REGIONAL CENTER-SPECIFIC ISSUES

Standard of Evidence

8 CFR § 103.2 Applications, petitions, and other documents.
(b) (8) *Request for Evidence; Notice of Intent to Deny--(i) Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, *except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion.* If the record evidence establishes ineligibility, the application or petition will be denied on that basis.

U.S. Citizenship and Immigration Services

MATTER OF CHAWATHE
In Preservation of Residence for Naturalization Proceedings
A74 254 994
Decided by the Director, Administrative Appeals Office,
January 11, 2006

3. In administrative immigration proceedings, the applicant must prove by a *preponderance of evidence* that he or she is eligible for the benefit sought. Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989), followed.

4. If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

REGIONAL CENTER-SPECIFIC ISSUES

Active Involvement

8 CFR § 204.6 (j)

(5) To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

REGIONAL CENTER-SPECIFIC ISSUES

Active Involvement

8 CFR § 204.6

(j) (5) (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

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REGIONAL CENTER-SPECIFIC ISSUES

Job Creation

8 CFR § 204.6

(j) (6) If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

REGIONAL CENTER-SPECIFIC ISSUES

Job Creation

8 CFR § 204.6

(j) (6) (ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

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REGIONAL CENTER-SPECIFIC ISSUES

Job Creation

8 CFR § 204.6

(j) (6) (ii) In the case of a high unemployment area:

[EASIEST IS:] **(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 CFR 204.6(i).**

U.S. Citizenship and Immigration Services

REGIONAL CENTER-SPECIFIC ISSUES

8 CFR 204.6(i)

State designation of a high unemployment area. **The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I–526. Before any such designation is made, an official of the state must notify the...[Chief, Office of Service Center Operations]...of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.**

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REGIONAL CENTER Q & A'S FOR I-526/829 TRAINING

Q. Can a single company (as opposed to a geographical region) be designated a "Regional Center"? If so, what happens if that company relocates its operation to a different County or State, does it automatically lose its certification as a "Regional Center" and need to reapply for certification?

Response: ***The term "regional center" is not specifically defined in the statute and has been defined in regulations very flexibly as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." The statute provides that a regional center should have responsibility for a clearly defined and limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in the defined economic zones. Entity does not apply to a particular land area or geography, but to the individual "entity" which has proposed and sought approval and designation to be a regional center.***

U.S. Citizenship and Immigration Services

As to the question relating to the issue of "relocation" there is no requirement that the responsible administrative party for a regional center entity be physically located within the same locale as the geographic area encompassed by the regional center. However, the industry and geographic focus of the regional center's approval and designation must remain fully consistent with what is contained within its approval in terms of economic target industry and geographic area of focus.

Q. Can a geographical region (as opposed to a single company) be designated a "Regional Center"?

Response: ***No. However, there is no restriction within either the statute or regulations as to how many entities may be approved and designated to be a regional center regardless of whether their geographic area overlaps or is even identical.***

Q. If the geographic area is covered by a certified Regional Center and if we have an identical business purpose (e.g., a Senior Retirement Facility), and if we are located within the same Target Employment Area, would we still need to submit an economist report with each individual alien investor petition?

Response: ***In any individual investor case which is un-affiliated or not formally connected to a regional center entity, there must be clear probative evidence of planned creation of not fewer than ten (10) permanent full time (35 hours or more per week) identifiable direct jobs for qualified employees (U.S. citizens or Permanent Residents of the U.S.). If the activity or enterprise and the investment is not made through or is not directly and legally affiliated/associated with an approved regional center for investment into an approved economic activity, the project may not benefit from seeking credit for creating jobs "indirectly." An approved economic activity absent affiliation or association with or through an approved regional center entity would not qualify to be credited with any "indirect" job creation within the Pilot Program.***

U.S. Citizenship and Immigration Services

To be eligible to be credited with "indirect" job creation, a formal proposal would need to be submitted to USCIS by which to separately apply for and obtain approval and designation as a new regional center entity from USCIS. A critical dimension related to regional center approval and designation by USCIS is that the approved regional center entity be aware of its inherent responsibilities with respect to the administration, oversight and vigilance to ensure that the purpose of the Pilot Program is sustained through evaluation and vetting of both proposed investment activities and the alien investors.

An integral aspect of the Pilot Program involves administration, operation and oversight through a regional center entity and the requirement for an approved regional center entity to apprise USCIS on its investment activities and alien investors in order to show that its activities, investments, recruitment efforts, investors, operations, etc., are continuing to meet the requirements under the statute which govern the Immigrant Investor Pilot Program. Such a responsibility is neither viable nor practical with respect to investments and investors not affiliated with or operating through a USCIS approved and designated regional center within the Pilot Program.

Q. If we have an identical business purpose but do not want to invest "through" the approved regional center, would an economist report be needed for our investors' EB-5 applications? If it would, can we utilize the same economist report for each EB-5 application in our program?

Response: ***Filing individual investor petitions which are neither affiliated with or made through a USCIS approved regional center, even if they are individually supported by individual economic analysis, forecasting tools, feasibility studies and indirect job multipliers in support of an individual investor petition that is neither part of or within the purview of a designated regional center entity would cause such a petition to be ineligigible for claiming or being credited with any job creation "indirectly." Rather, such an EB-5 alien investor would be required to demonstrate not less than ten (10) identifiable "direct" new jobs within an identifiable job creating enterprise for qualified employees in the case of any such un-affiliated EB-5 alien petition.***

Responsibility and authority to review, adjudicate, evaluate and approve any economically or statistically valid forecasting tools relating to "indirect" job creation; including, but not limited to, feasibility studies, analyses of foreign and domestic markets for goods or services to be exported (if applicable), and/or indirect job creation multipliers as required by 8 CFR 204.6(m)(3) rests at the program level within USCIS at the stage of the regional center review process involving actual adjudication of any application/proposal for USCIS' regional center designation. This is not intended and shall not be done on any case by case basis at the point of adjudication of any individual investor petition.

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Pursuant to the regulations at 8 CFR 204.6(m)(4) and (5) jurisdiction for evaluating and rendering a determination regarding economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for goods or services to be exported (if applicable), and/or indirect job creation multipliers as required by 8 CFR 204.6(m)(3) resides at a USCIS identified program level with respect to review and adjudication of applications seeking USCIS approval and designation to be a regional center within the Immigrant Investor Pilot Program. Thus, any individual immigrant investor who is not investing through the entity which has been designated to operate as an authorized regional center by USCIS, then such an individual EB-5 alien investor may not claim or be accorded the option of claiming "indirect" job creation.

Q. Which steps can we skip in the Regional Center application process, if any, since we are applying for Regional Center certification as a senior retirement facility, which is a business purpose already approved for Regional Center designation? For instance, would we still need to submit an economist report with our Regional Center application? Also, would the EB-5 foreign investor in our program still need to obtain an economist report in order to establish he met the employment requirement?

Response: ***Any entity applying for or seeking USCIS approval and designation to operate as a regional center within the Immigrant Investor Pilot Program, must submit a full and complete proposal and application. There are no short cuts, abridgements, or steps which may be "skipped." All the "how to apply" instructions need to be fully and completely addressed and followed in applying for approval and designation from USCIS to be a regional center.***

Q. Regardless of whether or not we establish a Regional Center, can the same 10 full time (direct or indirect) positions be attributed to more than one investor in the project? If so, how many investors can benefit from the same 10 full time positions?

Response: ***NO "indirect" jobs may be attributed to any investor not investing through or in affiliation with a USCIS approved and designated regional center entity. However, the regulations do allow un-affiliated partnerships comprised of individual EB-5 alien investors "pooling" their capital into an aggregate for larger scale investment purposes into one or more job creating enterprises without being affiliated with or investing through a regional center. However in such a situation, all the jobs must be "direct", full time, permanent, and for qualified employees.***

U.S. Citizenship and Immigration Services

Therefore, for example, if the enterprise invested into is located in a TEA or Rural Area, and involves 25 EB-5 investors at not less than $500,000 per investor in the pool of $12.5 million, then there would need to be a total of not less than 250 direct full time new jobs for qualified employees to enable all 25 alien investors to meet the job creation requirement. If the direct job creation were less than the requisite 250 identifiable direct jobs for qualified employees, then only the number of investors of the 25 who could be allocated not less than 10 direct jobs will qualify. Once the 10 direct jobs per investor threshold can no longer be met, then the balance of the other alien investor(s) in the pool would not be found to have met the critical job creation requirement.

Q. Do all 10 direct or indirect full time positions need to be established immediately or can they be created at any time over the 2-year Conditional Resident period?

Response: ***Absent investing through or in affiliation with an approved regional center, as noted above only individually identifiable "direct" jobs for qualified employees may be counted. At the I-526 stage, as explicitly required in the regulations at 8 CFR 204.6(j) (4) (B) a comprehensive business plan and supporting evidence must show that 10 full time permanent direct jobs for qualified employees will be created within the next two-years, meaning that all 10 direct jobs per each EB-5 alien investor must be shown and identified by the time the I-829 petition for a "non-affiliated" investor is filed with USCIS to remove their conditions.***

Has anyone got any Questions?

Has anyone got any Answers?

If you need help, send your questions to:

USCIS Immigrant Investor Program

in outlook e-mail or

USCIS.ImmigrantInvestorProgram@dhs.gov

Is it time for a break?

How about lunch?

U.S. Department of Homeland Security

REGIONAL CENTERS & IMMIGRANT INVESTOR PILOT PROGRAM

For Use in EB-5 Training

USCIS Foreign Trader, Investor and Regional Center Program (FTIRCP)

Regional Center-Defined (PL 108-156, Dec. 3, 2003, 117 Stat 1944

- The term "regional center" is defined as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."

- The statute provides that a regional center should have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in the defined economic zones.

- The establishment of a regional center may be based on general predictions, contained in the proposal concerning the kinds of commercial enterprises that would receive capital from aliens, the jobs that would be created directly or indirectly, and the other positive economic effects that would result from such capital investments.

REGIONAL CENTER REQUIREMENTS
[8 CFR 204.6(m)(3)]

- Focus on a geographic area
- Growth via Export Sales, if applicable
- Promote improved regional productivity
- Create 10 direct or indirect jobs
- Increase Domestic Capital Investment
- Promote, market, publicize to investors
- Positive impact on household earnings
- Generate greater demand for business services, maintenance, construction

USCIS Foreign Trader, Investor and Regional Center Program

Focus on a geographic region [8 CFR 204.6(m)(3)(i)]

- It is helpful that a proposal addresses the geographic region by:
  - Clear narrative description
  - How it's a contiguous geographic area/territory
  - Visually as reflected on a map with clearly detailed geographic territorial boundary lines (color coded)
  - That clearly delineates any TEA's and/or RA's which are within the Regional Center's boundaries from areas that are not.

USCIS Foreign Trader, Investor and Regional Center Program

Changes in the law relating to Regional Center pilot program

- 2000 Changes in law
  - Export Sales no longer mandatory
- 2002 Changes in law
  - General Business Plan to be contained in proposal
  - Regional Center must have jurisdiction over limited geographic area
  - Concentrate pooled investments in defined economic zones
- 2003 Changes in law
  - Extended Pilot Program to 2008
  - Authorized USCIS to give priority to I-526 petitions filed under the pilot program.

TEA's, RA's and Other

- **TEA:** Geographic area with population greater than 20,000 with unemployment rate 150% of the national unemployment rate.
- **RA:** Geographic area **outside** of a MSA or the outer boundary of a city with a population more than 20,000.
- Investment threshold for a TEA or RA is $500,000 per alien investor.
- Outside a TEA or RA, investment threshold is $1 million per alien investor.
- If RC includes TEAs or RAs, it should clearly delineate them from Non-TEAs/RAs.

Key Advantage – Indirect Jobs

1. Job creation methodology/model should be supported by sound and accepted economic forecasting tools for the specific geographical focus of the Regional Center. Also should be able to predict impact on regional economy.

2. Examples of tools or models that have been accepted:
   - Impact Analysis for Planning (IMPLAN)
   - RIMS II
   - Models specially created by Economists that are economically sound.
   - Other generally accepted economic models..

Should Clearly Reflect Basic EB-5 Requirements/Criteria

- Provision for:
  - Requisite Investment capital value threshold ($500K vs. $1 million)
  - Active investment provisions
  - "New" job creating business
  - Rescuing a "troubled" business
  - Reorganizing/restructuring an existing business
  - Lawful Source of Funds
  - Investment capital at risk
  - Active involvement of Alien Investor
  - Creation of 10 full time jobs (directly or indirectly)
  - Satisfies Izummi (22 I&N Dec. 169, 1998)

Helpful documentation in a Regional Center Proposal

- **A sample agreement or investment offering memo between Regional Center & Alien Investor which lays out key elements of investment in terms of risk, direct investment, describing nature of alien investor's "active" involvement, with NO redemption, buy back, or loan arrangement between alien & enterprise.**
- **A proposed escrow agreement that describes solely the investment capital at risk (e.g., does NOT include funds for attorney or other service fees) .**
- **Clear promotional marketing plans and strategies.**
- **Business Plan should describe how Regional Center will use investment capital for financial gain & job creation.**
- **Description of the types or kinds of job creating businesses that will be invested in, and how the Regional Center will focus on specific industries.**

Helpful Documentation (Continued)

- Describe the organizational structure of the commercial enterprise (e.g., LLC, LLP, Inc., etc.).
- Describe amount of capital the alien investor will be required to invest.
- Describe the timing of the investment.
- Describe alien investor's ownership interest and expected percentage of profit.
- Describe the roles and responsibilities of all core agencies or organizations in a proposed Regional Center's operation. Also provide executed agreements or MOUs that clearly define, describe or specify the relationship, responsibilities, and obligations.

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[redacted]migrant Investor Program
[redacted]l Center Training - 2010

Immigrant Investor Pilot Program

- The Immigrant Investor Pilot Program ("Pilot Program") was created by Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993 (Pub. L.102-395, Oct. 6, 1992, 106 Stat. 1874), as amended. This is different in certain ways from the basic EB-5 investor program.

Pilot Program

- The Pilot Program began in accordance with a Congressional mandate aimed at stimulating economic activity and creating jobs for U.S. workers, while simultaneously affording eligible aliens the opportunity to become lawful permanent residents.
- Through this program, foreign investors are encouraged to invest funds in the United States through investments affiliated with an economic unit known as a "Regional Center."

Pilot Program

- *Immigrant Investor Pilot Program* is defined in the statute but not within INA 203(b)(5) or the EB-5 regulations at 8 CFR 204.6 or 8 CFR 216.
- The Pilot Program has been utilized since its inception as a program in which designated Regional Centers facilitate pooled investments by alien investors within a focused geographic region.

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Pilot Program – Regional Center Defined

- A Regional Center is defined as any economic unit, public or private, engaged in the promotion of economic growth, including increased export sales (if applicable), improved regional productivity, job creation and increased domestic capital investment.

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Form I-924 Adjudication:

- Form I-924 applications may be filed on behalf of a Regional Center seeking:
  - An initial Regional Center designation;
  - An amendment request to expand the designated Regional Center's geographic or capital investment scope, to provide an exemplar Form I-526 petition for USCIS review, or to amend other aspects of the designation relating to the operation of the Regional Center.

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Key Requirements of a Regional Center Proposal:

- A. Focuses on a contiguous geographical region of the United States;
- B. Promotes economic growth through:
  - 1. increased export sales (if any),
  - 2. improved regional productivity,
  - 3. job creation, and
  - 4. increased domestic capital investment.

U.S. Citizenship and Immigration Services

Key Requirements of a Regional Center Proposal:

- C. Provides in verifiable detail how jobs will be created indirectly.
- D. Provides a detailed statement regarding the amount and source of capital which has been committed to the Regional Center by the sponsors/principles of the Regional Center.

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Key Requirements of a Regional Center Proposal:

- E. Provides a description of the promotional efforts taken and planned by the sponsors/principles of the Regional Center.
  - 1. Website, internet advertising;
  - 2. Direct mailings;
  - 3. Networking;
  - 4. Foreign contacts/agents;
  - 5. Conventions or trade shows, etc…

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Key Requirements of a Regional Center Proposal:

- F. Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy through:
- 1. increased household earnings,
- 2. greater demand for business services,
- 3. greater demand for utilities,
- 4. greater demand for maintenance and repair, and
- 5. greater demand for construction both within and without the regional center.

U.S. Citizenship and Immigration Services

Key Requirements of a Regional Center Proposal:

- G. Is supported by economically or statistically valid forecasting tools, including, but not limited to:
- 1. Feasibility studies,
- 2. Analyses of foreign and domestic markets for goods or services, and/or
- 3. Multiplier tables.

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Form I-924 Adjudication:

- The Form I-924 application should contain maps, charts or written descriptions that document the proposed or amended geographic area for the Regional Center.

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Form I-924 Adjudication:

- Reminder: TEA determinations are not made within Form I-924 applications. Whether a given capital investment meets the TEA requirements is determined within the Form I-526 adjudication. However, it is helpful to know if a Regional Center plans to offer investments within TEAs as this fact may impact the Regional Center's job creation estimates.

Form I-924 Adjudication:

- Reminder: *A Regional center* is not merely a defined geographic area but rather a business entity in charge of coordinating foreign investment within the area in compliance with EB-5 related immigration statute and regulation.

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Form I-924 Adjudication:

- The Form I-924 application should demonstrate that the Regional Center will be well poised to make a substantial economic impact in compliance with the EB-5 statute and regulations.

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Key Requirements of a Regional Center Proposal:

- The Form I-924 application should provide enough detail to make a determination that EB-5 capital investments that are affiliated with the Regional Center will create the required 10 jobs per investor in order to support the immigration efforts of the investors.

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Key Requirements of a Regional Center Proposal:

- A sound economic analysis, model, prediction, or forecast based on defensible economic reasoning and a reliable statistical methodology. Such an analysis starts with a credible business plan that is the source of the inputs into the analysis.

Key Requirements of a Regional Center Proposal:

- The Form I-924 application should be supported by a business plan describing the industry clusters or business focuses for EB-5 investments. The business plan should contain sufficient detail to support the economic analysis for job creation within each industry category.

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Direct v. Indirect Jobs

- Direct jobs are actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.
- Indirect jobs are those jobs shown to have been created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.

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Form I-924 Adjudication:

- Reminder: 8 CFR 204.6(g)(2): *Employment creation allocation.* The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I–526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. USCIS shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

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Form I-924 Adjudication:

- The Form I-924 application should demonstrate that the Regional Center will take steps to ensure that the EB-5 investors' funds are "lawfully obtained" in order to support the immigration efforts of its investors. Most successful Regional Centers have a strategy and plan to conduct "due diligence" on EB-5 investors' source of funds.

Form I-924 Adjudication:

- The Form I-924 application should demonstrate that investors in the capital investment projects affiliated with the Regional Center will invest the full amount of the funds needed to meet the statutory investment threshold, and that the investments will be "at risk" in order to support the immigration efforts of the investors.

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Key Requirements of a Regional Center Proposal:

- Memorandum of Understanding, Interagency Agreement, Contract, Letter of Intent, or similar agreement to be entered into with any other party, agency or organization to engage in activities on behalf of or in the name of the Regional Center.

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Regional Center Adjudications – EB-5 Compliance:

- USCIS is striving to streamline the EB-5 adjudicative process (see the 12/11/09 memo.) A Regional Center, if designated, should be well positioned to aid its investors in complying with the underlying requirements for the approval of their I-526 petitions and later on their, I-829 petitions.

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Key Requirements of a Regional Center Proposal:

- The Form I-924 application should include many, if not all, of the following sample or draft documents for the commercial enterprise(s):
- Operating Agreement;
- Partnership Agreement;

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Key Requirements of a Regional Center Proposal:

- Subscription Agreement;
- Escrow Agreement and Instructions, and,
- Offering Letter, Memorandum, Confidential Private Placement Memorandum, or similar offering made in writing to an immigrant investor through the regional center.

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Form I-924 Approval Procedures

- Form I-924 approval notices must outline the nature and scope of the EB-5 capital investment procedures which have been approved in the Regional Center's designation.
- If the Form I-924 application involves a request for an amendment of a previously approved Regional Center, then the Form I-924 approval notice should outline the nature and scope of the EB-5 capital investment procedures that have been newly approved as well as the residual elements of the designation that remain approved. Example – If the amended application was approved for additional industry clusters in which EB-5 capital investments have been made, then the approval notice should identify the previously approved industry clusters, as well as the newly approved industry clusters.

Form I-924 Approval Procedures, Cont'd

- If the amendment request involves the review of an exemplar Form I-526 petition, then the approval notice should identify the specific documents and their version dates that were reviewed.
- The approval notice should also include a reminder to the Regional Center regarding the Form I-924A filing requirement that commences for FY2011.
- This document must be submitted in support of all Form I-526 petitions that claim affiliation with the Regional Center.

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Form I-924A Supplement

- The Form I-924A, Supplement to Form I-924, will be the vehicle for a yearly RC reporting requirement pursuant to newly amended 8 CFR 204.6(m)(6).
- Each approved RC will be required to file the I-924A to report RC-related activities for the preceding fiscal year within 90-days of the end of the fiscal year (on or before December 29th of the calendar year in which the fiscal year ended.)
- **The submission of Form I-924A will not be required to report on RC EB-5 activity in FY10, but will be required to be filed by all approved RCs for FY11 on or before December 29, 2011.**
- There is no filing fee for the Form I-924A.
- USCIS plans to publish summarized RC data in order to be responsive to requests for this information from a broad spectrum of USCIS's external stakeholders, to include members of Congress, other federal agencies, state agencies, and major media outlets.

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Proposed I-924A, Cont'd

- USCIS plans to publish data provided each year by all designated regional centers, to include attributes of the RC-affiliated capital investments, such as:

1. the geographic areas and industry categories receiving investment capital;
2. The volume of regional center affiliated capital invested, and;
3. The number of jobs created or maintained as a result of the capital investments.

This summarized data will be published on the USCIS Web site for each fiscal year following the publishing of the Form I-924A.

