on an approved Form I-526. However, in the event of a lapse in authorization, we will be unable to act on any Form I-485 based on an approved Form I-526 associated with an approved regional center unless a visa through the Regional Center Program is reauthorized.*²

Approximately 24 hours later, on July 1, 2021, USCIS abruptly and without explanation updated its website and revised its policy as follows:

*We will begin rejecting all Forms I-485, Application to Register Permanent Residence or Adjust Status, and any associated Forms I-765, Application for Employment Authorization, and Forms I-131, Application for Travel Document, based on an approved Regional Center Form I-526.*³

AILA opposes the agency's divergence from its 2018 policy and urges USCIS to reconsider its position and continue to adjudicate Form I-765 and I-131 applications for EB-5 investors with pending regional center-affiliated I-485 applications, notwithstanding the temporary lapse of the EB-5 Regional Center Program.

¹ USCIS Issues Further Guidance on Impact of Lapse in Appropriations on EB-5 Program, AM. IMMIGRATION LAWYERS ASS'N, <https://www.aila.org/infonet/uscis-guidance-impact-lapse-eb-5-program> (last reviewed/updated Dec. 22, 2018) (emphasis added).

² USCIS Provides Guidance After Statutory Authorization for EB-5 Program Lapses June 30, 2021, AM. IMMIGRATION LAWYERS ASS'N (July 1, 2021) <https://ad//www.aila.org/infonet/uscis-provides-guidance-after-statutory> (emphasis added).

³ *Id.*

II. Current Status of Adjudications

Several AILA members have reported that their EB-5 investor clients have received approvals of their Form I-765 and I-131 applications based on pending regional center-affiliated Forms I-485 in the month of July 2021. We appreciate the agency continuing its work in this regard. However, AILA is highly alarmed by reports from other members that some USCIS adjudicators are not adjudicating Form I-765 and I-131 applications for pending regional center-affiliated I-485 applications. Likewise, we have been made aware of apparent conflicting statements made by agency officials in recent weeks in litigation matters regarding the adjudication of such benefits.

For example, in late June 2021, in the U.S. District Court for the District of Columbia in *Hulli v. Mayorkas*, the court denied a motion for a temporary restraining order based in large part upon a sworn declaration made by Eliel Aguilera, a Supervisory Immigration Services Officer at the California Service Center.⁴ That declaration stated in pertinent part:

*Meanwhile, individuals with approved I-526 petitions and pending I-485 petitions (such as plaintiffs) will remain eligible to apply for work and travel authorization documents.*⁵

In comparison, in July 2021, Mr. Aguilera provided another sworn statement about USCIS policy to the U.S. District Court for the Central District of California which reads, in pertinent part:

*At the present time USCIS will continue the procedures it has followed during these past lapses of the EB-5 Immigrant Investor Regional Center Program, and will not act on any pending petition or application of these form types that is dependent on the lapsed statutory authority. This includes any associated Forms I-765, Application for Employment Authorization, and Forms I-131, Application for Travel Document, based on an approved Regional Center Form I-526.*⁶

These two declarations have generated considerable confusion among stakeholders, particularly as our members report the issuance of interim EAD and AP benefits during the 2018 lapse, as well as during the month of July 2021, as described above.

III. USCIS Should Continue to Adjudicate Form I-765 and I-131 Applications for EB-5 Investors with Pending Regional Center-Affiliated I-485 Applications

The regulations provide at 8 C.F.R. § 274a.12(c)(9) that an individual who has filed an application for adjustment of status may apply for an EAD.⁷ For an application for adjustment of status to be filed, it need only be receipted and not rejected.⁸

⁴ See *Hulli v. Mayorkas*, No. 21-CV-1027 (CRC), 2021 WL 2843203 (D.D.C. June 29, 2021).

⁵ *Id.* (emphasis added).

⁶ *Nandu et. Al. v. Renaud*, 8:21-cv-00643-DOC-KES, ECF. No 17-1.

⁷ 8 C.F.R. § 274a.12(c)(9).

⁸ See 8 C.F.R. § 103.2(a)(7).

Although USCIS announced in January 2021 that it believes adjudicators should exercise discretion in the adjudication of Form I-765 applications that are based on a pending adjustment of status application⁹, USCIS has never exercised such discretion in the past for such applications. Although AILA disagrees that USCIS has the authority to exercise discretion during the adjudication of such applications, if USCIS is going to apply discretion to these cases, we believe that USCIS should exercise its discretion here by continuing to accept and adjudicate Form I-765 and I-131 applications for EB-5 investors with pending regional center-affiliated Form I-485s. USCIS has accepted and adjudicated interim benefits for applicants in similar situations. For example, USCIS regularly approves I-765 and I-131 applications for pending I-485 applicants filing under Chart B of the Visa Bulletin, when an immigrant visa number is not currently available. Moreover, USCIS accepts and adjudicates EAD and AP benefits for retrogressed I-485 applicants where an I-485 application was timely filed but subsequent retrogression means no immigrant visa is currently available. In the latter case, an applicant could not file a new I-485 application with USCIS given that the priority date is no longer current, but could, pursuant to long standing agency policy, continue to enjoy EAD and AP benefits and all related “pending adjustment” protections if the I-485 was timely filed before retrogression and current visa unavailability. AILA believes that the same protections should apply to EB-5 investors with pending regional center-affiliated I-485 applications. Moreover, past history has shown that Congress has ultimately reauthorized the EB-5 Regional Center program, making immigrant visas available to eligible EB-5 investors again.

Many EB-5 investors with pending regional center-affiliated I-485 applications are losing work authorization and employment opportunities and/or foregoing international travel due to this policy confusion. To ensure that EB-5 investors are granted the interim benefits for which they are eligible, AILA urges USCIS to clarify its policy as quickly as possible and direct adjudicators to continue to accept, adjudicate, and approve EAD and AP benefits for pending regional center-affiliated I-485 applications, notwithstanding the temporary lapse of the EB-5 Regional Center Program.

We thank you for your consideration of this matter. If you require any additional information or clarification, please contact Sharvari (Shev) Dalal-Dheini at (202) 507-7621 or by email at sdalaldheini@aila.org or Diane Rish at (202) 507-7642 or by email at drish@aila.org.

Respectfully,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

cc: Ur Jaddou, Director, USCIS
Amanda Baran, Chief, Office of Policy and Strategy, USCIS

⁹ See *USCIS Issues Policy Guidance on Applications for Discretionary Employment Authorization Involving Certain Adjustment Applications or Deferred Action*, AM. IMMIGRATION LAWYERS ASS'N (January 14, 2021) <https://www.aila.org/infonet/uscis-policy-guidance-discretionary-employment>; see also USCIS Policy Manual, Chapter 4 – Adjustment Applicants under INA 245, U.S. Citizenship & Immigration Serv., <https://www.uscis.gov/policy-manual/volume-10-part-b-chapter-4>.

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