U.S. Citizenship and Immigration Services

Form I-924 Termination Procedures

- USCIS may terminate the status of an approved RC under the termination procedures provided in 8 CFR 204.6(m)(6), upon a determination that the RC no longer serves the purpose of the Pilot Program by promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.
- USCIS must notify the RC through the issuance of a Notice of Intent to Terminate (ITT) of the reasons for termination and provide the RC with 30 days to provide evidence in rebuttal of the issues raised in the ITT.
- If USCIS determines that the RC's participation in the Pilot Program should be terminated, USCIS shall notify the RC of the decision and of the reasons for termination. As provided in 8 CFR 103.3, the RC may appeal the decision to USCIS within 30 days after the service of notice.

Form I-924 Termination Procedures, Cont'd

- USCIS will notify the public via the USCIS website of the termination of any previously approved RC, upon the completion of the administrative appeals process in the matter, if any.
- If USCIS determines that the RC's response to the ITT overcomes the reasons for termination, then USCIS shall affirm the approval of RC's designation for participation in the Pilot Program in writing.
- Note: Amended 8 CFR 204.6(m)(6), effective 11/23/2010, provides for the termination of an RC using the procedures outlined above if an RC fails to provide an RC fails to submit required information of its EB-5 activities (Form I-924A).

Questions?

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Economic Analysis & Multipliers

- What's the goal of an economic analysis?
  - For EB-5—JOB CREATION
- What is an Input-Output model?
  - A mathematical representation of our entire economy and the interconnections among consumers, businesses, government & foreign suppliers.
- What is a multiplier?
  - A new, expanding, or contracting industry can have impacts beyond the jobs and income generated by the original project. A multiplier is a single number which summarizes the total economic benefits resulting from a change in the local economy.

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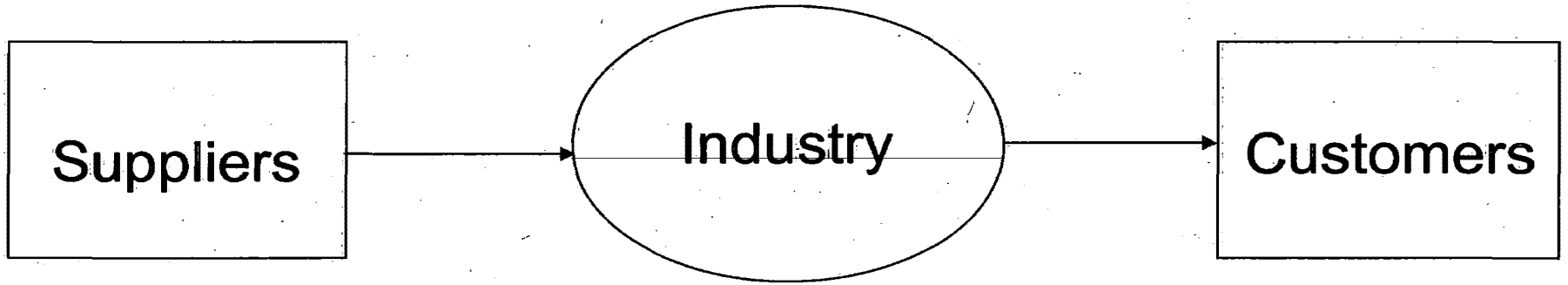
Economic Connections



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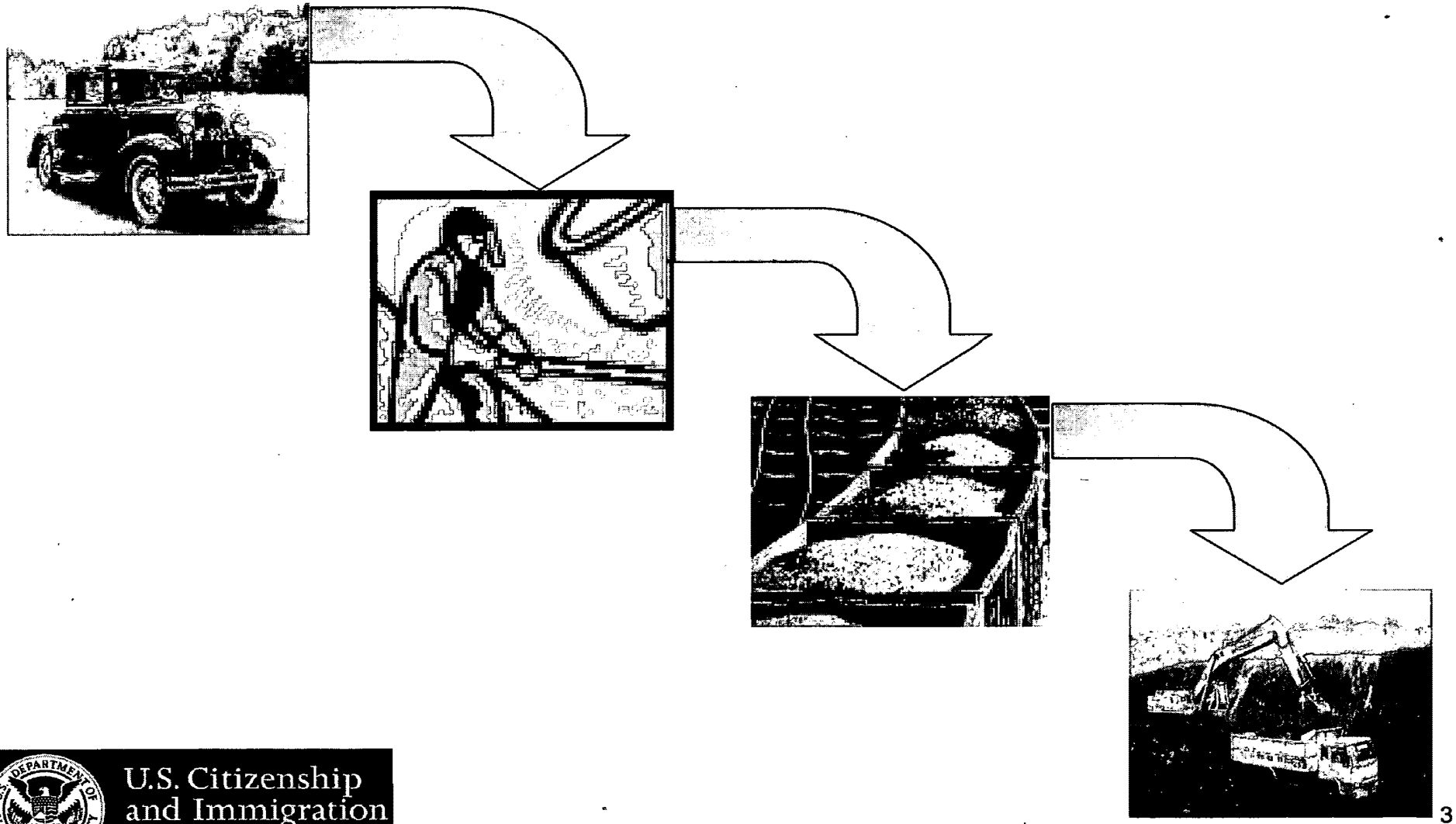
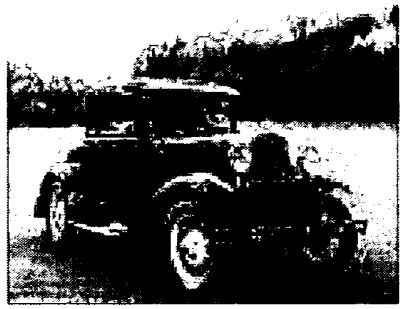
Multiplier Basics
Backward Linkages

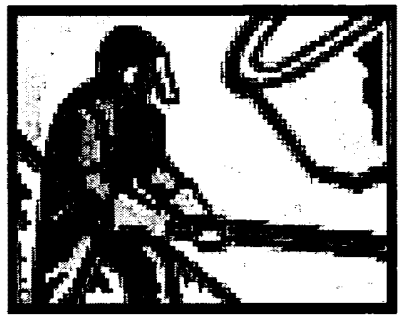


U.S. Citizenship and Immigration Services

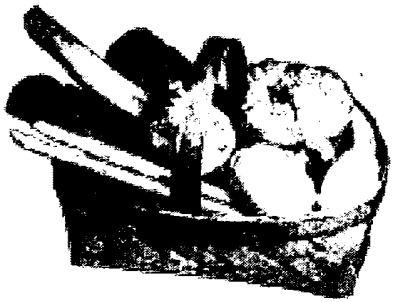
Multipliers--Critical Concept
Auto Industry Example



Direct Jobs=Auto Workers



Indirect Jobs=Steel Workers



Induced Jobs=Bakery Workers

U.S. Citizenship and Immigration Services

The Big Picture

- Using multipliers to estimate impacts requires the user to provide detailed information including: geographic scope, industry data, and initial changes in output, employment, & earnings.
- This information stems from a well-reasoned business plan.
- Use publicly available sources for data.
- To ensure analysis is readily reproducible include source data and RIMS II tables (if applicable).

U.S. Citizenship and Immigration Services

How to use Multipliers for EB-5?

- Direct Jobs Method
  - Several Methods to calculate
    - Square Foot per employee
    - Earnings method
    - Business Plan estimates

- Capital Investment
  - Straight forward

U.S. Citizenship and Immigration Services

Direct Jobs
Square Footage Method

U.S. Commercial Regional Center

Case Study

U.S. Citizenship and Immigration Services

Important Concepts

Household Income is the sum of money income received in the calendar year by all household members 15 years old and over, including household members not related to the householder, people living alone, and other nonfamily household members. Included in the total are amounts reported separately for wage or salary income; net self-employment income; interest, dividends, or net rental or royalty income or income from estates and trusts; Social Security or Railroad Retirement income; Supplemental Security Income (SSI); public assistance or welfare payments; retirement, survivor, or disability pensions; and all other income.

Important Concepts

Per Capita Income is the mean income computed for every man, woman, and child in a geographic area. It is derived by dividing the total income of all people 15 years old and over in a geographic area by the total population in that area. Note -- income is not collected for people under 15 years old even though those people are included in the denominator of per capita income. This measure is rounded to the nearest whole dollar. Unlike median household income, which is estimated annually for states and counties, per capita income is available only for 1999.

Important Concepts

Earnings consists of: gross money wage or salary income, including commissions, tips and cash bonuses, before deductions; net income from nonfarm self-employment (gross receipts minus business expenses); and net income from farm self-employment (gross receipts minus farm expenses).

U.S. Citizenship and Immigration Services

Direct Jobs Earnings Method

CCAE Regional Center Amendment

Case Study

U.S. Citizenship and Immigration Services

Direct Jobs
Business Plan Method

Northern Illinois Regional Center

Case Study

U.S. Citizenship and Immigration Services

Capital Investment Method

CMB Exports Amendment

Case Study

U.S. Citizenship and Immigration Services

Common Pitfalls

- Defining the study area incorrectly
- Comparing apples to oranges
- Averaging multipliers
- Treating employment impacts as FTE
- Double counting direct impacts
- Incorrectly identifying initial impacts
- Confuse forward linkages with backward linkages

Geography 101
Census Bureau's Hierarchy

United States

Region

Division

State

County

County subdivision

Place

Census tract

Block group

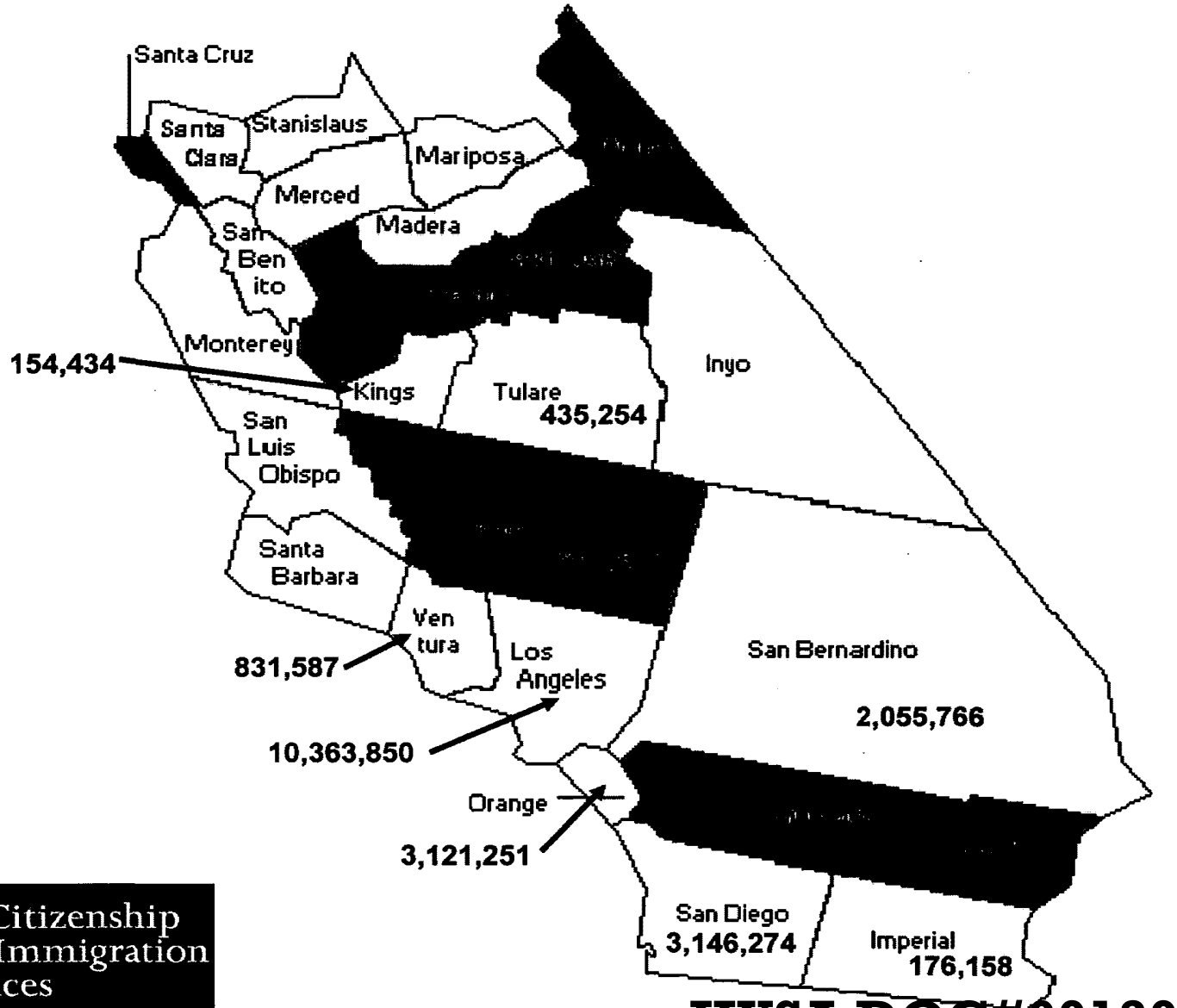
Census block

Competing Geography

- Regional Center Geography Focus—BIG
- TEA Geography Focus—SMALL
- Metropolitan Statistical Area
  - must have at least one urbanized area of 50,000 or more inhabitants
- Micropolitan Statistical Area
  - at least one urban cluster of at least 10,000 but less than 50,000 population
- Example—mixing geography from Miami RC case
  - Miami-Dade County **2,385,876**
  - Miami-Ft Lauderdale-Pompano MSA **5,501,752**

U.S. Citizenship and Immigration Services

TEA Issues

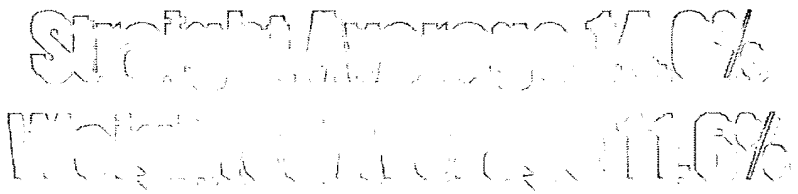


U.S. Citizenship and Immigration Services

TEA Issues

(Annual Average 2009)

County	Population	Unemployment %
Ventura	831,587	10.0%
Kern	817,517	14.4%
San Bernardino	2,055,766	13.0%
LA	10,363,850	11.6%
Orange	3,121,251	9.0%
Riverside	2,088,322	13.6%
San Diego	3,146,274	9.7%
Imperial	176,158	28.2%
Tulare	435,254	15.3%
Kings	154,434	14.6%
Fresno	931,098	15.1%



U.S. Citizenship and Immigration Services

How to Calculate a Weighted Average

County	Civilian Labor Force (CLF)	# of Unemployed
Ventura	431,300	43,100
Kern	366,900	52,800
San Bernardino	864,300	112,700
LA	4,896,100	567,500
Orange	1,594,200	143,200
Riverside	913,900	123,900
San Diego	1,557,400	151,300
Imperial	76,200	21,500
Tulare	205,400	31,400
Kings	61,200	8,900
Fresno	438,700	66,200
Total	11,405,600	1,322,500

Total # Unemployed / Total CLF = Unemployed Weighted Average

1,322,500 / 11,405,600 = 11.6%

U.S. Citizenship and Immigration Services

Other TEA Issues

- Seasonally adjusted data
- Annual averages
- Rolling annual averages
- Monthly vs. annual
- Geography
- Census Tract caution

U.S. Citizenship and Immigration Services

Research Techniques

- How to recognize good or bad sources?
- How to look for information?
- Where to look for good information?

U.S. Citizenship and Immigration Services

Where to get more information?

- Bureau of Economic Analysis
- Census Bureau
- Bureau of Labor Statistics (LAUS)
- Small Business Administration
- National Associations

U.S. Citizenship and Immigration Services

Using RIMS II Multipliers

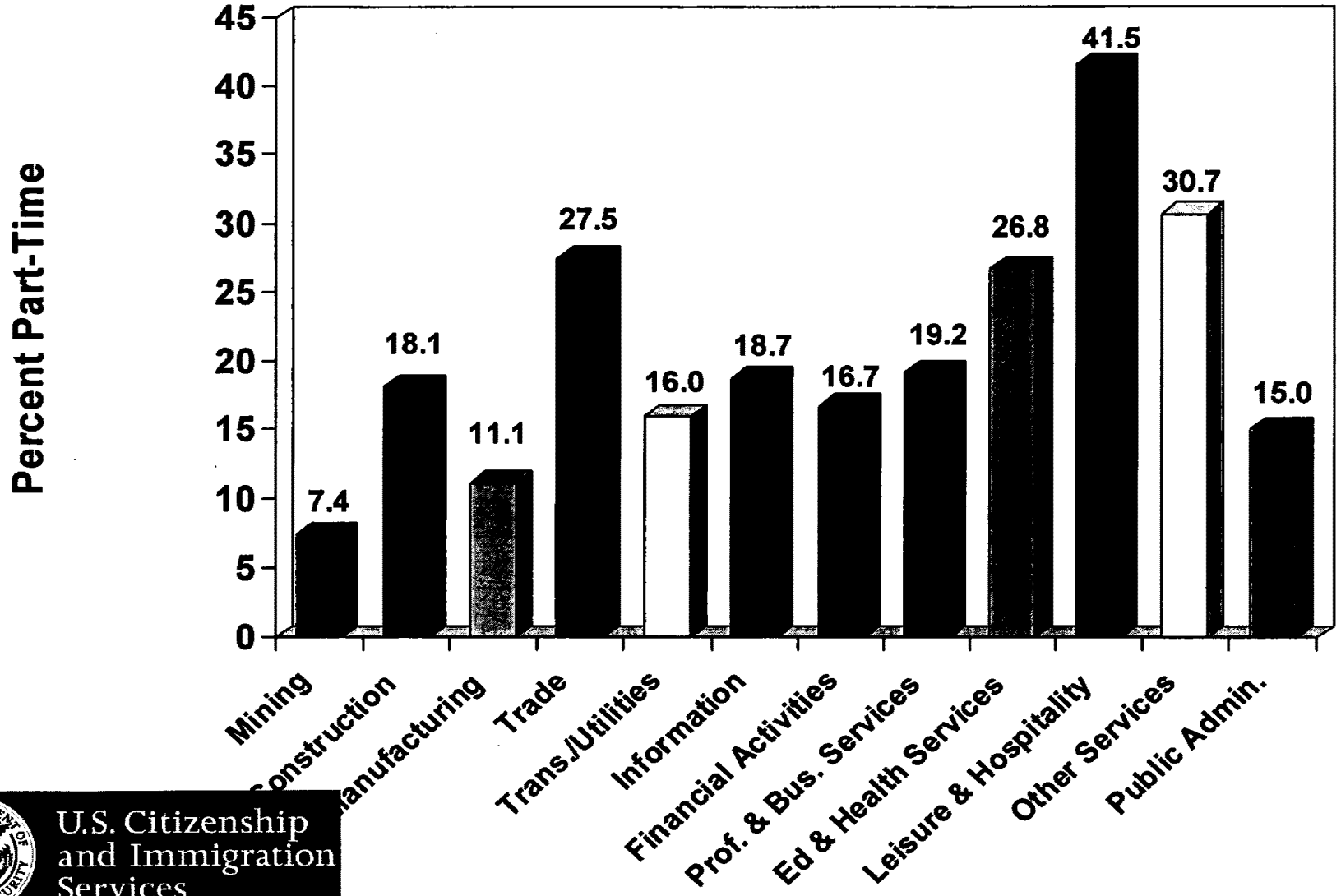
If you have:	Then use this multiplier:
Initial change in number of jobs	Direct-Effect Employment
Initial change in household earnings	Direct-Effect Earnings
Change in final demand	Final Demand: Output, Earnings, Employment* or Value-Added

*Final demand employment multipliers represent change in jobs per $1 million change in final demand. All other final demand multipliers are based on a $1 change in final demand.

U.S. Citizenship and Immigration Services

Important Concepts

Source: Bureau of Labor Statistics



U.S. Citizenship and Immigration Services

MATERIAL MISREPRESENTATION & FRAUD

Public Law 107-273 introduced the terms "material misrepresentation. Where the Form I-526 or subsequent I-829 contains a "material misrepresentation", wherein a statement or representation in an eligible alien's Form I-526 or I-829, as originally filed or supplemented, or any accompanying documentation, which is determined in USCIS' discretion to be both false and a statement or representation which USCIS reasonably would attach importance in determining whether to grant the petition, without regard to the petitioner's or any other person's intent or to whether or not USCIS detrimentally relied upon the statement or representation. Material misrepresentation also includes an omission that has the effect of making any material representation in the Form I-526 or I-829 or accompanying documentation false. As an example, if the alien failed to mention in his or her I-526 petition that the alien's investment capital was to be guaranteed to be redeemed or paid back in full by way of a verbal promise or a separate written commitment not contained in the petition's supporting documents, or that the alien's investment capital had been returned to the alien prior to the filing of the alien's Form I-829 petition, then the alien's claim in the petition that he or she had substantially complied with the capital investment requirement would constitute a material misrepresentation. USCIS formulated this definition of material misrepresentation from its common law meaning. See Kungys v. U.S., 485 U.S. 759 (1988). [In a concurring opinion, the court held that a misrepresentation was material if a reasonable man would be influenced by its existence or nonexistence in determining his choice of action.]

INA: ACT 216A - CONDITIONAL PERMANENT RESIDENT STATUS FOR CERTAIN ALIEN ENTREPRENEURS, SPOUSED, AND CHILDREN

Sec. 216A. [8 U.S.C. 1186b]

(a) In general.-

(1) Conditional basis for status.-Notwithstanding any other provision of this Act, an alien entrepreneur (as defined in subsection (f)(1)), alien spouse, and alien child (as defined in subsection (f)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

(2) Notice of requirements.-

(A) At time of obtaining permanent residence.-At the time an alien entrepreneur, alien spouse, or alien child obtains permanent resident status on a conditional basis under paragraph (1), the Attorney General shall provide for notice to such an entrepreneur, spouse, or child respecting the provisions of this section and the requirements of subsection (c)(1) to have the conditional basis of such status removed.

(B) At time of required petition.-In addition, the Attorney General shall attempt to provide notice to such an entrepreneur, spouse, or child, at or about the beginning of the 90-day period described in subsection (d)(2)(A), of the requirements of subsection (c)(1).

(C) Effect of failure to provide notice.-The failure of the Attorney General to provide a notice under this paragraph shall not affect the enforcement of the provisions of this section with respect to such an entrepreneur, spouse, or child.

(b) Termination of status if finding that qualifying entrepreneurship improper.-

(1) In general.-In the case of an alien entrepreneur with permanent resident status on a conditional basis under subsection (a), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that-

(A) the investment in 1/ the commercial enterprise was intended solely as a means of evading the immigration laws of the United States,

(B) (i) 1/ the alien did not invest, or was not actively in the process of investing, the requisite capital; or

(ii) 1/ the alien was not sustaining the actions described in clause (i) throughout the period of the alien's residence in the United States; or

(C) the alien was otherwise not conforming to the requirements of section 203(b)(5), then the Attorney General shall so notify the alien involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (and the alien spouse and alien child) involved as of the date of the determination.

(2) Hearing in removal proceeding.-Any alien whose permanent resident status is terminated under paragraph (1) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that a condition described in paragraph (1) is met.

(c) Requirements of Timely Petition and Interview for Removal of Condition.-

(1) In general.-In order for the conditional basis established under subsection (a) for an alien entrepreneur, alien spouse, or alien child to be removed-

(A) the alien entrepreneur must submit to the Attorney General, during the period described in subsection (d)(2), a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information described in subsection (d)(1), and

(B) in accordance with subsection (d)(3), the alien entrepreneur must appear for a personal interview before an officer or employee of the Service respecting the facts and information described in subsection (d)(1).

(2) Termination of permanent resident status for failure to file petition or have personal interview.-

(A) In general.-In the case of an alien with permanent resident status on a conditional basis under subsection (a), if-

(i) no petition is filed with respect to the alien in accordance with the provisions of paragraph (1)(A), or

(ii) unless there is good cause shown, the alien entrepreneur fails to appear at the interview described in paragraph (1)(B) (if required under subsection (d)(3)), the Attorney General shall terminate the permanent resident status of the alien (and the alien's spouse and children if it was obtained on a conditional basis under this section or section 216) as of the second anniversary of the alien's lawful admission for permanent residence.

(B) Hearing in removal proceeding.-In any removal proceeding with respect to an alien whose permanent resident status is terminated under subparagraph (A), the burden of proof shall be on the alien to establish compliance with the conditions of paragraphs (1)(A) and (1)(B).

(3) Determination after petition and interview.-

(A) In general.-If-

(i) a petition is filed in accordance with the provisions of paragraph (1)(A), and

(ii) the alien entrepreneur appears at any interview described in paragraph (1)(B), the Attorney General shall make a determination, within 90 days of the date of the such filing

or interview (whichever is later), as to whether the facts and information described in subsection (d)(1) and alleged in the petition are true with respect to the qualifying commercial enterprise.

(B) Removal of conditional basis if favorable determination.-If the Attorney General determines that such facts and information are true, the Attorney General shall so notify the alien involved and shall remove the conditional basis of the alien's status effective as of the second anniversary of the alien's lawful admission for permanent residence.

(C) Termination if adverse determination.-If the Attorney General determines that such facts and information are not true, the Attorney General shall so notify the alien involved and, subject to subparagraph (D), shall terminate the permanent resident status of an alien entrepreneur, alien spouse, or alien child as of the date of the determination.

(D) Hearing in removal proceeding.-Any alien whose permanent resident status is terminated under subparagraph (C) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that the facts and information described in subsection (d)(1) and alleged in the petition are not true with respect to the qualifying commercial enterprise.

(d) Details of Petition and Interview.-

(1) 2/ Contents of petition.--Each petition under subsection (c)(1)(A) shall contain facts and information demonstrating that the alien

(A)(i) invested, or is actively in the process of investing, the requisite capital; and

(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United States; and

(B) is otherwise conforming to the requirements of section 203(b)(5) .

(2) Period for filing petition.-

(A) 90-day period before second anniversary.-Except as provided in subparagraph (B), the petition under subsection (c)(1)(A) must be filed during the 90-day period before the second anniversary of the alien's lawful admission for permanent residence.

(B) Date petitions for good cause.-Such a petition may be considered if filed after such date, but only if the alien establishes to the satisfaction of the Attorney General good cause and extenuating circumstances for failure to file the petition during the period described in subparagraph (A).

(C) Filing of petitions during removal.-In the case of an alien who is the subject of removal hearings as a result of failure to file a petition on a timely basis in accordance with subparagraph (A), the Attorney General may stay such removal proceedings against an alien pending the filing of the petition under subparagraph (B).

(3) Personal interview.-The interview under subsection (c)(1)(B) shall be conducted within 90 days after the date of submitting a petition under subsection (c)(1)(A) and at a local office of the Service, designated by the Attorney General, which is convenient to the parties involved. The Attorney General, in the Attorney General's discretion, may waive the deadline for such an interview or the requirement for such an interview in such cases as may be appropriate.

(e) Treatment of Period for Purposes of Naturalization.-For purposes of title III, in the case of an alien who is in the United States as a lawful permanent resident on a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence.

(f) Definitions.-In this section:

(1) The term "alien entrepreneur" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) under section 203(b)(5).

(2) The term "alien spouse" and the term "alien child" mean an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the spouse or child, respectively, of an alien entrepreneur.

(3) 3/ The term `commercial enterprise' includes a limited partnership.

FOOTNOTES FOR SECTION 216A

INA: ACT 216A FN 1

FN 1 Section 216A(b)(1)(A) and (B) were amended by section 11036(b)(1)(A) and (B) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section 11036 shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section 216A(c)(1)(A) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.

INA: ACT 216A FN 2

FN 2 Section 216A(d)(1) revised by section 11036(b)(2) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section 11036 shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section 216A(c)(1)(A) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.

INA: ACT 216A FN 3

FN 3 Section 216A(f)(3) added by section 11036(b)(3) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section 11036 shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section 216A(c)(1)(A) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.

§ 204.6(m)(6)Petitions for employment creation aliens.

Termination of participation of regional centers. 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. The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided 30 days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of intent to terminate. If USCIS determines that the regional center's participation in the Pilot Program should be terminated, USCIS shall notify the regional center of the decision and of the reasons for termination. As provided in 8 CFR 103.3, the regional center may appeal the decision to USCIS within 30 days after the service of notice.

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQPRD 70/6.1.8-P
AD06-04

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

From: Michael Aytes
Acting Associate Director, Domestic Operations

Date: November 23, 2005

Re: Handling of N-400s filed by Alien Entrepreneurs with Pending I-829s
Addition to *Adjudicator's Field Manual (AFM)* Chapter 22
(*AFM* Update AD06-04)

This memorandum provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers in the field regarding adjudication of the Form N-400, Application for Naturalization, filed by a conditional resident (CR) who has a pending Form I-829, Petition by Entrepreneur to Remove Conditions.

This guidance is effective immediately. Please direct any questions regarding this memorandum through appropriate channels.

Handling of N-400 filed by Alien Entrepreneurs with Pending I-829s
Addition to *Adjudicator's Field Manual (AFM)* Chapter 22
(*AFM* Update AD06-04)

Chapter 22 of the AFM does not currently contain guidance on the adjudication of Form N-400, Application for Naturalization, filed by alien entrepreneurs in conditional resident status (CR) with a pending Form I-829, Petition by Entrepreneur to Remove Conditions. Chapter 22 has been revised to add a new sub-chapter, 22.4(i).

Accordingly, the AFM is revised as follows:

(i) General. (Added [date of signature], AFM AD06-04.) This guidance applies only to alien entrepreneurs in conditional resident status (CR) with a pending Form I-829, Petition by Entrepreneur to Remove Conditions, who have filed a Form N-400, Application for Naturalization. These CRs will have one of the following EB-5 classification codes: N51-N58, T51-T53, T56-T58, I51-I53, I56-I58, C51-C53, C56-C58, R51-R53, or R56-R58. The E51- E58 classification codes are given once the conditions are removed.

> **NOTE 1:** If a CR has a status in the "N" series the District Adjudications Officer (DAO) should first check the U.S. Department of Justice Executive Office for Immigration Review (EOIR) system to see if the person has been ordered removed by the IJ and then follow the March 3, 2000 EB-5 Field Memo Number 9: Form I-829 Processing and the January 18, 2005 Memo on Extension of Status for Conditional Residents with Pending or Denied Form I-829 Petitions Subject to Public Law 107-273.
>
> **NOTE 2:** If a DAO checks the Central Index System (CIS) history and only sees an E51-E58 classification without the alien previously having a conditional classification (i.e. C51-C58, T51-T58, I51-I58, R51-R58), the DAO should then check the A-file to determine if there was a classification error at the time of admission or adjustment or if the error was a CIS update error. This issue must be resolved before moving forward on the adjudication of the Form N-400.

Except as otherwise specifically provided, no person shall be naturalized unless he or she has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Immigration and Nationality Act (the "Act"). See section 318 of the Act. A person may not be naturalized if his or her residence status is subject to any conditions. DAOs conducting naturalization examinations based on T-files, or even A-files, must ensure that applicants are in fact lawful permanent residents (LPR) not subject to conditions.

(1) Eligibility to file for naturalization while a Form I-829 is pending. A CR who has timely filed Form I-829 may submit a Form N-400 prior to the adjudication of the Form I-829. The regulations at 8 CFR 216.1 clearly state that CRs have the right to apply for naturalization. Thus, a CR may file a Form N-400 whether the Form I-829 filed by the CR has been adjudicated.

(2) The 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (P.L. 107-273). There are two categories of EB-5 cases: a group of approximately 800 cases that are subject to procedures and standards set forth in P.L. 107-273 and all others (which are adjudicated under standard EB-5 procedures). P.L. 107-273 applies to certain alien entrepreneur applications where the Form I-526, Immigrant Petition by Alien Entrepreneur, was approved after January 1, 1995 and prior to August 31, 1998, and the Form I-829 was timely filed prior to November 2, 2002 (even if the Form I-829 had been denied before November 2, 2002, if a motion to reopen was filed before January 2, 2003). The Public Law states that USCIS cannot deny any of these applications until implementing regulations have been published. As a result, these cases generally must remain pending until the regulations are published and USCIS commences its review of them pursuant to such regulations.

The California Service Center (CSC) will no longer de-schedule in Claims 4 the examination of naturalization applicants who are alien entrepreneur CRs subject to P.L. 107-273. As such, as of the date of this memorandum, these applications may only proceed to examination, subject to the procedures described below.

(3) Adjudicating the Form N-400 if the Form I-829 is pending. A DAO who is conducting the examination of a naturalization applicant who was admitted as a CR, based on the approval of a Form I-526 and who subsequently timely filed Form I-829, should ascertain the current status of the Form I-829 prior to proceeding with a final adjudication of the Form N-400. A Form N-400 shall not be approved under any circumstances prior to the adjudication of a pending Form I-829 and the removal of conditions on the CR's status, unless the applicant has obtained LPR status through another avenue or is eligible to naturalize based on military service under section 329 of the Act.

(A) Form N-400 filed with a pending Form I-829 where the applicant has since obtained LPR status on other grounds (applies to all EB-5 cases, including P.L. 107-273 cases). If a Form I-829 is pending at the time of the CR's examination on the Form N-400, but the applicant was admitted as an LPR on other grounds (e.g., marriage to U.S. citizen qualifying), thereby rendering the Form I-829 moot, only then may the DAO proceed with the naturalization examination. If the applicant demonstrates eligibility for naturalization, including the requirement in Section 318 of the Act that the applicant has been admitted as an LPR, the DAO must obtain a written withdrawal of the Form I-829 from the applicant. Such withdrawal should be annotated in MFAS and a copy of the written withdrawal interfiled with the Form I-829. In addition, the DAO should notify the appropriate Service Center EB-5 point-of-contact of the withdrawal by contacting the California Service Center or the Texas Service Center as appropriate, and by

faxing a copy of the withdrawal to the relevant Service Center (CSC: 949-389-8027 and TSC: 214-489-8017). These procedures apply to all EB-5 cases, including those subject to P.L. 107-273.

(B) Form N-400 filed with a pending Form I-829 where the applicant has not obtained LPR status on other grounds.

i. Applications subject to P.L. 107-273.

1. Which applications are subject to P.L.107-273?

Applications by alien entrepreneur CRs are subject to P.L. 107-273 if the Form I-526 was approved after January 1, 1995 and prior to August 31, 1998, and the Form I-829 was timely filed prior to November 2, 2002 (even if the Form I-829 had been denied before November 2, 2002, if a motion to reopen was filed before January 2, 2003).

2. Guidance for handling applications subject to P.L. 107-273:

The DAO may conduct the naturalization examination. However, if the applicant is still a CR, the DAO should deny the application on the basis of section 318 of the Act (as well as on any other applicable ground). Before taking final action on the application, the DAO should confirm that the case is subject to P.L. 107-273 by contacting the Investor and Regional Center Unit (IRCU), Headquarters for further instructions. The IRCU will coordinate any action with the relevant Service Center EB-5 point-of-contact.

ii. Applications not subject to P.L. 107-273.

The DAO may conduct the naturalization examination, but must contact the Service Center with jurisdiction over the Form I-829 before taking any final action.

Only officers fully trained in EB-5 law, procedures, and the relevant precedent decisions may adjudicate Forms I-829. As a result, the DAO conducting the naturalization examination shall not attempt to adjudicate the Form I-829, but instead must contact the appropriate Service Center or Regional office EB-5 point-of-contact to obtain adjudication of the Form I-829 before proceeding with a determination on the N-400.

Once the Form I-829 is adjudicated, including the appropriate update in MFAS, the DAO may proceed with the adjudication of the Form N-400. If

the Service Center approves the Form I-829, the Service Center will update MFAS. If the Form I-829 is approved, the form N-400 may be granted if the applicant is otherwise eligible for naturalization.

If the Form I-829 is denied, the Form N-400 must be denied on the basis of Section 318 of the Act because the applicant's resident status remains subject to conditions. The Service Center will then send the A file to the district office, as designated by the district EB-5 POC, for the issuance of the denial and the MFAS update.

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Domestic Operations (MS-2010)
Washington, DC 20529-2010

U.S. Citizenship and Immigration Services

HQ 70/6.2
AD 09-38

DEC 17 2009

Memorandum

TO: Field Leadership

FROM: Donald Neufeld
Acting Associate Director, Domestic Operations

SUBJECT: 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)

I. Purpose

This memorandum provides instruction to California Service Center (CSC) personnel involved in the adjudication of EB-5 Regional Center Proposals, and affiliated Forms I-526, Immigrant Petition by Alien Entrepreneur and Forms I-829, Petition by Entrepreneur to Remove Conditions. This memorandum rescinds in its entirety the USCIS memorandum, *Establishment of an Investor and Regional Center Unit*, dated January 19, 2005, and provides guidance regarding:

- The timing of the adjudication of EB-5 eligibility issues;
- The procedures to be used when there appears to be a material change in circumstances relating to an eligibility issue following the issue's prior adjudicative resolution;
- Targeted Employment Area (TEA) determinations;
- How an alien may seek approval of a new Form I-526 petition in order to change the focus of his or her investment to a new capital investment project or commercial enterprise; and
- The respective EB-5 program responsibilities of CSC and Service Center Operations (SCOPS) personnel.

This memorandum also addresses the issue of communication with non-USCIS individuals or entities regarding case specific information.

II. Background

The Immigrant Investor Program, also known as "EB-5", was created by Congress in 1990 under § 203(b)(5) of the Immigration and Nationality Act (INA) to stimulate the U.S. economy through job creation and capital investment by alien investors. Alien investors have the opportunity to obtain lawful permanent residence in the United States for themselves, their spouses, and their minor unmarried children by making a certain level of capital investments and associated job creation or preservation.

There are two distinct EB-5 pathways for an alien investor to gain lawful permanent residence, the Basic Program and the Regional Center Pilot Program. Both programs require that the alien investor make a capital investment of either $500,000 or $1,000,000 (depending on whether the investment is in a TEA or not) in a new commercial enterprise located within the United States. The new commercial enterprise must create or preserve 10 full-time jobs for qualifying U.S. workers within two years of the alien investor's admission to the United States as a Conditional Permanent Resident (CPR).[1] When making an investment in a new commercial enterprise affiliated with a USCIS-designated regional center under the Regional Center Pilot Program, an alien investor may satisfy the job creation requirements of the program through the creation of either direct or indirect jobs. Notably, an alien investing in a new commercial enterprise under the Basic Program may only satisfy the job creation requirements through the creation of direct jobs.

Note: *Direct jobs* are those jobs that establish an employer-employee relationship between the newly established commercial enterprise and the persons that they employ.

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[1] The statutory framework for the EB-5 program can be found at INA sections 203(b)(5) and 216A, which were modified by:

- Section 610 of Pub. L. 102-395, as amended by section 116(a)(l) of Pub. L. 105-119 and section 402(a) of Pub. L. 106-396;
- Section 4 of Pub. L. 108-156, relating to the Regional Center Pilot Program; and
- Sections 11031-11034 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, relating to certain aliens with conditional resident status who filed I-829 petitions before November 2, 2002.

The regulatory framework for the EB-5 program can be found at 8 CFR 204.6 and 8 CFR 216.6.

There are also four EB-5 precedent decisions:

- *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998);
- *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998). **Note:** Pub. L. 107-273 eliminated the requirement set forth in *Izummi* that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations;
- *Matter of Hsiung*, 22 I&N, Dec. 201 (BIA 1998); and
- *Matter of Ho*, 22 I&N Dec. 206 (BIA 1998).

Indirect jobs are the jobs held by persons who work outside the newly established commercial enterprise. For example, indirect jobs include employees of the producers of materials, equipment, and services that are used by the commercial enterprise. There is also a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. *Induced jobs* are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

Under the Regional Center Pilot Program, an individual or entity must file a Regional Center Proposal[2] with the CSC to request USCIS approval of the proposal and designation of the entity that filed the proposal as a regional center. A "Regional Center" is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. The Regional Center Proposal must provide a framework within which individual alien investors affiliated with the regional center can satisfy the EB-5 eligibility requirement and create qualifying EB-5 jobs.

The Regional Center Proposal may also include 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 so that USCIS may determine if they are in compliance with established EB-5 eligibility requirements. Providing these documents may facilitate the adjudication of the related I-526 petitions by identifying any issues that could pose problems when USCIS is adjudicating the actual petitions. For example, if a new commercial enterprise's limited partnership (LP) agreement contains a redemption clause guaranteeing the return of the alien investor's capital investment, then the alien investor's capital investment will not be a qualifying "at-risk" investment for EB-5 purposes. Likewise, if the LP agreement requires the payment of fees from the alien investor's capital investment of $1,000,000 (or $500,000 if in a TEA) to such extent that the investment will be eroded below the qualifying level, preventing the full infusion of sufficient capital into the job creating enterprise, then the alien investor's capital investment will not meet the required EB-5 level of investment. The approval of a Regional Center Proposal containing defects such as these is not in the best interest of the prospective regional center or the USCIS EB-5 program as the end result will most likely be the denial of the individual alien investor's Form I-526 petition.

Any individual Form I-526 and Form I-829 petitions claiming new commercial enterprise affiliation with a regional center and thus EB-5 eligibility based on indirect job creation must be denied if they are filed prior to the approval of the Regional Center Proposal.

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[2] USCIS is developing a Regional Center Proposal form through the standard Office of Management and Budget (OMB) form development process. The new form will require the submission of a filing fee for the filing of an initial Regional Center Proposal and for Proposal Amendments that are filed subsequent to the initial approval and designation of the regional center. There is no filing fee for the submission of Regional Center Proposals and Proposal Amendments at the present time.

Each alien investor must file an individual Form I-526 petition to establish his or her eligibility for classification as an EB-5 alien investor under either the Basic Program or the Regional Center Pilot Program. If the Form I-526 petition is approved, then the alien must file a Form I-485, Application to Register Permanent Residence or Adjust Status, to adjust status in the United States, or apply for an immigrant visa abroad, in order to obtain CPR status. The alien investor must file a Form I-829 petition within the 90-day period immediately preceding the two-year anniversary of his or her admission to the United States or adjustment of status as a CPR. The Form I-829 petition must demonstrate that all of the terms and conditions of the EB-5 program have been met by the alien investor in order for the conditions on his or her permanent residence to be removed.

III. Rationale for Updated Field Guidance

A. Streamlining EB-5 Case Processing.

USCIS wishes to streamline the Regional Center Proposal and EB-5 petitioning processes. Distinct EB-5 eligibility requirements must be met at each stage of the EB-5 immigration process. If USCIS evaluates and approves certain aspects of an EB-5 investment, that favorable determination should generally be given deference at a subsequent stage in the EB-5 process. However, a previously favorable decision may not be relied upon in later proceedings where, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation in the record of proceeding, or the previously favorable decision is determined to be legally deficient.

USCIS is aware that there are times when Immigration Service Officers (ISOs) question whether a previously established EB-5 eligibility requirement has been met at a later stage in the process even though the facts of the case have not changed. USCIS is also aware that some designated regional centers have subsequently made material alterations to documentation initially provided in support of the regional center proposal. For example, there have been cases where a regional center has made significant changes to the organizational documentation, the transfer of capital mechanisms, or other aspects of the new commercial enterprise after approval of the regional center proposal. This documentation was changed to such a degree that it no longer resembled the documentation upon which USCIS based the approval of the Regional Center Proposal, and it appeared that the new commercial enterprise would no longer comply with EB-5 Program requirements.

In some instances, the adjudication of EB-5 petitions has been prolonged due to the issuance of requests for evidence (RFEs) that inappropriately seek to revalidate previously favorable determinations. Likewise, the finalization of EB-5 petitions have

been delayed due to the material alteration of documentation vetted during the Regional Center Proposal Process, requiring that previously decided issues be re-adjudicated within the EB-5 petitioning processes. This has prompted USCIS to deny EB-5 petitions.[3] Information provided in support of EB-5 petitions may also prompt USCIS to reopen a Regional Center Proposal and ultimately terminate the regional center designation under 8 CFR 204.6(m)(6) if the regional center is shown to be operating in a manner not in accordance with section §610(a) of Public Law 102-395.

In light of the above, USCIS is incorporating guidance into the AFM that highlights the adjudicative issues to be resolved at each stage of the Regional Center Proposal and EB-5 petitioning processes. In addition, the guidance outlines the factors that should be in place in order to revisit previously approved EB-5 eligibility requirements at a later stage in the process. USCIS is also adding guidance into the AFM update that explains how a regional center may provide an exemplar Form I-526 with the supporting documentation required by 8 CFR 204.6 in order to determine if the documentation is EB-5 compliant, and thus can generally be favorably acted upon if submitted unaltered in support of an actual Form I-526 petition.

B. Changes in Form I-526 Business Plans.

USCIS is aware that some EB-5 aliens may encounter difficulties when unforeseen circumstances cast doubt on the achievement of the requisite job creation as outlined in an approved Form I-526 petition. This may occur when the job creating capital investment project or commercial enterprise that was relied upon for the approval of the Form I-526 petition fails, or otherwise cannot be completed, within the alien's two-year period of conditional residence. The statutory structure of the EB-5 program and relevant precedent decisions limit an alien entrepreneur's options when a planned investment project fails. 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 and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment.[4] The business plan in the Form I-526 petition may not be materially changed after the petition has been filed.[5] In addition, USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions beyond the timeframes outlined in INA section 216A(d)(2) and 8 CFR 216.6(a) and (c).

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[3] EB-5 petitioners must establish eligibility as of the date of filing of the petition. See 8 CFR 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Note also that 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 USCIS requirements. *Matter of Izummi*, 22 I&N Dec. at 175.

[4] See 8 CFR 216.6(c).

[5] See *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998) and 8 CFR 103.2(b).

As a result, USCIS is incorporating guidance into the AFM outlining the procedures for an ISO to follow when adjudicating:

- A new Form I-526 petition seeking to change the capital investment and job creation scheme outlined in an alien's previously filed Form I-526 petition; and
- If such new Form I-526 petition is approved, a Form I-485 application requesting re-adjustment of status.

C. Communication with EB-5 External Stakeholders.

It is critically important that all USCIS staff involved in the EB-5 Program understand that any case-specific communication with non-agency stakeholders may not be considered in the adjudication of an application or petition unless it is included in the record of proceeding of the case. USCIS may only provide information about specific cases to:

- The affected party in the proceeding; and
- The representative of the affected party, if any, who is identified on a properly executed Form G-28.[6] The agency will only recognize one attorney of record at a time as reflected in the most current Form G-28 available in the record.[7]

If USCIS receives evidence about a specific case from anyone other than an affected party or his or her representative, such information is not part of the record of proceeding and cannot be considered in adjudicative proceedings, unless the affected party has been given notice of such evidence and, if such evidence is derogatory, he or she has been given an opportunity to respond to the evidence as required in 8 CFR 103.2(b)(16). Note that the opinion of a USCIS official outside of the adjudicative process is not binding and no USCIS officer has the authority to pre-adjudicate a Regional Center Proposal or an EB-5 petition. *Matter of Izummi*, 22 I&N Dec. at 196.

In light of the above, USCIS staff is directed to include in the record of proceeding copies of all case-specific written communication with external stakeholders involving receipt of information relating to specific EB-5 Regional Center Proposals or individual petitions pending on or after the date of this memorandum. In the very limited instances where oral communication takes place between USCIS staff and external stakeholders regarding specific EB-5 cases, the conversation must either be recorded, or detailed minutes of the session must be taken and included in the record of proceeding. As provided above, if the documentary or oral evidence was not provided by the affected party or his or her representative, the party must be notified of the evidence.

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[6] See 8 CFR 103.3(a)(iii)(B), 103.2(a)(3). See also sections §§551(14) and 557(d) of the Administrative Procedures Act (APA).

[7] See 8 CFR 292.4(a) providing for substitution of counsel via subsequent execution and submission of a new G-28. See also 8 CFR 292.5(a) and (b), 103.2(a)(3), and 103.2(b)(11), all of which refer to a singular "attorney" or "representative" permitted to represent the petitioner or applicant.

The EB-5 program maintains an e-mail account at USCIS.ImmigrantInvestorProgram@dhs.gov for external stakeholders to use when seeking general EB-5 program information, inquiring about the status of pending cases, or requesting the expedite of a pending EB-5 case. USCIS personnel are instructed to direct all case-specific and general EB-5 related communications with external stakeholders through this email account, or through other established communication channels, such as the National Customer Service Center (NCSC), or the USCIS Office of Public Engagement.

USCIS believes that transparency in the administration of this program is critical to its success. USCIS is aware that some external stakeholders routinely contact SCOPS HQ personnel with questions regarding general EB-5 eligibility issues. SCOPS HQ has routinely responded directly to the external stakeholders in accordance with the EB-5 oversight authority delegated to the Investor and Regional Center Unit in the USCIS memorandum, *Establishment of an Investor and Regional Center Unit*, dated January 19, 2005. Unfortunately this method of communication is very resource intensive and only serves to inform the external stakeholders who contact SCOPS HQ. USCIS is formally rescinding the January 19, 2005, memo. SCOPS HQ will no longer respond to questions from external stakeholders regarding EB-5 eligibility issues that have not been vetted through the National Customer Service Center at (800) 375-5283, the EB-5 email account at USCIS.ImmigrantInvestorProgram@dhs.gov, or are raised through other established USCIS communication channels.

EB-5 eligibility issues that are raised through the EB-5 email account will be reviewed by the CSC EB-5 staff who will:

- Respond to those that involve routine EB-5 questions; and
- Raise issues involving novel adjudicative questions to SCOPS HQ personnel.

SCOPS HQ will publish EB-5 FAQs and in some cases, policy memoranda, on the USCIS website to address novel adjudicative issues raised by external stakeholders. This method of communication will promote transparency and the free flow of EB-5 related information in a manner that makes all EB-5 external stakeholders privy to the information, not just a select few.

IV. Field Guidance

USCIS EB-5 program staff are directed to follow the guidance provided in this memorandum in the adjudication of all Regional Center Proposals and EB-5 petitions pending or filed as of the date of this memo.

V. AFM Update

The Adjudicator's Field Manual is revised as follows:

1. Chapter 22.4(a)(2) of the AFM is revised to read as follows:

(2) Regional Center Pilot Program.

(A) Program Overview. The Regional Center Pilot Program was first instituted in 1992. Three thousand of the 10,000 total available EB-5 visas are set aside for aliens who invest in a USCIS designated "regional center" in the United States organized "for the promotion of economic growth, including improved regional productivity, job creation, and increased domestic capital investment." Section 610 of Pub. L. 102-395, as amended by section 116(a)(l) of Pub. L. 105-119 and section 402(a) of Pub. L. 106-396.

An alien investing in a new commercial enterprise affiliated with and located in a regional center is not required to demonstrate that the new commercial enterprise itself directly employs ten U.S. workers; a showing of indirect job creation and improved regional productivity will suffice. Implementing regulations for the Pilot Program are found at 8 CFR 204.6(m).

Note: *Direct jobs* are those jobs that establish an employer-employee relationship between the commercial enterprise and the persons that they employ. Regional centers typically use the RIMS II or IMPLAN economic models to determine the number of indirect jobs that will be created through investments in the regional center's investment projects. *Indirect jobs* are the jobs held by persons who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise, such as steel producers or outside firms that provide accounting services. There is a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. *Induced jobs* are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

A Regional Center Proposal must be filed with the CSC to request USCIS approval of the proposal and designation of the entity that filed the proposal as a regional center. A "Regional Center" is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. The Regional Center Proposal must demonstrate that capital investments made by individual alien investors within the geographic area of the regional center will satisfy the EB-5

eligibility requirements in order to create qualifying EB-5 jobs. The Regional Center Proposal should also demonstrate that the new 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 are in compliance with established EB-5 eligibility requirements.

(B) Regional Center Proposal EB-5 Eligibility Requirements. Regional Center Proposals must demonstrate the following EB-5 eligibility requirements in order to be approved:

(i) A clearly identified, contiguous geographical area for the regional center. If the regional center proposal bases its predictions regarding the number of direct or indirect jobs that will be created through EB-5 investments in the regional center, in whole or in part, by offering investment opportunities to EB-5 investors with the reduced $500,000 threshold, then the Targeted Employment Areas (TEAs), Rural Areas (areas with populations under 20,000 people) and areas of high unemployment (areas with unemployment rates 150% or more of the national rate), should be identified. Note: 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.

(ii) A detailed description of how EB-5 capital investment within the geographic area of the regional center will create qualifying EB-5 jobs, either directly or indirectly. This analysis must be supported by economically and statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported [if any], and/or multiplier tables.

(iii) A detailed prediction of the proposed regional center's predicted impact regionally or nationally on household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and outside of the geographic area of the proposed Regional Center.

(iv) A description of the plans to administer, oversee, and manage the proposed Regional Center, including but not limited to how the regional center will:

- Be promoted to attract EB-5 alien investors, including a description of the budget for the promotional activity;
- Identify, assess and evaluate proposed immigrant investor projects and enterprises;
- Structure its investment capital, e.g., whether the investment capital to be sought will consist solely of alien investor capital or a combination of alien investor capital and domestic capital, and how the distribution of the investment capital will be structured, e.g. loans to developers, venture capital, etc.; and
- Oversee all investment activities affiliated with, through or under the sponsorship of the proposed Regional Center.

(C) The Regional Center Proposal may also include an "exemplar" Form I-526 petition that contains 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. USCIS will review the documentation to determine if they are in compliance with established EB-5 eligibility requirements. Providing these documents may facilitate the adjudication of the related I-526 petitions by identifying any issues that could pose problems when USCIS is adjudicating the actual petitions. For example, if a new commercial enterprise's limited partnership (LP) agreement contains a buy-back agreement (i.e. a redemption clause guaranteeing the return of the alien investor's capital investment), then the alien investor's capital investment will not be a qualifying "at-risk" investment for EB-5 purposes. Likewise, if the LP agreement requires the payment of fees from the alien investor's capital investment of $1,000,000 or $500,000, respectively, to the extent that the investment will be eroded below the qualifying level, preventing the full infusion of the capital into the job creating enterprise, then the alien investor's capital investment will not meet the required EB-5 level of investment. The approval of a Regional Center Proposal containing defects such as these is not in the best interest of the prospective regional center or the USCIS EB-5 program as the end result will most likely be the denial of the individual alien investor's Form I-526 petition.

Any individual Form I-526 and Form I-829 petitions claiming new commercial enterprise affiliation with a regional center and thus EB-5 eligibility based on indirect job creation must be denied if they are filed prior to the approval of the regional center's Regional Center Proposal.

(D) Regional Center Proposal and Amendment Request Processing. There are two general workflows for the adjudication of Regional Center

Proposals, one for Initial Regional Center Proposals and one for Regional Center Amendment requests. ISOs adjudicate cases within these workflows in "first in, first out" order, unless an expedite request is granted by the CSC director in accordance with the routine expedite criteria that is used for all cases filed with USCIS.

(E) Amended Regional Center Proposals.

(i) Amendments Due to Material Changes in EB-5 Related Organizational Structure or Capital Investment Instruments. Designated regional centers may elect to file an amended Regional Center Proposal and receive an updated approval of the regional center designation prior to the filing of individual EB-5 petitions that use supporting documentation relating to EB-5 eligibility issues that has been materially altered or is inconsistent with the documentation used as the basis for the approval of the regional center designation. Doing so, may assist in the streamlining of the adjudication of affiliated individual EB-5 petitions, as the altered documentation may otherwise need to be re-evaluated within the individual EB-5 petitions to determine if they still EB-5 compliant.

(ii) Other Amendments. Some Regional Center Proposals are approved for an industry segment using a hypothetical investment project in order to demonstrate how an actual investment project will be capitalized and operate in a manner that will create at least 10 direct or indirect jobs per alien investor. Individual Form I-526 petitions are then filed with copies of the business plan for the hypothetical investment project as well as the regional center's actual investment project. If the actual investment project is not different in a material way from the exemplar investment project, then the job creating efficacy of the investment project, if carried through as specified in the business plan will generally be established.

Regional centers may opt to file an amendment of their Regional Center Proposal in order to eliminate the uncertainty as to whether the actual investment project is different in a material way from the exemplar investment project that was approved in the Regional Center Proposal. The filing of these amendments is in the best interest of the EB-5 program as it may assist in the streamlining of the adjudication of the individual Form I-526 petitions. These amendments should be supported by detailed documentation relating to the actual investment project. Once approved, then only the documentation relating to the actual approved project would be provided in support of the Form I-526

petition, eliminating the uncertainty regarding whether the actual project meets EB-5 eligibility requirements.

A regional center may also file an amendment in order to provide an exemplar Form I-526 with the supporting documentation required by 8 CFR 204.6 in order for USCIS to determine if the documentation is EB-5 compliant, and thus facilitate adjudication of an actual but identical Form I-526 petition, if the evidence of record otherwise establishes EB-5 eligibility.

Note: If the Regional Center requirements are met and a determination of eligibility is made, then the favorable determination regarding regional center eligibility requirements for the capital investment structure and job creation should generally be given deference and not revisited in the adjudication of individual EB-5 petitions, as long as the underlying facts upon which the favorable decision was made remain unchanged. The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of an EB-5 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies, or the exemplar Form I-526 petition has materially changed since the most recent approval of the regional center designation;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) to include the determination that the exemplar Form I-526 petition is EB-5 compliant was legally deficient.

2. Chapter 22.4(c)(3) of the AFM is revised to read as follows:

(3) General Review. Review the Form I-526 petition for completeness and signature of the petitioner.

- Verify that the name given in Part 1 (Information about you) is identical to the signature in Part 7 (Signature block).

- Remember that the petition can only be signed by the petitioner and not by his or her authorized representative.

The following EB-5 eligibility requirements must be established in the Form I-526 petition:

- The capital investment is in a new commercial enterprise;
- If the petitioner claims that the capital investment qualifies for the reduced capital investment threshold of $500,000, that the new commercial enterprise is located in a TEA;
- The investment capital was obtained by the alien through lawful means;
- The required amount of capital has been fully committed to the new commercial enterprise;
- The new commercial enterprise will create not fewer than 10 full-time positions; and
- The alien investor will be engaged in the management of the new commercial enterprise.

Note: If the new commercial enterprise identified in the petition is affiliated with a regional center, then the petitioner must provide with the Form I-526 petition a copy of the regional center's:

- Most recently issued approval letter; and
- Documentation relating to its approved capital investment structure and job creation methodology.

If the evidence provided remains unchanged from the documentation that was the basis for the approval of the regional center proposal, then the prior approval of the capital investment structure and the job creation methodology should generally be given deference. The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of Form I-526 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies has materially changed since the approval of the regional center designation;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) to include the determination that the exemplar Form I-526 petition is EB-5 compliant was legally deficient.

3. Chapter 22.4(c)(4)(D)(iii) of the AFM is revised to read as follows:

(iii) Clarification of the Meaning of Full-time Position. Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position." Adjudicating ISOs should keep the following points in mind when determining if positions meet this requirement:

- Economic input/output (I/O) models, such as RIMS II or IMPLAN, used to evaluate the calculation of the number of indirect jobs (including induced jobs) created through a commercial enterprise affiliated with a regional center do not distinguish between full-time and part-time jobs. In other words, the job creation results of the multipliers in the economic I/O models do not distinguish between the full-time and part-time nature of the positions. Therefore, the number of indirect jobs quantified through the I/O model analysis will be considered to be full-time and qualifying for EB-5 purposes. Accordingly, determinations regarding whether jobs qualify as "full-time" are only relevant to the analysis of direct jobs created by a commercial enterprise claiming the creation of direct jobs as a result of the EB-5 capital investment.

- USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. See, e.g., Spencer Enterprises v. U.S., 229 F.Supp.2d 1025 (E.D. Cal. 2001). Historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent. USCIS, however, now interprets that direct construction jobs may now count as permanent jobs if they:
  - Are created by the petitioner's investment; and
  - Are expected to last at least two years, inclusive of when the petitioner's Form I-829 is filed.

  Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the direct positions, as described in the petition, are continuous full-time employment rather than intermittent, temporary, seasonal or transient.

For example, if a petition reasonably describes the need to directly employ general laborers in a construction project that is expected to last several years and require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if the same project called for electrical workers to provide services as direct employees during three to four five week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.

- Generally, it is the position that is critical to the full-time direct employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment.

  For example, the positions described in the above bullet would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week, as long as the need to directly employ general laborers in the position remains constant. This interpretation is consistent with 8 CFR 204.6(e), which includes job sharing arrangements as part of the regulatory definition of full-time employment.

- It is important to note, however, that this interpretation does not override the regulatory definitions of employee and full-time employment at 8 CFR 204.6(e). Thus, direct jobs must still be filled by qualifying employees and not by independent contractors. Positions filled by independent contractors are not qualifying direct jobs and may only be credited for EB-5 job creation purposes in petitions involving commercial enterprises that are affiliated with a regional center. In addition, multiple part-time positions may not be combined to create one full-time position, unless those part-time jobs can be shown to be part of a job-sharing arrangement.

- Full-time employment relating to the creation of direct jobs as defined in 8 CFR 204.6(e) means year-round employment and not seasonal full-time employment. Full-time employment consists of 35 hours a week. Seasonal positions do not qualify for purposes of the full-time employment requirement for direct jobs.

4. Chapter 22.4(c)(4)(F) of the AFM is revised to read as follows:

(F) New Commercial Enterprise in a Targeted Employment Area (TEA). A TEA is either a rural area or an area experiencing a high unemployment rate at the time of the capital investment or the time of filing of the Form I-526 petition, whichever occurs first. If the petitioner shows that the area where he or she is investing is a rural area, the petitioner need not also establish that the area has high employment. Conversely, if the area is a high unemployment area, the petitioner need not also show that it is a rural area.

INA 203(b)(5)(B) and 8 CFR 204.6(e) require that in order to establish eligibility for the reduced EB-5 investment threshold of $500,000, the area in which the alien makes a capital investment must qualify as an rural area or an area of high unemployment when the investment is made. *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998) provides in pertinent part that:

> A petitioner has the burden to establish that his enterprise does business in an area that is considered "targeted" as of the date he files his [Form I-526] petition. The fact that a business may be located in an area that was once rural, for example, does not mean that the area is still rural.

A conflict between the statutory and regulatory requirements, and *Matter of Soffici* may arise when an alien makes a capital investment at a point in time prior to the filing of the Form I-526 petition when the area in which the investment is made qualifies as a TEA, only to have the area no longer qualify as a TEA at the time of filing of the Form I-526 petition. In order to promote predictability in the capital investment process and to reconcile the potential conflict outlined above, ISOs must identify the appropriate date to examine in order to determine that the alien's capital investment qualifies for the reduced $500,000 threshold according to the following "if, then" table:

TEA "if then" Table	
If the Investment...	Then...
Is made into the commercial enterprise's job creating project prior to the filing of the Form I-526 petition...	The TEA analysis should focus on whether the location of the investment qualifies as a TEA at the time of the investment.
Has yet to be committed to the commercial enterprise's job	The TEA analysis should focus on whether the location of the

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...	investment qualifies as a TEA at the time of the filing of the I-526 petition.

Note: In some instances, an alien may request eligibility for the reduced investment threshold based on the fact that other EB-5 aliens who previously invested in the same project qualified for the $500,000 minimum investment, even though the area did not qualify at the time of the instant alien's investment or the filing of his or her Form I-526. Each alien must establish that his or her capital investment qualifies for the reduced investment threshold, and cannot rely on previous TEA determinations made based on facts that have subsequently changed.

Note also that the area where the new commercial enterprise is located may qualify as a TEA at the time the capital investment is made or the I-526 petition is filed, (whichever occurs first), but may cease to qualify by the time the Form I-829 petition is filed. Changes in population size or unemployment rates within the area during the alien investor's period of conditional permanent residence are acceptable as increased job creation is the primary goal of the EB-5 program.

(i) Rural Area Defined. The term "rural area" means any area that is both outside of a metropolitan statistical area (MSA) and outside of a city or town having a population of 20,000 or more based on the most recent decennial census of the United States. See INA § 203(b)(5)(B)(iii) and 8 CFR §204.6(j)(6)(i). MSAs are designated by the Office of Management and Budget and can be found at www.census.gov.

(ii) Definition of High Unemployment Area. The term "high unemployment area" means an area which has experienced unemployment of at least 150 percent of the national average rate. See INA § 203(b)(5)(B)(ii). The I-526 petitioner must demonstrate that, at the time the capital investment is made or the petition is filed (whichever occurs first), there has been an unemployment rate of at least 150% of the national unemployment rate within the MSA or other non-rural area in which the commercial enterprise that will create or preserve jobs is located. This should be based on the most recent information available to the general public from federal or state governmental sources as of the time the I-526 petition is submitted.

In some instances I-526 petitioners may claim high unemployment in only a portion or portions of a geographic area or political subdivision for which distinct unemployment data is not readily available to the general public from federal or state governmental sources. This may be indicative of an attempt by the petitioner to "gerrymander" a finding of high unemployment when in fact the area does not qualify as being a high unemployment area. Such a claim is not sufficient to establish that the area is a high unemployment area unless it is accompanied by a designation from an authorized authority of the state government. (State designations are discussed below in (iii) of this section.)

The Bureau of Labor Statistics (BLS) provides data regarding the national average rate of unemployment at www.bls.gov/cps/. BLS's **Local Area Unemployment Statistics (LAUS)** program produces monthly and annual unemployment and other labor force data for census regions and divisions, states, counties, metropolitan areas, and many cities, by place of residence. This information can be found at www.bls.gov/lau/. States, the District of Columbia, and the U.S. territories may also publish local area unemployment statistics on their government websites.

(iii) State Designation of a High Unemployment Area. The state government of any state of the United States may designate a particular geographic area or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such a state as an area of high unemployment. Before any such designation is made, an official of the state must notify USCIS of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area. Evidence of such a designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be submitted in support of the Form I-526 petition in lieu of other documentary evidence of high unemployment in the area where the new commercial enterprise is located. See 8 CFR 204.6(i). The statistics used in the analysis must reflect the national and local unemployment rates for these regions at the time of the alien investor's capital investment. See 8 CFR 204.6(e).

The designation of high unemployment areas are within the purview of each U.S. state governor, or if applicable, his or her designee. USCIS

personnel have no substantive authority to question or challenge such high unemployment designations, and therefore must rely on the high unemployment designations that conform to the requirements outlined above that are made by a U.S. state governor or his or her designee. ISOs should notify the CSC EB-5 program manager and seek guidance regarding how to address the TEA issue in petitions that contains a state designation letter that does not conform to the requirements of 8 CFR 204.6(i), utilizes statistics that do not reflect the national and local unemployment rates at the time of the alien investor's capital investment, or has been issued by an official of a state that has not notified USCIS regarding who in the state government has the authority to issue such designations.

Note: State designations of high unemployment areas also include designations issued by the appointed government body with authority to make such certifications by the governors of the U.S. territories or the mayor of the District of Columbia.

5. Chapter 22.4(c)(4)(G) of the AFM is added as follows:

(G) Eligibility Requirements for the Review of a Form I-526 Petition that Seeks Consideration of a Business Plan that Differs from the Business Plan in a Previously Approved Form I-526 Petition.

Some EB-5 aliens may encounter difficulties when unforeseen circumstances cause the achievement of the requisite job creation outlined in the Form I-526 petition to be cast in doubt. This may occur when the job creating capital investment project or commercial enterprise that was relied upon for the approval of the Form I-526 petition fails or otherwise cannot be completed within the alien's two-year period of conditional residence. The structure of the EB-5 program is inflexible in 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 and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment. The business plan in the Form I-526 petition may not be materially changed after the petition has been filed. In addition, USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions beyond the timeframes outlined in 8 CFR 216.6(a) and (c).

The following "if, then" table explains how an EB-5 investor can seek consideration of a business plan that differs from the business plan in a previously approved Form I-526 petition.

New Form I-526 Petition "If, Then" Table	
If...	Then...
The alien wishes to change the business plan from the business plan outlined in a previously filed Form I-526 petition...	S/he may file a new Form I-526 petition with fee that is supported by the new business plan and addresses all requirements of the I-526 petition.
If the new Form I-526 Petition is Filed...	Then...
Before the alien adjusts status (AOS) or is issued an immigrant visa (IV)...	The new petition, if approved, will be the basis for the AOS or the IV and the new business plan will be used as the basis for evaluating EB-5 eligibility at the I-829 stage.
After the alien adjusts status or is issued an IV, but before the due date of the filing of the I-829 petition (90 days prior to the end of the two-year CPR period).	Upon approval of the new Form I-526 petition, S/he may file Form I-407 with a Form I-485 adjustment application. The prior CPR status will be terminated and the new AOS application will be approved, if otherwise approvable, granting a new two year period of CPR status. The new I-526 petition will be used as the basis when evaluating eligibility at the I-829 stage. If the new Form I-526 is denied, then the alien will have to file the I-829 petition and use the initial Form I-526 petition as the basis for the eligibility evaluation in the Form I-829 petition.
After the alien adjusts status or is issued an IV on or after the due date for the filing of the I-829 petition.	If the new I-526 is approved, S/he may request the withdrawal of the initial I-829 petition and file an AOS application. The prior CPR status will be terminated and the new AOS application will be approved, if otherwise approvable, granting a new two year period of CPR status. The new I-526 petition will be used as the

	basis when evaluating eligibility at the second I-829 stage. If the new I-526 petition is denied, then the initial Form I-829 petition will be adjudicated using the project plan in the initial I-526 petition as the basis for the initial I-829 eligibility evaluation.
Note: Dependents will have to file I-407s at the same time as required for the principals as well as Form I-485 applications in order to terminate their CPR status and be "re-adjusted" to CPR anew. The dependents must be eligible to be classified as EB-5 dependents at the time of the filing of new Form I-485 application, i.e. the dependents must be the spouse or unmarried child under the age of 21 years of the EB-5 principal alien	

6. Chapter 25.2(e)(4) of the AFM is revised by adding new paragraph (E) to read as follows:

(E) I-829 Consideration of Form I-526 EB-5 Eligibility Requirements. Pursuant to section 216A(c)(3) of the Act, USCIS must determine that the facts and information contained in the petition are true. ISOs should generally give deference to the approval of EB-5 eligibility requirements previously made in the alien investor's Form I-526 petition and affiliated regional center designation, as applicable, if the facts presented in the earlier proceedings remain unchanged to include:

- The new commercial enterprise's capital investment structure;
- That the commercial enterprise qualifies as "new" for EB-5 purposes;
- If the commercial enterprise is affiliated with a regional center, the direct and indirect job creation methodology;
- If the Form I-526 petition was approved for reduced capital investment threshold of $500,000, that the new commercial enterprise was located in a TEA at the time of filing of the Form I-526, and;
- That the alien investor's investment capital was lawfully obtained.

The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of the Form I-829 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies or the eligibility requirements favorably decided-upon in the Form I-526 petition have materially changed post-approval of the regional center designation or Form I-526 petition;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) was legally deficient.

If the documentation of record presents material inconsistencies that impact the alien investor's EB-5 eligibility, then ISOs should require the petitioner to resolve the inconsistencies prior making a favorable determination in the case. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

Note: EB-5 petitioners must establish eligibility as of the date of filing of the petition. See 8 CFR 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Note also that 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 USCIS requirements. *Matter of Izummi*, 22 I&N Dec. at 175.

7. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD09-38	Chapter 22 and Chapter 25	This memorandum revises Chapters 22 and 25 of the *Adjudicator's Field Manual* (*AFM*) by amending sections 22.4 and 25.2 to clarify issues pertaining to EB-5 (Immigrant Investor) Regional Center Proposal petitions for classification (Form I-526) and petitions for removal of conditions (Form I-829).

VI. Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does

not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

VII. Questions

Questions regarding this memorandum should be directed through appropriate channels to Alexandra Haskell in the Business and Employment Services Team of Service Center Operations.

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MATTER OF TREASURE CRAFT OF CALIFORNIA

LOS-N-14623

In Visa Petition Proceedings

Decided by Regional Commissioner September 7, 1972

Since the burden of proof to establish eligibility for the benefits sought rests with petitioner, who seeks to accord beneficiaries classification as trainees under section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, as amended, the contention that petitioner need only go on record as stating that training is not available outside the United States is rejected; likewise rejected is the contention that petitioner may rely solely upon his statement "on record" that beneficiaries will not displace U.S. workers, particularly when such statement is contradicted by other evidence of record. Accordingly, the petition is denied for failure of petitioner to submit an adequate training program, for failure to establish why the alleged training could not be obtained in beneficiaries' country, and because productive employment is involved which would displace United States workers.

ON BEHALF OF PETITIONER: Emanuel Braude, Esquire
356 S. Broadway, Suite 207
Los Angeles, California 90013

This is an appeal from the District Director's decision denying the petition.

The petitioner is engaged in the manufacture of ceramic giftware. This business was established in 1946 and currently employs 225 persons. The petitioner proposes to train the beneficiaries in one of the various phases of pottery manufacturing for 18 months, with wages of $66.00 per week and up, depending on ability shown, for 40 hours per week.

The beneficiaries are all natives and citizens of Mexico, presently unlawfully in the United States. The petitioner's resume of their employment history is as follows:

Guadalupe Ruiz Martinez—hired February 23, 1972—has been employed as a kilnman's helper and sometimes as a caster's helper.

Rafael Salazar Guillen—hired October 15, 1971—has been employed as a caster's assistant.

Jesus Murillo Guardado—hired November 24, 1971—has been employed as a wareman. Duties consist of bringing items to packers to be packaged, and taking packaged items away from packers after packing complete.

Rosario Martinez Ramirez—hired December 29, 1971—Employed as a production worker in the conveyor casting section. Fills molds with clay and strips them.

The beneficiaries were interviewed by an officer of this Service on August 8, 1972, at which time it was ascertained that Jesus Murillo-Guardado had been employed by the petitioner previously from April 1969 until June 1971. He stated that he was a foreman at the time of his interview.

Guadalupe Ruiz-Martinez stated that he had also been previously employed by the petitioner for one year in 1969 while the other two beneficiaries stated that they had been employed only as stated by the petitioner.

The petitioner submitted job descriptions of four positions utilized in the pottery making industry which are entitled as follows: Clay Batching, Stain Department, Mold and Die Maker, and Glaze Preparation Handling and Application of Glazes. The petitioner has stated that the beneficiaries will be trained in these jobs, but it is not possible to submit a course outline which reflects training in stages, as the beneficiaries will learn the separate duties when, as and where the opportunity affords. It was added that there would be no academic training as all training is on-the-job training, with productivity estimated at 30% at the beginning of training, rising, hopefully, to 85% towards training's completion.

The petitioner stated that the beneficiaries will become competent in one phase of pottery manufacture, and upon completion, they will be able to perform their job duties in a Mexican pottery factory or in a United States subsidiary pottery factory in Mexico. It was also stated that the Mexican pottery industry, at present, is far behind us with respect to methods, equipment, technology and know-how. The petitioner then alleged that no United States workers will be displaced or replaced, as this is a training program only, which is open to everyone in the United States who is susceptible to training.

In his decision denying the petition, the District Director stated in part as follows:

The record in this case has been carefully considered. Other than self-serving assertions, no evidence has been furnished that would establish that competent training for employment in a pottery factory is unavailable in Mexico. In view of the beneficiaries' employment experience with the petitioner, it appears that the training program as outlined by the petitioner is not properly applicable to the beneficiaries. They have already acquired the basic knowledge and training required for performance in the occupation. Continuous and repetitious training in the basic skills would no doubt make them more proficient, but section 101(a)(15)(H)(iii) contemplates the training of an individual so that he acquires basic skills for adequate performance in the occupation and not to provide him with further day-by-day on-the-job repetitious experience and application of his skills for the sake of higher degree of proficiency.

In view of the foregoing, the petitioner has failed to establish the need for beneficiaries to be trained in this country; that the beneficiaries' presence in the United States is sought principally and primarily for the purposes of training, any productive labor being incidental thereto; and that their presence in the United States would not have the effect of displacing or replacing available United States resident labor.

On appeal, counsel argued that the petitioner needs only to state that the proposed training cannot be obtained outside of the United States and that available labor is not a material issue as evidenced by the obvious absence of a labor determination/requirement in connection with the provisions of section 101(a)(15)(H)(iii). He then added that the petitioner has complied with the spirit of the law as he offers a training program to an alien desirous of receiving such training, and that he has "gone on record" as stating no displacement of resident labor will occur and the training is not available outside of the United States.

Counsel argued further that the petitioner has met the requirements of law and the intent of Congress, but the District Director asked for more as evidenced by his decision. He then alleged as follows:

1. *Competent training in this field is not available in Mexico.*

   The petitioner is only required to state "whether such training can be obtained outside the United States". 8 CFR 214.2(h)(2)(iii). This, the petitioner has done (item 10, fourteen reference point attachment). The fact that the petitioner has been in his field since 1946 qualifies him to speak with authority on the quality of the industry and the training available. He certainly is in a better position to so judge and the Service offers no evidence contradicting such statement.

   Congress previously acknowledged U.S. superiority in training (Senate Report, *supra*).

2. *The productivity is incidental in that "on the job training" will necessarily result in some productivity by the very nature of the system of training. The beneficiaries' presence is sought principally and primarily for the purpose of training.*

   Although the beneficiaries have been in the employ of the petitioner, the training program has not been implemented and/or completed. Each beneficiary has maintained a position which has not progressed through the contemplated training. The employment has ascertained an ability and will to learn which provided the petitioner with assurance that the training will be fruitful; his efforts will be well expended. The loss of trainer time lowers the overall productivity. And such productivity will immediately decrease upon implementation of the training.

3. *No displacing or replacing of available labor will occur.*

   As stated before, the Service led Congress to believe that the petitioner's statement "on record" would be sufficient protection for U.S. labor. The petitioner went on record in his petition (item 12 of fourteen reference

point attachment). There will be no change in hiring policies as a result of the trainees' presence or departure. All qualified and willing applicants will be employed notwithstanding the training program.
In summation, the District Director has failed to implement the intent of Congress and places too restrictive an interpretation on the regulations. Even under such restrictive interpretation the petitioner has overcome all objections.

It has been decided that the burden of proof to establish eligibility for the benefits sought rests with the petitioner in visa petition proceedings (*Matter of Brantigan*, 11 I. & N. Dec. 493). Therefore, counsel's argument that the petitioner need only go on record as stating that training is not available outside the United States is rejected in this matter. It is commonly known, and administrative notice is taken of the fact, that Mexico exports pottery of many types and ceramic giftware to the United States in successful competition with United States manufacturers. One need only travel to the Mexican border city of Tijuana to observe the vast quantity and variety of the beautiful and artistically designed ceramic giftware that is manufactured in Mexico as evidence that Mexico has a thriving pottery industry. One can also observe tourists from the United States examining and purchasing this famous Mexican giftware in many other Mexican cities along the United States border. Under these circumstances, it is reasonable and proper to require the petitioner to do more than merely state that the proposed training cannot be obtained outside of the United States.

It has also been decided that the question of productive employment is an issue to be considered in connection with the approval of visa petitions to classify aliens as industrial trainees (*Matter of Kraus Periodicals, Inc.*, 11 I. & N. Dec. 63; *Matter of Sasano*, 11 I. & N. Dec. 363; *Matter of International Transportation Corp.*, 12 I. & N. Dec. 389; *Matter of Bronx Municipal Hospital Center*, 12 I. & N. Dec. 768). In this case, the beneficiaries have been employed by the petitioner for periods of time ranging from more than seven months to over two years, performing purely productive labor. The petitioner now proposes that the beneficiaries be permitted to remain in the United States for an additional 18 months under the thinly veiled allegation that they will now undergo a training program; yet, he has not found it possible to submit a training program which reflects training in planned and logical phases showing the periods of time required for each phase of training. A careful examination of the positions involved reveals that they consist of two to three basic functions and seven to nine major duties, which are clearly and distinctly outlined by the petitioner.

A training program designed principally for the purpose of providing the beneficiaries substantial and meaningful training

can reasonably be expected to offer more than learning "the separate duties when, as, and where the opportunity affords". Training in this manner will provide the beneficiaries with little, if any, training which is not incidental to the employment of any worker in a position which involves purely productive labor.

We also reject the argument that the petitioner may rely solely upon his statement "on record" that the beneficiaries will not displace United States workers. In fact, he has qualified that statement on appeal wherein he states: "No displacing or replacing of *available* labor will occur." (Emphasis added.) It is proper to consider all of the facts in a visa petition proceeding of this nature in arriving at a conclusion regarding the issues. The petitioner's statement must be given due consideration; however, this Service is not precluded from rejecting such statement when it is contradicted by other evidence in the record of the matter under consideration.

Section 214(c) provides that a petition to import an alien as a nonimmigrant under section 101(a)(15)(H) shall be in such form and contain such information as the Attorney General shall prescribe. 8 CFR 214.2(h)(4)(ii) provides in pertinent part that a trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident.

It has been stated that there will be productive employment performed by the beneficiaries of this petition. Thus, it must be decided if United States residents would be displaced by such employment.

The fact that there are employable unemployed United States resident workers in Los Angeles County is well known. The petitioner's offer to employ trainees with wages of $1.65 an hour can certainly be expected to reduce the number of United States resident workers desirous of such employment. The job descriptions submitted with the petition reveal that the performance of such work consists primarily of the use of the hands and the manipulation of hand and machine tools in the preparation of liquid clay, pressing clay, mixing and applying stain, and making plaster and other mixes. Employment of this nature further reduces the number of interested workers. On the basis of the petitioner's offered salary and the working conditions of the employment involved, it is concluded that the productive employment which would be performed by the beneficiaries would displace United States resident workers which would be available if offered wages at an acceptable level.

The entire record in this matter has been carefully considered. It is concluded that the District Director properly denied the petition and the statements made on appeal do not warrant

overruling that decision. The petitioner has not met his burden of proof as required to establish that the petition should be approved. The appeal will be dismissed.

ORDER: It is ordered that the appeal be dismissed.

(b)(6)

In re HO, Petitioner

In Visa Petition Proceedings

[redacted]

Decided by the Associate Commissioner, Examinations, July 31, 1998.

(1) Merely establishing and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant-investor petitioner has placed his capital at risk. The petitioner must present, instead, evidence that he has actually undertaken meaningful concrete business activity.

(2) The petitioner must establish that he has placed his own capital at risk, that is to say, he must show that he was the legal owner of the invested capital. Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital.

(3) The petitioner must also establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement.

(4) To establish that qualifying employment positions have been created, INS Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities and have been hired in permanent, full-time positions.

(5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

ON BEHALF OF PETITIONER: JOHN L. SUN
3550 WILSHIRE BOULEVARD, SUITE 1250
LOS ANGELES, CA 90010-2413

DISCUSSION

The preference visa petition was approved by the Director, California Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be reversed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5), The director determined that the petitioner had already invest-

ed the requisite amount of capital, apparently obtained through lawful means. The director further found that, while the business had only two employees at the time of her decision, the business plan called for at least eight more employees within the next 12 months.

The petitioner has chosen not to respond.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner indicates that the petition is based on the creation of a new business located in a targeted employment area, for which the required amount of capital invested has been adjusted downward.

MINIMUM INVESTMENT AMOUNT

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

On December 18, 1997, King's Wheel Corp. filed its articles of incorporation with the State of California. According to the petitioner, who is the president, director, and chief executive officer of the corporation, King's Wheel will import steel and aluminum automobile wheels from Taiwan and market them in the United States as a wholesaler. On December 20, 1997, the petitioner signed a lease on behalf of King's Wheel for an "office and warehouse" located at 350 W. Artesia Boulevard in Compton, California.

Compton is in Los Angeles County, and the most current information available from the California Employment Development Department indicates that all of Los Angeles County is an area of sufficiently high unemployment to qualify as a targeted area. Therefore, the amount of capital necessary to make a qualifying investment in this matter is $500,000.

INVESTMENT OF QUALIFYING CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness, ...
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
>
> (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
>
> (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
>
> (iv) Evidence of monies transferred or committed to be transferred to the new com-

mercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred), Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On December 30, 1997, the sum of $515,000 was transferred from an unidentified bank account to one of King's Wheel's business accounts at Cathay Bank, and the business account was credited $514,995. On January 5, 1998, the petitioner obtained 500,000 of the one million authorized shares of King's Wheel; the petitioner indicates that these shares were in exchange for $500,000.

Capital at risk

Even though the petitioner owns only half of the authorized shares in King's Wheel, he is the sole shareholder thus far. He is also the only officer of the corporation. As such, the petitioner exercises sole control over the corporation's activities; whether the business proceeds according to plan or whether, for example, the business returns the petitioner's money is the petitioner's decision alone. Therefore, the petitioner cannot meet his at-risk requirement by merely depositing funds into a corporate account.

The business plan indicates that sales would commence in three to six months from the date of submission of the petition (January 12, 1998), yet the petitioner has not undertaken the necessary preparations to meet this deadline. The petitioner has not submitted evidence that King's Wheel has purchased inventory or office equipment. The petitioner has not shown that he has entered into negotiations with potential suppliers of wheels abroad, nor has he even identified who his potential suppliers are. The petitioner has not provided evidence that he has identified or entered into negotiations with potential buyers within the United States. The petitioner has not even furnished evidence that he has contracted with the suppliers of local utilities, such as the telephone or electric companies. The petitioner has not adequately explained how the business will go about spending the $500,000 that have been placed into its account. Although the petitioner has signed a lease for King's Wheel's showroom, the lease contains an escape clause at section 14, allowing King's Wheel to assign the lease or sublet the property with consent from the landlord.

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere

deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment.[1] Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimis action of signing a lease agreement, without more, is not enough.

Source of funds

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petitioner must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

To show that he has invested his own capital obtained through lawful means, the petitioner has furnished copies of bank statements showing that as of December 12, 1997, he had NT$1,339,447 (less than US$41,000[2]) on deposit at the Bank of Taiwan, and as of December 23, 1997, an individual named "Ho Wang Chung-Chia, Theresa Wang" had NT$6,255,844.52

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[1]King's Wheel has two accounts at Cathay Bank: the money-market account into which the $514,995 were deposited and a commercial checking account containing $3,100. The petitioner has not shown any activity in either account.

[2]This figure assumes an exchange rate of NT$32.68 = US$1, which appears in the materials submitted by the petitioner. The current exchange rate is closer to NT$34.27 = US$1. WASHINGTON POST, July 21, 1998, at C10.

(US$191,427.31) on deposit at the First Commercial Bank. The petitioner has also submitted a letter from the United World Chinese Commercial Bank indicating that he holds 506,000 shares of capital stock in the bank, and as of December 22, 1997, those shares were worth NT$30,866,000. A letter from United Orthopedic Corporation states, "Mrs. Ho Wang Chung-Chia, also known as Theresa Wang has invested N.T.$1,000,000 in United Orthopedic Corp." On December 19, 1997, Ms. Chung-Chia Ho Wang's single unit on the 11th floor of an 18-story, 147-unit condominium in Taiwan was appraised at NT$6,502,348 (less than US$199,000).

The petitioner asserts that Chung-Chia Ho Wang is his wife; however, he has submitted no documentation, such as a marriage certificate, to substantiate this claim.[3] Even if Ms. Wang is the petitioner's wife, and even if her assets can be considered joint property, the petitioner has failed to establish the source of the funds transferred to the King's Wheel money-market account, totalling $515,000. Prior to the date of transfer, neither Taiwanese bank account contained sufficient funds; in fact, the two accounts together contained less than $250,000. Neither the petitioner nor Ms. Wang has sold any shares of stock in the Taiwanese corporations, and Ms. Wang appears still to own the condominium unit. As stated earlier, the wire-transfer receipt does not reveal from what bank account(s) the funds originated.

Furthermore, while the petitioner claims to have been a medical doctor in Taiwan, he has not presented any evidence of his having engaged in this occupation, nor has he provided any documentation regarding his level of income. The petitioner explains that, through his medical practice and investments, he has accumulated "liquid assets" of approximately US$1.4 million, and therefore the source of his $500,000 is lawful. The above documentation does not reflect $1.4 million in liquid assets; moreover, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or

[3] The real-estate appraisal indicates that Ms. Wang's name changed to "Ho" after marriage, but "Ho" is a common Chinese name.

other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

Employee means an individual who provides services or labor for the new commercial enterprise and who receive wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

As evidence that two positions have already been created, the petitioner has submitted two Forms I-9 completed just three days prior to the date he signed the Form I-526 petition. The business plan calls for the hiring of eight employees within the next 12 months: a secretary, an accounting clerk, a truck driver, two warehouse people, and three salespersons.

With respect to the two persons identified in the Forms I-9, the petitioner has not explained what positions they occupy, and it is not known whether they work full- or part-time or whether they work at all. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as paystubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full-time employment within the United States.

In addition, as the business plan fails to reveal what these two individuals do, it is not altogether clear that they would still be needed once sales commenced and the business progressed beyond its "planning stage." The petitioner has not demonstrated that he has created permanent employment.

According to 8 C.F.R. § 204.6(j)(4)(i)(B), if a petitioner has not already met the employment-creation requirement, he must submit a comprehensive business plan from which it is clear that the business will in fact require

10 qualifying employees within the next two years. To be "comprehensive," a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.

A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor.[4] Most importantly, the business plan must be credible.

Certainly no astute investor would place half a million or a million dollars into a business that he had not thoroughly researched. Creating a comprehensive business plan as described above is normal practice for any businessman seeking to operate a viable business. Without knowing whether a business is feasible and has the potential for long-term survival, neither the petitioner nor the Service can reasonably conclude that it will create permanent, full-time employment. It is not too onerous to ask a petitioner who has not yet met the employment-creation requirement to submit to the Service a real business plan. Other administrative agencies, such as the Small Business Administration, and private financial institutions routinely require the submission of detailed business plans before extending loans to businesses. Permanent resident status is no less significant a matter than a loan.

The petitioner's four-page "business plan" is wholly inadequate and fails to meet the petitioner's burden of showing that he will create 10 permanent, full-time positions within the next two years.

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[4]The Service recognizes that each business is different and will require different information in its business plan. These guidelines, therefore, are not all-inclusive.

CONCLUSION

The petitioner is ineligible for classification as an alien entrepreneur because he has failed to establish that he has made an active, at-risk investment and has failed to clarify the source of his funds. The petitioner has further failed to demonstrate clearly that his proposed business will result in the requisite employment creation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the petition is denied.

ORDER: The decision of the director is reversed. The petition is denied.

(b)(6)

In re NEW YORK STATE DEPT OF TRANSPORTATION, Petitioner

In Visa Petition Proceedings

Designated by the Acting Associate Commissioner, Programs,
August 7, 1998

(1) An alien seeking immigrant classification as an alien of exceptional ability or as a member of the professions holding an advanced degree cannot meet the threshold for a national interest waiver of the job offer requirement simply by establishing a certain level of training or education which could be articulated on an application for a labor certification.

(2) General arguments regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field or seeking an as yet undiscovered solution to the problematic issue.

(3) A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

ON BEHALF OF PETITIONER: Jill Nagy
Lee and LeForestier, P.C.
Box 1054
Second Street
Troy, NY 12180

DISCUSSION

The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.[1]

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2), as

[1]This decision was originally entered on April 27, 1998. The matter has been reopened on Service motion for the limited purpose of incorporating revisions for publication.

(b)(6)

In re HSIUNG, Petitioner

In Visa Petition Proceedings

[redacted]

Decided by the Associate Commissioner, Examinations, July 31, 1998.

(1) A promissory note secured by assets owned by a petitioner can constitute capital under 8 C.F.R. § 204.6(e) if: the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; and the assets are fully amenable to seizure by a U.S. note holder.

(2) When determining the fair market value of a promissory note being used as capital under 8 C.F.R. § 204.6(e), factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered.

(3) Whether a petitioner uses a promissory note as capital under 8 C.F.R. § 204.6(e) or as evidence of a commitment to invest cash, he must show that he has placed his assets at risk. In establishing that a sufficient amount of his assets are at risk, a petitioner must demonstrate, among other things, that the assets securing the note are his, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value.

(4) A petitioner engaging in the reorganization or restructuring of a pre-existing business may not cause a net loss of employment.

ON BEHALF OF PETITIONER: ROBERT LUBIN
8229 BOONE BOULEVARD
SUITE 610
VIENNA, VA 22182

DISCUSSION

The preference visa petition was denied by the Director, Nebraska Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The petitioner has chosen not to respond. The decision of the director is affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5). The petitioner is one of 14 "investors" in Imedix, Inc. Imedix was established on June 16, 1997, for the purpose of structuring, purchas-

ing, reorganizing, and upgrading health-care facilities in targeted areas of the United States. No clinics have yet been acquired, but the petitioner estimates that 27 clinics will employ approximately 194 employees.

The director determined that the petitioner had failed to make an active, at-risk investment in that the project was not even in the start-up phase; Imedix had not conducted any sort of business or financial analysis and had not engaged in any discussions with health-care facilities, state health officials, or real-estate agents, for example. The director also found that the required amount of capital had not been placed at risk and that the petitioner had failed to show that he was investing his own funds, obtained through lawful means. The director was further unable to ascertain a reasonable basis for Imedix's determination that it would create 194 positions, as this estimate was given without reference to medical needs of specific communities to be served.

After review of the evidence contained in the record, the decision of the director is found to be correct. Beyond the director's decision, other issues must be addressed. The affirmance of the director's decision is based not only on the director's findings but also on the findings discussed below.

The first issues concern the petitioner's payment agreement and his claimed assets abroad. As stated by the director, the petitioner agreed, pursuant to this payment agreement, to make an initial payment of $50,000, another payment within 30 days after the petition was approved, a payment of $200,000 one year after entry into the United States, and a final payment of $200,000 prior to the removal of the conditions of permanent resident status. The petitioner agreed to secure the principal sum of $500,000 by an assignment of his property having a net fair market value of $500,000.

The petitioner's claimed investment is in the form of a promissory note. A promissory note can constitute "capital" under 8 C.F.R. § 204.6(e) if the note is secured by assets owned by the petitioner. These assets must be specifically identified as securing the note. Furthermore, any security interest must be perfected to the extent provided for by the jurisdiction in which the asset is located,[1] and the asset must be fully amenable to seizure by a U.S. note holder.[2]

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[1]This office notes that the Office of General Counsel ("OGC") has previously stated its opinion that the regulations do not require that indebtedness meet the requirements for secured transactions under Article 9 of the Uniform Commercial Code ("UCC"); similarly, OGC has stated that the regulations do not require that the lender perfect his security interest. Memorandum from Paul W. Virtue to Louis D. Crocetti, Jr. (June 27, 1995), *reprinted in* 72 INTERP. REL. 1209 (September 1, 1995). While the regulations do not specifically require that a promissory note be secured under the UCC, merely "identifying" assets as securing a loan, without perfecting the security interest, is not meaningful since the note holder cannot be assured that the identified assets will remain available for seizure in the event of default.

[2]See below for a discussion concerning the seizure of assets.

The petitioner has submitted no evidence that a security interest has been recorded in any particular property, and the promissory note does not even identify what assets are securing it. In addition, as the director stated in her decision, the petitioner has not established that the assets he claims to own in Taiwan are in fact his. The bank accounts at the Bank of Taiwan, containing NT$5,736,012 (US$199,613 as of September 3, 1997, according to counsel), belong to Dustin Hsiung; the petitioner has not demonstrated that he and Dustin Hsiung are the same person. The real estate in Taiwan, appraised at NT$11,167,843 (US$388,640 as of September 3, 1997), belongs to Ping-Hsiu Liu; the petitioner has not demonstrated that he and Ping-Hsiu Liu are the same person. Therefore, even if these assets were properly securing the note, the note does not meet the definition of "capital" because the petitioner has not shown that it is secured by his assets.

Assuming arguendo that the note at issue here did constitute "capital," the regulations at 8 C.F.R. § 204.6(e) further provide that all capital must be valued at fair market value in United States dollars. Whether a promissory note has a fair market value equivalent to its face value depends on many factors, including the value of the assets securing the note. The Taiwanese real estate, appraised at $388,640, is subject to a mortgage of NT$7,000,000 (approximately US$201,180). The net value of this real estate, then, is approximately $187,460. Assuming that the petitioner has made his initial payment of $50,000, assuming that the real estate and the money in the bank accounts (which contain $199,613) are his, and assuming that these assets do secure the promissory note, the net result is that a $450,000 obligation is being secured by only $387,073 in assets.[3] This is not sufficient to meet the fair-market-value requirement of the regulations.

The fair market value of a promissory note also depends on the amenability of the assets securing the note to seizure. Both the bank account and real estate are located abroad. In order for foreign assets, including real estate, to be considered as acceptable security, a petitioner must establish that the laws of the foreign country in which the assets are located would recognize, and permit execution of, a judgment of a court of the United States or of any State with respect to the foreign assets.[4] In the alternative, the petitioner must establish that the courts of that foreign country would themselves recognize and enforce the promissory note absent the judgment of an American court. Otherwise, the promissory note would clearly not have the value attributed to it by the petitioner. The petitioner here has not

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[3]The current exchange rate is closer to NT$34.27 = US$1. WASHINGTON POST, July 21, 1998, at C10. At this exchange rate, the net value of the assets is only US$288,994.89.

[4]This, for example, could take the form of a transfer of ownership of the property to the creditor or it could take the form of a court-ordered liquidation and transfer of assets to the creditor.

presented any evidence as to Taiwanese law regarding the seizure of assets.

Even if assets can be reached under the laws of the applicable foreign country, considerable expense and effort would be involved in pursuing them. These factors would reduce the fair market value of a promissory note secured by foreign assets. It is not clear to what extent the value of the petitioner's promissory note should be reduced since the petitioner has not submitted any evidence as to the cost of enforcing a judgment against his purported property.

The fair market value of a promissory note further depends on its *present* value. *Matter of Izumii,* 22 I&N Dec. 169 (July 13, 1998), Money received today is worth more than money received tomorrow, and promissory notes are routinely discounted in recognition of this principle. A petitioner who bases his claim of investment on a promissory note must demonstrate that the promissory note has a fair market value equal to the amount of the investment. A petitioner cannot merely claim that his promissory note for $500,000 is worth $500,000, even if the note is properly secured with personal assets, amenable to seizure, of sufficient fair market value. This petitioner has not furnished evidence of the present value of his promissory note and has therefore failed to meet his burden.

To establish that the petitioner has invested, or is actively in the process of investing, he must show that he has placed the required amount of capital at risk.[5] 8 C.F.R. § 204.6(j)(2), The petitioner here has not shown that his assets are at risk. As discussed above, the petitioner has failed to demonstrate the following: that the bank accounts and real estate in Taiwan allegedly securing the note belong to him; that these assets are in fact securing the note; that any security interest in these assets has been perfected to the extent provided for under Taiwanese law; and that these assets are amenable to seizure. In addition, even if the petitioner had established ownership of these assets, he still has not shown that the requisite amount of money is at risk; he has failed to demonstrate that the assets in Taiwan have a total net fair market value of $500,000 (or $450,000 if he has already made his first payment of $50,000), and he has failed to allow for the estimated costs of seizing the assets should the need arise.

A further issue to be addressed concerns the petitioner's statement that Imedix plans to engage in "structuring, purchasing, reorganizing and upgrading health care facilities." Although the petitioner could argue that Imedix is the new commercial enterprise at issue here, the clinics Imedix claims it will purchase are pre-existing, ongoing businesses. Through his

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[5]This applies regardless of whether the petitioner is claiming that his promissory note is itself capital or whether he claims that it is merely evidence that he is in the process of investing cash. An actual commitment does not exist if the petitioner's assets are not at risk. *See* 8 C.F.R. § 204.6(j)(2).

company's business activities, a petitioner cannot directly cause a net loss of employment. It is not known if the projected figure of "194" employees represents the maintenance of the former levels of employment at the unidentified clinics (in the case of troubled businesses), the addition of 10 new positions per investor, or an actual loss of employment.

ORDER: The decision of the director is affirmed. The petition is denied.

(b)(6)

In re IZUMMI, Petitioner

In Visa Petition Proceedings

Decided by the Associate Commissioner, Examinations, July 13, 1998.

(1) Regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement.

(2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

(3) A petitioner may not make material changes to his petition in aneffort to make a deficient petition conform to Service requirements.

(4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.

(5) An alien may not receive guaranteed payments from a new commercial enterprise while he owes money to the new commercial enterprise.

(6) An alien may not enter into a redemption agreement with the new commercial enterprise at any time prior to completing all of his cash payments under a promissory note. In no event may the alien enter into a redemption agreement prior to the end of the two-year period of conditional residence.

(7) A redemption agreement between an alien investor and the new commercial enterprise constitutes a debt arrangement and is prohibited under 8 C.F.R. § 204.6(e).

(8) Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.

(9) The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits.

(10) Under 8 C.F.R. § 204.6(e), all capital must be valued at fair market value in United States dollars, including promissory notes used as capital. In determining the fair market value of a

promissory note, it is necessary to consider, among other things, present value.

(11) Under certain circumstances, a promissory note that does not itself constitute capital may constitute evidence that the alien is "in the process of investing" other capital, such as cash. In such a case, the petitioner must substantially complete payments on the promissory note prior to the end of the two-year conditional period.

(12) Whether the promissory note constitutes capital or is simply evidence that the alien is in the process of investing other capital, nearly all of the money due under the promissory note must be payable within two years, without provisions for extensions.

(13) In order for a petitioner to be considered to have established an original business, he must have had a hand in its actual creation.

ON BEHALF OF PETITIONER: MAURICE INMAN/FREDRICK W. VOIGTMANN
1925 CENTURY PARK EAST, 16TH FLOOR
LOS ANGELES, CA 90067

DISCUSSION

The preference visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5), and section 610 of the Appropriations Act of 1993. The director determined that the petitioner had failed to establish that he had placed the requisite capital at risk. The director made the following findings: $30,000 of the claimed contribution would be used for the expenses of the Partnership rather than being infused into the subsidiary commercial enterprise for the purpose of employment creation; the majority of the remaining capital would not be available for job creation because the Partnership was required to maintain it in reserves; part of the petitioner's capital contribution was not an investment because it was made in exchange for a debt arrangement; and another part of the petitioner's contribution would derive from guaranteed annual interest payments received from the Partnership.

In response, the petitioner submits two separate briefs, two supplemental briefs, and numerous exhibits. He contends that the director's decision misstates existing facts and mischaracterizes the provisions of the American Export Limited Partnership ("AELP") investor program. The petitioner also complains that the director's decision fails to mention, distinguish, or "explain away" approvals of other AELP petitions by both the Texas Service Center and Vermont Service Center; furthermore, the director's decision fails to mention, distinguish, or "explain away" prior Service opin-

ions and communications that directly supported and authorized the use of various features of the AELP program. The petitioner states that, even if the director had been correct in denying the petition, certain new amendments to the partnership plan should cause the Administrative Appeals Unit (AAU) to approve his petition.

Oral argument was granted in this case, and during his presentation counsel reiterated the points made in the brief. Counsel emphasized that the petitioner had made an investment by executing and delivering the promissory note for $500,000; the schedule of future payments under the note was irrelevant.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner indicates that the petition is based on an investment in a new business in a targeted employment area for which the required amount of capital invested has been adjusted downward. In addition, the business is located in an area designated as a "regional center" authorized to participate in the Immigrant Investor Pilot Program.

THE PETITIONER HAS NOT DEMONSTRATED THAT AELP IS ENGAGING IN APPROVED REGIONAL-CENTER ACTIVITIES IN TARGETED EMPLOYMENT AREAS

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

On October 19, 1995, American Export Partners, LLC ("AEP") filed its articles of organization with the State of South Carolina. On March 25, 1996, AELP filed its certificate of limited partnership with the State of South Carolina, and AEP was designated as AELP's general partner. Both AEP and AELP are located in Charleston, South Carolina.

In a letter dated February 8, 1995, the Assistant Commissioner for Adjudications designated AEP a regional center and specified that individuals could file petitions with the Service "for new commercial enterprises located within the eight-county coastal areas, or Lowcountry, of South Carolina." On June 14, 1995, the Acting Assistant Commissioner for Adjudications expanded the geographical area covered by the AEP regional center to include 22 other counties in South Carolina.

The petitioner has presented evidence that many, but not all, of the counties within this regional center were considered rural in 1995 and qualified at that time as targeted employment areas.[1]

In his brief, the petitioner explains that AELP has established a commercial credit corporation subsidiary, American Commercial and Export Credit Company, Inc., with its co-venturer, Resurgens Capital & Investment. This credit company makes asset-based loans and engages in receivables financing for small export companies "located throughout South Carolina and the southeastern United States." The capital provided by the alien investors to AELP is used to purchase stock in the credit com-

[1]Of the 22 new counties added to the regional-center area, Aiken, Edgefield, Lexington, Richland, and Sumter counties were not targeted employment areas in 1995.

pany, and the credit company uses this money to secure loans from an institutional bank lender. This other lender will increase the capital by a factor of three or four. The petitioner claims that the credit company has succeeded in placing "several" loans already.

According to the materials submitted, the credit company has extended or purchased four loans to date. The credit company has purchased a $780,000 loan that had been extended to Pillow Perfect, Inc. by First Capital Bank; Pillow Perfect is located in Woodstock, Georgia. The credit company has purchased a $380,000 loan that had been extended to Pointe Services, Inc. by First Capital Bank; Pointe Services is located in Atlanta, Georgia. The credit company has extended a $200,000 loan to Advanced Technology Services, Inc. located in Atlanta, Georgia. Finally, the credit company has extended a $1,000 loan to Bitz America, Inc., in Martinez, Georgia.

It is not known how much the credit company paid to purchase the loans involving Pillow Perfect and Pointe Services. The above four loans evidence at most the use of only $1,361,000 of the funds obtained from the first 95 investors who were granted under this program.[2] The petitioner has provided loan-prospect reports from October 1997 and February 1998; these reports show that the credit company has proposed (but not succeeded in) lending money to various companies in Norcross, Oakwood, Atlanta, and Marietta, Georgia as well as Miami and Orlando, Florida.

Pillow Perfect is located in Cherokee County, Georgia; according to the employment information submitted by counsel, Cherokee County did not have any census tracts that qualified as areas of high unemployment in 1995. Pointe Services and Advanced Technology Services, Inc., are located in Fulton County. The petitioner has not demonstrated that these companies are located in the particular census tracts that qualified as areas of high unemployment in 1995 or in any other year. Nor has the petitioner shown that Bitz America is located in a targeted employment area.

The few transactions in which the credit company has engaged have not been shown to benefit companies located in targeted employment areas.[3] Even the businesses considered "loan prospects" are not located in targeted employment areas. Neither the credit company, headquartered in Atlanta, nor AELP, headquartered in Charleston, has been shown to be located in a targeted employment area. Therefore, the amount of capital necessary to make a qualifying investment in this matter is $1,000,000.

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[2]This computes to approximately $14,327 per investor, far short of the requisite $500,000 per investor.

[3]It is noted that the employment information provided by counsel is out of date, in any event. A petitioner must establish that certain areas are targeted employment areas as of the date he files his petition; just because a particular area used to be rural many years ago, for example, does not mean that it still is.

Also, the regional-center designation in this case was granted for most of the counties in South Carolina. It did not extend to Georgia or Florida. While AELP is located in South Carolina, neither the credit company extending the actual loans nor the companies receiving the loans are located within the regional center. Therefore, the petitioner must establish direct employment creation.

The petitioner states in his brief that the Service had expressly permitted the use of the subsidiary credit corporation as a vehicle for making loans to export-related businesses not related to the regional center. He refers to a letter dated September 27, 1995, from the Chief of the Immigrant Branch, Adjudications, who was asked whether the customers of an export credit corporation needed to be located within the region covered by the regional-center designation. The Chief's response did not directly address this question; instead, he stated, "Although the regional center should focus on a geographical area, there is no requirement in either the statute or the regulations that the exports generated under the Pilot Program be **produced or manufactured** within the area designated by the regional center," (emphasis added).[4] The petitioner concludes that the credit company may extend loans to any export-related company located anywhere.

Such an interpretation renders the geographical limitation of a regional center meaningless. The definition of "regional center" in 8 C.F.R. § 204.6(e) requires that the economic unit be involved in "improved regional productivity." 8 C.F.R. § 204.6(m)(3)(i) states that, in order to gain approval as a regional center, an entity must describe clearly how it will promote economic growth through "improved regional productivity." If neither the credit company nor the export-related businesses are located in the regional center, it is difficult to see how the productivity within the regional center is being improved.[5]

As the subsidiary credit corporation's actual and proposed loan activities benefit companies outside the geographical area covered by the regional-center designation granted in this case, the petitioner must estab-

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[4]Not all export-related businesses produce or manufacture their own goods. For example, if a bank located within the regional center were to lend money to a company that exported chicken parts to Russia, the chickens would not have to have been raised within the specific geographical area; the export company would have to be located within the area, however. Similarly, the bank could permissibly lend money to a company located in the geographical area that exported cosmetics, jeans, and American rice to Japan; these products would likely not have been produced or manufactured within the area. It is not sufficient for just the bank, or the bank's primary shareholder, to be located in the regional center

[5]Even if the credit company here were located within the regional center rather than in Atlanta, the arrangement would still not qualify. The only improved regional productivity would concern the salaries of a few loan officers; this is not what was intended by the regional-center provisions.

lish direct employment creation; he cannot rely on indirect employment creation. For the sake of argument, however, the AAU will analyze the investment portion of this case using his claim of indirect employment creation.

CERTAIN REVISIONS TO THE PARTNERSHIP AGREEMENT CANNOT BE ACCEPTED

Subsequent to the issuance of the director's decision, counsel has submitted numerous revisions to AELP's limited partnership agreement. He explains that the revisions are in the form of Stage I and Stage II amendments.

The original partnership agreement had been prepared and executed in March of 1996, prior to the creation of an initial payment option of $120,000. When the $120,000 option was added to AELP's program in the fall of 1996, AELP neglected to amend the partnership agreement. As a result, many provisions within the documents signed by this petitioner contradict provisions within the official partnership agreement. The Stage I amendments are intended to correct these inconsistencies.

In addition, after the attorneys for AELP obtained a copy of a memorandum issued in December of 1997 by the Service's Office of General Counsel ("OGC"), "the Limited Partnership Agreement of AELP was further amended to restructure, amend or eliminate some or all of [the] 'objected-to' provisions." These Stage II amendments, counsel continues, should render the instant petition approvable.

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.

Counsel states that petitions have previously been amended to reflect program changes and to cure defects in the original documents. He refers to a 1995 case in which the center director had correctly found that the business at issue did not constitute a troubled business. At oral argument in that case, counsel presented a completely different business plan that abandoned the troubled-business claim and substituted a plan to create a new business instead. This new business plan formed the basis of an approval. The case referenced by counsel, however, resulted in an unpublished decision that did not have any precedential value, procedural or otherwise. Furthermore, the AAU acknowledges that acceptance of the new business plan at such a late date was improper and erroneous.

In the case at hand, the AAU will recognize the Stage I amendments to the extent that they cause the partnership agreement to conform to the other

agreements that this petitioner had originally executed and submitted with his Form I-526. The AAU will make no determination as to the adequacy or inadequacy of the Stage II amendments, as they are irrelevant in this proceeding; the Service cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). If counsel had wished to test the validity of the newest plan, which is materially different from the original plan, he should have withdrawn the instant petition and advised the petitioner to file a new Form I-526. The case shall be analyzed only on the basis of the original documents and the revisions that correct the original inconsistencies.

THE PETITIONER HAS NOT MADE A QUALIFYING "INVESTMENT"

8 C.F.R. § 204.6(e) states, in pertinent part, that

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars; ...
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> (i) Bank statement(s) showing amount(s) deposited in United States business

account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred), Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Counsel states that the petitioner has made an investment of $500,000 in the form of a $500,000 promissory note. This note provides for an initial deposit of $120,000 into an escrow account, to be released to the partnership upon approval of the immigrant visa, five annual payments of $18,000, and a final balloon payment of $290,000.

Initial Partnership expenses

On October 14, 1997, Wells Fargo Bank notified the petitioner that his funds in the amount of $120,000 had been received and deposited into a custody account for the Partnership. According to section 2.A(3) of the investment agreement, the petitioner agreed to instruct counsel, as trustee of his escrow account, "immediately to release US$30,000 as a refundable advance for initial expenses of the Partnership"; the remaining $90,000 would be released upon approval of the visa application. As pointed out by the director on page 4 of his decision, the use of the $30,000 for Partnership costs and expenses meant that the full $500,000 would not be "infused into the commercial enterprise for the purpose of employment creation."

In response, the petitioner states that it is possible that the director objected to the expenses being released from the escrow account and that the director might not have objected if the expenses had been paid after the funds were released from escrow. Regardless of the timing of the payment, the ultimate payee is the Partnership, the petitioner maintains. The timing

of the payment, however, was not the director's objection. The director cited 8 C.F.R. § 204.6(j)(2) in stating that the required amount of capital must be placed at risk "for the purpose of generating a return on the capital placed at risk." As the payment of initial Partnership expenses and costs was not the type of profit-generating activity contemplated by the regulations, no more than $470,000 could be considered to have been "invested."

The petitioner argues that fees and expenses incurred in the process of raising capital are customary and reasonable. For example, when businesses go to banks for money, the banks charge processing fees, points, appraisal fees, and other expenses that are included in the debt. The petitioner continues:

> It is absurd to suggest that there is no cost to creating an immigrant investor program (attorneys fees, accountant fees, and administrative fees), there is no cost to raising money in the market place (finders fees, immigration consultant fees, forwarding fees, and so forth); and that there are no ongoing administrative and operating expenses during the initial start up phase of the business (rent, utilities, telephones, fax machines, office furniture, personnel costs, executive salaries, etc.), We live in a world of reality, not "make believe."

The petitioner refers to AELP's subsidiary credit company having retained an expert in asset-based loans for an annual salary "in excess of $200,000." What is important, the petitioner emphasizes, is that the money spent by AELP on initial expenses is in furtherance of the Partnership business.[6]

While points and processing fees are often financed, they are considered an amount over and above the original loan amount. To illustrate, when a person intends to obtain a mortgage for $200,000, he can choose to pay the points and fees separately or he can choose to finance them. If he chooses to finance the fees, the principal on his mortgage is no longer just $200,000 but something more. In the investor context, the Service is not prohibiting the payment of Partnership expenses; rather, the Service is finding that if AELP wishes to have the limited partners pay these expenses, these expenses must be paid in addition to the $500,000.

The petitioner explains that AELP deducts its operating expenses of $30,000, and the remaining funds go to the subsidiary credit corporation. The credit corporation then deducts its own expenses and the leftover money is contributed to a lending fund from which the loans to export companies are made. The petitioner contends that the new commercial enter-

[6]Nevertheless, counsel appears to be prepared to abandon these numerous arguments. In his brief on behalf of the petitioner, counsel states that if the AAU finds that providing for the payment of initial expenses from and out of capital contributed by the investor is improper, then AELP will immediately amend its partnership agreement to eliminate the provision from its program.

prise here is the Partnership, AELP, and an investment of $500,000 in AELP constitutes an investment of $500,000 in the new commercial enterprise, "It was never AELP's intent...that 100% of the funds contributed by the foreign national investors would flow through the partnership and into the credit corporation for lending to U.S. export businesses." After AELP and the credit corporation deduct tens of thousands of dollars for their "expenses," however, it is not clear how much of the original money is made available for loans.

It could perhaps be argued that, when the owner of a corporation pays a million dollars for shares in his business and earmarks the money for equipment, inventory, and working capital, some of the working capital will in fact be spent on initial salaries and expenses. In the partnership scenario, the new commercial enterprise is the partnership, and it too will need to spend money on initial salaries and expenses. The Service distinguishes these two situations in that, in the former example, the employment-creating entity is spending the money. In the latter example, the employment-creating entity never receives the money spent on the partnership's expenses. Especially where indirect employment creation is being claimed, and the nexus between the money and the jobs is already tenuous, the Service has an interest in examining, to a degree, the manner in which funds are being applied. **The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.**[7] The Service does not wish to encourage the creation of layer upon layer of "holding companies" or "parent companies," with each business taking its cut and the ultimate employer seeing very little of the aliens' money.

In his brief on behalf of the petitioner, counsel claims that the deduction of AELP's and the credit company's expenses had previously been disclosed to, and approved by, the Service when the Service approved the general partner's designation as a regional center. The focus of an inquiry into the designation of a regional center, however, has to do with whether proposed activities will improve regional productivity through increased exports; it has nothing to do with the propriety of various business expenses and how they are funded. Counsel also claims that the same facts were disclosed within the past few months, both in writing and during a conference attended by AELP representatives and Service attorneys. Disclosure, though, does not mandate approval.

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[7]Whether or not $500,000 must be made available for the loans to export companies or whether $500,000 must merely be made available to the credit corporation extending the loans, it is clear that making $500,000 available to **AELP** is not sufficient. AELP's primary purpose is apparently to locate potential alien investors. AELP does not extend the loans to the export companies and is not the entity most closely engaged in employment creation, indirect or otherwise.

In his brief on behalf of the petitioner, counsel cites a 1995 case in which the Vermont Service Center had questioned whether $80,000 or $90,000 set aside for fees could be considered an investment of capital. On May 25, 1995, the Administrative Appeals Unit approved the case. Counsel further states, "During oral argument an AAU official stated that it was proper to deduct such fees from the amount of the capital contributed by the investor without thereby reducing the investor's contribution of capital."

The decision rendered by the AAU in that case did not specifically address the issue of fees. In addition, the decision in that case was unpublished and has no precedential value.

Annual payments

According to section 2B of the investment agreement executed by the petitioner, the petitioner must make five annual cash payments of $18,000 each, totalling $90,000, commencing one year from the date he is admitted to the Partnership.

Section 3 of the investment agreement, however, states, "I shall receive a return on the cash I have contributed to the Partnership in the amount of 12% per annum, payable annually, commencing one year from the date I am admitted to the Partnership as a Limited Partner and ending five years thereafter."[8] The petitioner would also receive a share of any profits exceeding this 12-percent return. The partnership agreement explains that the percentage return is computed on the basis of the total cash contributed at the time the distribution is made. In other words, the petitioner's first annual distribution would be at least $14,400 (12 percent of $120,000, plus any additional profits), his second annual distribution at least $16,560 (12 percent of $138,000), his third at least $18,720, his fourth at least $20,880, and his fifth at least $23,040.

In effect, the $90,000 that the petitioner's annual payment obligation represents would require very little in new, personal funds. To make his first annual payment of $18,000, the petitioner would have to contribute no more than $3,600 of his own funds to the $14,400 (or more) he would receive from the Partnership. To make his second payment, the petitioner would have to contribute no more than $1,440 of his own funds to the $16,560 he would receive from the Partnership. The petitioner's third, fourth, and fifth payments, however, would be entirely covered by his guaranteed distributions from the Partnership; in fact, the petitioner would be at least $8,640 ahead for these last three years.

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[8]The original partnership agreement, however, provides that this return is **10** percent per year, payable for **four** years. Counsel does not submit a Stage I amendment for this inconsistency.

The petitioner's obligation to make his annual payments is conditioned upon the Partnership making the guaranteed annual distributions to the petitioner.[9] As such, these annual payments do not constitute a contribution of capital.[10]

The petitioner refers to the OGC memorandum of December 19, 1997, which had criticized the use of profits generated by a business to meet obligations under a promissory note. The petitioner contends that he is entitled to use his guaranteed return for whatever purpose he desires, and it would be absurd to segregate dividends or profits in a special account to guarantee that they would not be used to make payments on the note.

The AAU does not at this time reach the issue of whether it is ever appropriate for a business to distribute profits to an alien who still owes money to the business. The problem addressed here is that the annual returns are **guaranteed**. The fact that title to that money changes hands does not change the essence of the transaction; as the director pointed out in his decision, the Partnership receives no infusion of new funds from the petitioner.

Another problem with guaranteed annual distributions is the source of the distributions. As the petitioner concedes on page 70 of his brief, "[i]t is unlikely that the business will be immediately profitable from the lending activities contemplated by AELP and its credit corporation subsidiary." Since there is never a guarantee that the Partnership will generate sufficient profits during any given year to pay each investor his 12-percent guaranteed distribution, the possibility exists that the distributions may be drawn from the contributions of future limited partners (thereby necessitating the acquisition of more and more limited partners) or from the contributions already made (thereby depleting the initial contributions).

At pages 70 and 71 of his brief on behalf of the petitioner, counsel counters, "The payment of this guaranteed return is an obligation of the partnership which may or may not be met. If the partnership does not have the ability to make such annual payments, they will not be made." As mentioned earlier, this is directly contradicted by section 2.C of the investment agreement, which provides that the failure of the Partnership to make the

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[9]Section 2.C of the investment agreement states, "In the event of the bankruptcy, the insolvency, or the failure of the partnership to pay the annual return on capital, to pay the sell option price, or to pay any judgment, the Partnership shall be deemed to be in breach of its obligations to the Limited Partners under the American Export Limited Partnership Agreement, and I, as a Limited Partner, shall have no further obligations to the Partnership, and furthermore, I shall not be obligated to make any further cash payments under the Limited Partnership Agreement, this Investment Agreement or the Promissory Note."

[10]At most, one could argue that the petitioner must make an initial outlay of $5,040 for the first two payments; but because this amount would be more than offset by the last three guaranteed distributions from the Partnership, this initial outlay is, in effect, a loan. 8 C.F.R. § 204.6(e) specifies that contributions of money in exchange for debt arrangements do not qualify as "investments."

annual distributions is considered a breach of the Partnership's obligations and will cause the petitioner not to have to make any further cash payments.

The petitioner states that Service administrative case law exists supporting a petitioner's application of guaranteed annual returns paid by a partnership toward meeting the petitioner's obligation to make annual payments to the partnership. The petitioner cites an unpublished AAU decision from 1995 involving the "C&W Hotel Management program." While the center director's decision in that case had referred to a provision in the business plan stating that four annual payments might come from the profits of the business, the center director did not note whether these so-called "profits" were in the form of *guaranteed* returns (which would then have no direct connection to profit, as discussed above), and he did not make any finding as to the propriety of this provision. Review of the AAU decision reveals no reference whatsoever to annual returns or annual payments. Therefore, it cannot be said that the AAU has specifically sanctioned the use of guaranteed annual returns toward meeting obligations to make annual payments. More significantly, the AAU decision in question was unpublished and has no binding precedential authority.[11]

The petitioner points to an internal Service memorandum issued on October 20, 1997, by the Office of Adjudications. This memorandum stated that in some cases, guaranteed interest payments were made through outside loans or from capital contributed by other investors; as not all businesses could be profitable immediately, a contractual provision for guaranteed payments may, in certain cases, be consistent with a genuine investment.[12] This memorandum was a general statement of policy and did not analyze any particular fact patterns. Indeed, the statements in the memorandum were qualified with the words "may" and "in certain cases." Given the confusing statements contained in the memorandum, and the lack of guidelines provided, this memorandum provides no assistance in resolving the present case.

In short, because the petitioner is guaranteed annual distributions from the Partnership of at least 12-percent for five years, which would yield him $93,600, the petitioner's five annual payments totalling $90,000 under the promissory note cannot be considered a qualifying contribution of capital.[13]

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[11]The AAU recognizes that the Service has approved plans that may have contained guaranteed annual returns. If so, such approvals were in error for the reasons stated in this decision.

[12]This recent memorandum was superseded by a subsequent memorandum dated March 11, 1998, however.

[13]In apparent recognition of the fact that the petitioner is not contributing capital through the five annual payments, the investment agreement provides, at section 6, that if the conditions of the petitioner's permanent resident status are not removed, the Partnership will refund the petitioner $120,000. Presumably, by the time the petitioner applied for removal of his conditions, he would have made at least one of the annual payments and contributed $138,000.

The petitioner has effectively shifted the risk of loss of the $90,000 from himself to the Partnership.

Redemption agreement

Section 4 of the investment agreement provides, "after the sixth anniversary of my admission to the Partnership, I, as a limited partner, may exercise a sell option under which I have the **right to require** the Partnership to purchase from me my limited partnership interest," (emphasis added).[14] The sell-option price is equal to the petitioner's total contributed capital, less the first six payments, plus a pro rata share of profits. In other words, the sell-option price is $290,000 plus profits. Or, to look at it from the petitioner's perspective, the price of permanent resident status is $116,400 minus profits; as discussed above, the five annual payments are more than fully covered by the annual distributions and do not require any expenditure on the part of the petitioner. At the same time, the Partnership may exercise a buy option for the same price.[15]

Section 4 of the investment agreement specifies that the sell-option price is "payable as soon as the sell option is exercised." Section 8.05C of the original partnership agreement, however, states that the price is payable 180 days after the exercise of the sell option. The revised partnership agreement, instead of conforming to the investment agreement, reiterates the 180-day deadline. While the Stage I amendments were intended to reflect the actual intent of the parties, the petitioner has not executed a new investment agreement or otherwise indicated that he agrees with the new partnership agreement and is willing to wait 180 days.

It is not clear whether the petitioner is obligated actually to make the last payment of $290,000 if he exercises his sell option; both his responsibility to pay and his right to sell ripen at the same time. Section 8.05C of the partnership agreement provides that once the Partnership pays the sell-option price, "all amounts owed under such Selling Limited Partner's Investor Note shall be deemed satisfied by the Partnership..." Similarly, under section 8.06C, after the Partnership pays the buy-option price, "all

[14]The original partnership agreement states that the sell option is exercisable after five years; the revised agreement, pursuant to a Stage I amendment, states that the sell option is exercisable after six years in the case of a limited partner who makes an initial cash payment of $120,000.

[15]Section 8.06 of the original partnership agreement states that this "buy option" is exercisable after **three** years. Pursuant to Stage II amendments, the partnership agreement now states that the buy option is exercisable one year after the petitioner completes his payments under the note, or **seven** years. The revised partnership agreement also mentions sell-option prices of "$410,000? $290,000?" [sic].

amounts due and owing under the Investor Note shall be discharged by the Partnership..." It is not known what amount would still be owed if the petitioner is obligated to pay the $290,000 prior to the exercise of the buy or sell option. If the petitioner can avoid making this last payment by exercising his sell option, this amount of $290,000 cannot be considered to have been placed at risk.

Even if the petitioner is obligated to make this balloon payment prior to exercising his sell option, the $290,000 still cannot be said to be at risk because it is guaranteed to be returned, regardless of the success or failure of the business. If the investment agreement executed by the petitioner is controlling, then the moment he made this last payment, the petitioner could exercise his sell option, and the money would be immediately returned; the amount of $290,000 would never be at risk. If the partnership agreement is controlling, then the petitioner's agreement to make this payment of $290,000 is, in essence, a debt arrangement in which he provides funds in exchange for an unconditional, contractual promise that it will be repaid later at a fixed maturity date (six months later). Such an arrangement is specifically prohibited by the regulations. *See* 8 C.F.R. § 204.6(e).

In its opinion dated December 19, 1997, OGC engaged in a lengthy discussion of the factors evidencing debt and equity in the context of tax law; the opinion cited various tax cases and concluded that the debt characteristics of a plan such as AELP's outweighed any equity characteristics. The AAU finds such a discussion unnecessary and not particularly helpful with respect to this matter. The considerations at issue here are not the same as those of a court attempting to ascertain whether a business is attempting to evade taxes. Furthermore, the businesses examined in those tax cases were standard businesses not created for the purpose of enabling aliens to obtain immigration benefits. As counsel conceded at oral argument, potential alien investors are

> not going to make this investment, under *any* circumstances, unless they get a green card. If anybody ever suggests that this is a wonderful investment and they're going to make it without getting lawful permanent residence, they're lying and they're crazy; they're brain-damaged, all right? Nobody is gonna do this without getting a green card. That was the intent of the law. That's the carrot; that's the quid pro quo.

In other words, AELP has created a program to which most people would be unwilling to subscribe.[16] A discussion of the numerous debt and equity factors set forth in the tax cases unnecessarily complicates the

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[16]This, by itself, raises the question of whether the AELP plan is a genuine investment. If normal investors would be unwilling to participate in this program because the chance for a net monetary gain does not exist, then it is logical to conclude that the hoped-for "profit" inherent in this program is the green card itself.

attempt to ascertain the true substance of the transaction. Very simply, the payment of the $290,000 constitutes a straight loan; the petitioner would be making this money available to AELP with the contractual expectation that it would be returned to him six months later. The risk that the petitioner might not receive payment if the Partnership fails is no different from the risk any business creditor incurs.

Counsel states on page 30 of his brief on behalf of the petitioner, "The payment of the sell-option price was dependent upon the Partnership's ability and willingness to pay. Thus, substantial risk existed in that the Partnership might be unable or unwilling to pay the investor." At oral argument, counsel claimed that the redemption provisions were entirely unenforceable; no partner could bring a lawsuit to enforce them. Aside from the question of why not, counsel's statements raise questions of good faith. For AELP to entice aliens to invest in AELP by promising them redemption rights, but then for counsel (who is counsel for both AELP and the petitioner) to suggest in his brief that AELP might not be "willing" to honor the redemption rights, and to add at oral argument that the redemption provisions are not enforceable anyway, is disturbing. While most normal investors in the business world realize that they risk losses due to business downturns, the aliens participating in AELP may not realize that their attorney believes that their risk instead involves the refusal of their attorney's other client to comply with the written contract it executed with them. The Service cannot endorse illusory promises and does not recognize this type of "risk" as the kind of risk contemplated by 8 C.F.R. § 204.6(j)(2).

More importantly, the AAU must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel; these documents provide the petitioner with the right to redemption and a certain price. As mentioned earlier, section 2.C of the investment agreement specifies that the failure of AELP to pay the sell-option price constitutes a breach of AELP's obligations to its limited partners.

In its memorandum of September 10, 1993, OGC stated its opinion at page 8 that it was "entirely appropriate for an alien to enter into an agreement with the investment fund whereby the seller agrees to repurchase the investor's shares upon, but not before, removal of the conditional basis of the alien's permanent residence." OGC qualified this statement by adding that such a redemption agreement "may not be used as a vehicle to avoid or reduce the risk of capital loss to the alien investor during the two-year period of conditional residency." To ensure that the capital remained at risk during the two-year period, OGC believed that the repurchase agreement should expressly provide that the price of the shares to be resold could not exceed the fair market value of the shares at the time of repurchase; "[a]ny other repurchase arrangement would impermissibly shift the risk of loss from the investment from the alien to the party promising to buy back the alien's interest in the investment." In a subsequent memorandum dated

June 27, 1995, OGC explained at page 10 that such a redemption agreement was permissible "since the alien risks losing all or part of his own capital in the event the fair market value of the investment has fallen at the time of the repurchase."

The AAU does not entirely agree with the opinions of OGC. To enter into a redemption agreement at the time of making an "investment" evidences a preconceived intent to unburden oneself of the investment as soon as possible after unconditional permanent resident status is attained. This is conceptually no different from a situation in which an alien marries a U.S. citizen and states, in writing, that he will divorce her in two years. The focus here is on the green card and not on the business. Despite counsel's repeated claims that the Service's current position is hurting U.S. workers and U.S. businesses, and despite counsel's accusations regarding the Service's allegedly cavalier attitude toward them, one could argue that an alien who enters into a redemption agreement considers the continued success of the U.S. workers and U.S. businesses secondary. His primary concern is obtaining permanent resident status for as little money as possible.

For the alien's money truly to be at risk, the alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one.

The fair-market-value limitation on the sale price referenced by OGC, while well-intended, is not workable. It is not clear how this fair market value would be determined. For example, at page 31 of his brief on behalf of the petitioner, counsel discusses the two five-year payment options offered by AELP prior to the offering of the $120,000 option subscribed to by this petitioner. "Since the AELP sell-option prices were either $150,000 or $140,000 less than the $500,000 cash contribution recently completed, it seemed obvious that the sell-option prices would be substantially below fair market value." The only reason this would be "obvious" would be if counsel already knew what the fair market value would be in five years. True fair market value cannot be known five years in advance. Fair market value assumes the existence of a market. In this case, no public market exists for the AELP partnership interest. The sale of the partnership interest would not be an arms-length transaction, and the valuation of the parties would not reflect a true fair market value.

The AAU does not find that an alien investor may never sell back his partnership interest. Rather, the AAU finds that, prior to completing all his cash payments under a promissory note (whether to the partnership or to some third-party lender), an alien investor may not enter into any agreement granting him the right to sell his interest back to the partnership. In no event may he enter into such an agreement prior to the end of the two-year period of conditional residence. An investment assumes that a risk exists. The

alien must go into the investment not knowing for sure if he will be able to sell his interest at all after he obtains his unconditional permanent resident status; and if he is successful in selling his interest, the sale price may be disappointingly low (or surprising high and more than what he paid), This way, the alien risks both gain and loss. To allow otherwise transforms the arrangement into a loan.[17]

The petitioner contends that the AAU, in the unpublished C&W decision from 1995, had previously considered the issue of whether a structure identical to AELP's constituted a debt arrangement. According to the petitioner, the Vermont Service Center had found that the plan in question appeared to represent a good-faith commitment on a debt agreement, and representatives of the AAU "advised that they had analyzed the investment agreements and had concluded that the C&W program did not constitute a debt arrangement." "The C&W decision reversing the Vermont Service Center and ordering that the petitions be approved rejects the argument that this structure constitutes a debt arrangement," the petitioner continues.

The petitioner misreads the decisions. The Vermont Service Center's statement regarding a "good faith commitment on a debt agreement" was a reference to a comment in the Federal Register from someone suggesting that the Service "should state in the regulations that a good faith commitment on a debt agreement, *which is secured by the alien entrepreneur's assets*, should suffice to meet the requirement that the alien entrepreneur has, in good faith, substantially met the capital investment requirement..." (emphasis added). In other words, the "debt agreement" referred to by the Vermont Service Center was the promissory note executed by the *petitioner*, who had agreed to make cash payments to the partnership; as such, the "debt" at issue was the petitioner's debt to the partnership, not the partnership's subsequent debt to the petitioner. Neither the center decision nor the AAU decision specifically considered whether the investment structure at issue involved a prohibited debt arrangement (i.e., loan) as is at issue here. Neither decision made reference to a sell option.

The petitioner points to another program, which he calls the "Pardini/Tony Roma program." According to the petitioner's counsel, the California Service Center stated, in a notice of intent to deny, that the effect of the partnership arrangement appeared to be "a series of loans called investments made by the Limited Partners, the foreign investors, to the General Partner who is to be repaid by the General Partners at 10% interest." Brief at 54. Counsel claims that, in his response, he set forth the AAU decision in C&W; "[t]he AAU's rejection of the debt arrangement argument proved persuasive to the California Service Center, which in turn rejected

[17]More precisely, the AAU finds that the AELP plan contains, as one of its many features, a loan of $290,000. This amount of $290,000 cannot be considered an "investment."

the 'debt' argument and approved the Pardini/Tony Roma investor petitions."

As noted above, the AAU's C&W decision did not address the issue of loans extended by the limited partners to the partnership. Therefore, the California Service Center would have been in error if it had relied on the C&W decision to conclude that the Tony Roma plan did not involve an impermissible debt arrangement. Moreover, the C&W decision was unpublished and, even if it were relevant to Tony Roma or to this case, would not have any binding precedential value. Furthermore, even if the Service has, in the past, approved petitions that contained redemption agreements, these approvals were in error because the Service now recognizes that such agreements are in fact debt arrangements.

> The petitioner also refers to an internal Service memorandum from October 20, 1997, in which appears the following statement:
>
> On the other hand, absent evidence to the contrary, where the agreement does not specifically grant the investor the option to sell or the new commercial enterprise to buy out the investment before the balloon payment is due, an adjudicator may not deny the petition based on a finding that the investor will not exercise a sell (or the new commercial enterprise a buy-out) option before the due date on the balloon payment.

This statement makes no sense and certainly does not support the petitioner's contentions. The petitioner characterizes this memorandum as "all-important"; far from being "all-important," this memorandum was meant only to provide general policy statements, not to analyze specific fact patterns.[18]

As far as the petitioner's criticism that the Texas Service Center's decision in this case failed to mention, distinguish, or explain away the above prior decisions and OGC opinions, it is not clear why the center director would reference them at all. Neither of the above decisions had any precedential value, and neither case originated from the Texas Service Center. OGC memoranda, as counsel himself stated after oral argument, are merely opinions. OGC is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations. *See* 8 C.F.R. § 103.1(b)(1).

Because the petitioner here has entered into an agreement to pay $290,000 in exchange for a promise that he can receive the $290,000 back six months later, he has in effect entered into a debt arrangement as prohibited by 8 C.F.R. § 204.6(e).[19] The $290,000 cannot be considered to have been properly "invested" and is not at risk.

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[18]Furthermore, as mentioned earlier, this memorandum was superseded by another memorandum less than five months later.

[19]Again, this is assuming that the partnership agreement is the controlling document. If the investment document executed by this petitioner is controlling, then the money must be returned immediately and not after six months.

Cash reserves

The definitions section and section 4.04 of the original partnership agreement state that the general partner may deposit portions of the limited partners' capital contributions, designated as "reserve funds," in escrow or sub-escrow accounts. According to section 4.04.A(i) of the agreement, the banks holding these accounts shall invest the funds "in securities or other financial instruments and obligations in amounts sufficient to satisfy the requirements of **Section 8.05**," (emphasis in original). Section 4.04.B adds that the general partner "shall deposit with the Banks from the Initial Cash Payments sufficient Reserve Funds to satisfy the Partnership obligations under **Section 8.05** and to defray such costs and expenses of the Partnership as determined by the General Partner," (emphasis in original), Section 8.05 of the partnership agreement is entitled "Limited Partner Sell Option" and sets forth the timing and price of the sell option.

Section 4.03.B explains that after all the requirements of section 4.04.B are satisfied, any funds remaining from the initial cash payments and all subsequent capital contributions may be used to meet the obligations of the Partnership, as determined by the general partner in its sole discretion, with any excess to be used in the business of the Partnership.

In other words, pursuant to the above sections of the original partnership agreement, the general partner would be obligated to deposit sufficient portions of the initial $120,000 and/or the remaining $380,000 into the reserve funds such that the deposits and their earnings (from securities or other financial instruments) would enable the Partnership to fulfill its own obligations to buy back Partnership interests. The creation and maintenance of these reserve funds take priority over any other use of the capital contributions. Under these terms, any leftover money would be used for other Partnership obligations, and whatever was left thereafter would then be used for business activities. As the director stated in his decision, these reserve funds are, by agreement, not available for purposes of job creation and therefore cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.

In his brief, the petitioner claims, "It is estimated in the business plans of AEP [the general partner] that no more than 10% of the total amount invested will ever be placed in bank accounts as reserves." The petitioner argues that since the sell-option price is $290,000, the initial payment of $120,000 and the installment payments totalling $90,000 would never become the subject of reserve accounts because they would yield an insufficient amount ($210,000) to cover the sell-option price. As such, these payments would be able to be used fully by the Partnership. Furthermore, the petitioner points out that if all of the limited partners' initial contributions and annual payments had been withheld as cash reserves, the subsidiary credit corporation could not have extended the

loans that it has.[20]

First, the partnership agreement states that the reserve funds are supposed to be invested in securities and other financial instruments, so the amount withheld from the capital contributions would not necessarily have to be $290,000. Second, the reserve provisions do not say that the reserves deducted from the contributions of a limited partner must be used to pay the sell-option price to that same limited partner; reserves drawn from later partners could conceivably be used to help pay the sell-option price to earlier partners.

Third, the reserve provisions probably have more significance as far as the final balloon payment of $290,000 than with respect to the initial payments. This final payment might have to be returned to the limited partner within six months, and the Partnership has a contractual obligation under sections 4.04.A(i) and 4.04.B to reserve sufficient funds to meet its redemption obligation of $290,000.[21] This is assuming, of course, that the partnership agreement is controlling; if the investment agreement executed by the petitioner is controlling, the money would be returned immediately instead of six months later.

In his brief, the petitioner states that in 1992 a Service official had delivered to counsel a model EB-5 investor petition that had been approved; at oral argument, counsel added that he was assured that if he followed this model petition, his petitions would also be approved. According to the petitioner, the one million dollars in capital invested in that case "would create reserves for inventory, working capital, expansion, and other partnership expenses, in the sum of *$450,000*. Thus, the model petition established that $450,000 of the $1,000,000 to be invested, or 45%, would be set aside as bank reserves."

The record does not contain a copy of this "model petition," and the AAU cannot ascertain whether the cash reserves in that case were mandatory or inadvertent, temporary or long-term. The opinions of one Service official, moreover, cannot work to remove from the AAU's jurisdiction the authority to review individual cases. *See* 8 C.F.R. § 103.1(f)(3)(iii), The Service does not pre-adjudicate investor petitions;[22] each petition must be adjudicated on its own merits. The fact that a particular petition (which did not result in a precedent decision) was considered qualifying in 1992, when the Service was less experienced with these types of cases, has no bearing

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[20]The credit company has only extended four loans to date, totalling $1,361,000. Capital contributions of $500,000 from the 95 previously-approved petitioners would yield $47.5 million available for loans.

[21]Even if, after six years, the petitioner elected to remain in the Partnership instead of exercising his redemption option, the reserve provisions would still preclude the capital from being placed at risk during the two-year conditional period, as required by the regulations.

[22]Cf. 8 C.F.R. § 214.2(l)(2)(ii) regarding non-immigrant L-1 blanket petitions.

on whether the reserve provisions in question here should also be considered qualifying.

Counsel explains in his brief on behalf of the petitioner:

> It was discovered by AELP that the Limited Partnership Agreement may be interpreted to require the creation of reserves in order to enable the Partnership to perform its obligation to pay the sell-option price to investors who exercised the sell-option obligations. It was never the intention of the Partnership to require the maintenance of reserves for this purpose.

Therefore, he states, pursuant to Stage I amendments the reserve provisions have since been eliminated.

The plain language of section 4.04.B of the original partnership agreement, however, clearly states that the general partner "shall" deposit sufficient reserves for the purpose of enabling the Partnership to meet its obligations under the sell-option agreement; the reference to the section pertaining to the sell option is even in bold face. It is difficult to imagine what the intent of this provision could be other than to require the creation and maintenance of reserves for such purpose. The assertion that the deletion of the reserve provisions is a Stage I amendment is not well taken; this revision does not conform the partnership agreement to the investment agreement executed by the petitioner and is a material change in position from the original partnership agreement. It is more in the nature of an unacceptable Stage II amendment.[23] (See earlier discussion of revisions to the partnership agreement.) Even if the issue of cash reserves were the sole ground for denial, the elimination of the cash-reserve requirement could not form the basis of an approval of *this* petition.

Fair market value of promissory note, schedule of payments

As stated in 8 C.F.R. § 204.6(e), **all** capital must be valued at fair market value in United States dollars. Counsel claims that the petitioner has made a capital contribution of $500,000 because he has executed a promissory note for $500,000. One issue to be examined when determining the fair market value of a promissory note is whether it is adequately secured.

According to the Secured Promissory Note executed by the petitioner on October 14, 1997, the obligation of the petitioner to make payments is secured by the petitioner's personal assets, "which are identified in the Attachment hereto." The promissory note does not include any document entitled "Attachment," although the record does contain a Summary of Bank Account Balances. This summary does not specify that the bank

[23]The investment agreement is silent as to cash reserves.

accounts listed are securing the note.

The summary and accompanying bank statements verify that the petitioner's accounts at Sumitomo Bank in Japan contained a total of $42,376.70 as of October 3, 1997; the petitioner's savings accounts at Sanwa Bank in Japan contained a total of $500,558.60 as of October 6, 1997; the petitioner's checking account at Sanwa Bank in California contained $70,985.80 as of October 10, 1997; and the petitioner's account at South Bay Bank in California contained $51,500 as of October 14, 1997. The Summary states that these accounts represent a total of $665,421.10 in funds.[24]

Assuming, arguendo, that the bank accounts do constitute the security for the promissory note, the petitioner has not demonstrated how AELP could reach the funds in the overseas accounts if the petitioner were to default, and it is not clear what expenses and effort would be involved. In the absence of such information, and in the absence of any details regarding the laws of Japan and the enforceability, by U.S. entities, of security interests taken in Japanese bank accounts, the petitioner has failed to establish that the security interest in the foreign accounts has any value.

More importantly, funds in bank accounts can easily be dissipated. As none of the above accounts is, for example, an escrow account or trust account in favor of AELP, no guarantee exists that the money contained in the accounts would remain there for the entire six years over which the petitioner would be obligated to make payments on the promissory note. For this reason, too, the petitioner has failed to show that his promissory note is adequately secured.

The fair market value of a promissory note also depends on the terms of the note itself. The petitioner contends that the promissory note at issue here is for $500,000, not $380,000; he urges the Service not to view his contribution as an initial payment of $120,000, plus annual payments totalling $90,000, plus a balloon of $290,000. The petitioner states that the regulations allow him either to have already invested or to be in the process of investing the requisite amount of capital. Therefore, the petitioner could either pay all $500,000 now or pay it over time. The regulations do not require that a petitioner pay extra to compensate for the fact that money paid now is worth more than money paid later, he argues. The petitioner points out that, at the time an alien investor seeks to remove the conditions of his permanent resident status, he need only demonstrate that he has "substantially" complied with the investment requirement. The petitioner main-

[24]It should be noted that the bank balances are for completely different dates, and it is not known if money was transferred among the various accounts and some of the funds double-counted. The petitioner did not provide transactions histories, and only one bank statement specifies the date on which the account was opened.

tains that by delivering the executed promissory note for the full $500,000, he has already made the full investment, and the schedule of payments is irrelevant.

The petitioner has failed to demonstrate that his promissory note, if it is to be considered capital, has a fair market value equal to its face value of $500,000. The question to be asked is what a third party would pay for the petitioner's note. In the real business world, promissory notes, such as mortgages, are regularly sold and are regularly discounted; present value is always relevant. The petitioner has submitted no evidence whatsoever as to the fair market value of his promise to finish paying $500,000 over six years.[25] In fact, applying standard formulae for computing the fair market value of annuities and future payments, the present value of five annual payments of $18,000 plus a payment due in six years of $290,000 plus a completed payment of $120,000 would be approximately $375,000 instead of $500,000.[26]

Under certain circumstances, a promissory note that does not itself constitute capital could instead constitute evidence that the petitioner is "in the process of investing" other capital, such as cash. In that situation, 8 C.F.R. § 216.6(c)(1)(ii) requires that a petitioner substantially complete his payments on the note prior to the end of the two-year conditional period. In the present case, however, the promissory note is not evidence that the petitioner is in the process of investing $500,000 of cash. As discussed earlier, the five $18,000 annual payments are covered by the guaranteed annual distributions. The $290,000 balloon payment is not due until well after the two-year period.

In administering this program, the Service has a responsibility to ensure that the requisite amount of money is actually paid by the petitioners. Over the years, the Service has observed that the terms of promissory notes have grown progressively longer; AELP, for example, started with due dates of four and five years, while the petitioner's payment plan, a more recent AELP development, involves six years. The schedule of payments under a promissory note, whether the note is used as capital or as evidence of a

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[25] As noted earlier, it is not actually clear that the petitioner is in fact obligated to complete all of his payments prior to exercising his sell option. If the petitioner can avoid making the last payment of $290,000 by simply exercising his sell option at the time the payment is due, any purchaser of the note could not count on receiving this last payment and would further discount the value of the note. In addition, as discussed earlier, section 2.C of the investment agreement provides that the petitioner is not obligated to make any further payments on the note in the event of the Partnership's bankruptcy (voluntary or involuntary) or failure to make any of its own payments; this further reduces the value of the promissory note to a third-party purchaser.

[26] As discussed above, the note in this case would be further discounted for other reasons, such as the lack of adequate security.

commitment to invest, is relevant to the issue of whether a petitioner has, in good faith, committed the requisite amount of his personal funds. It is also relevant to the issue of the amount of funds at risk and available to the job-creating enterprise(s). Therefore, at a minimum, nearly all of the money due under a promissory note must be payable within two years, without provisions for extensions.[27] To allow otherwise would permit the admission of aliens who, by the terms of their investment plans, would be ineligible for removal of the conditions of their permanent resident status. *See* 8 C.F.R. § 216.6(c)(1)(iii).

If the instant petition were to be approved, the petitioner would have paid at most $123,600 of his own funds at the time he sought removal of the conditions of his permanent resident status.[28] This is far short of the requisite $500,000 and hardly evidences a good-faith commitment of funds. As noted above, the petitioner has also failed to show that the promissory note is adequately secured and that it otherwise has an adequate fair market value.

Source of funds

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

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[27]The petitioner must still show that the promissory note is adequately secured and that the promissory note has an adequate fair market value.

[28]§§ 216A(c)(1) and (d)(2) of the Act provide that such a petition must be filed within the 90-day period preceding the second anniversary of a petitioner's admission as a conditional permanent resident.

While the record contains a letter from Wells Fargo Bank dated October 14, 1997, acknowledging the receipt of $120,000 and advising the petitioner that the funds had been deposited into a custody account, the record does not reveal from where these funds originated. It is not known if the money came from the petitioner's overseas accounts, from his U.S. accounts, or from some other source. As the petitioner has not documented the path of the funds, such as by wire-transfer records, the petitioner has failed to meet his burden of establishing that the initial $120,000 were his own funds. *See Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998).

The petitioner has also failed to document the source of the hundreds of thousands of dollars in his bank accounts. The petitioner is 30 years old and, according to counsel, began his "entrepreneurial activities" in May 1993. The petitioner is said to be the president of a company that imports and sells vintage Levis jeans in Japan.

The only evidence of earnings contained in the record consists of two documents from the Director of Nerima Higasi Taxation Office. These documents indicate that, for the taxable year of June 3, 1996, to May 31, 1997, South Bay Trading Japan, Inc., declared Y12,674,887 in corporate income and paid Y3,992,100 in taxes. Counsel states that, applying an exchange rate of 122 Japanese yen to one U.S. dollar, the company's taxable income was $103,892.52 for this period. After subtracting taxes paid, however, the net income of South Bay Trading was approximately $71,170.

Furthermore, this figure says nothing about the *petitioner's* level of income that year, and the petitioner has not submitted any documentation about his level of income during other years. Assuming that the petitioner had taken all of South Bay's net income for himself, and assuming that the petitioner's business activities had been just as successful in the previous three years, and assuming that the petitioner had had no living expenses, he could have saved no more than $300,000; counsel claims that the petitioner's bank accounts contain over $650,000. Therefore, the petitioner has failed to meet the requirements of 8 C.F.R. § 204.6(j)(3).

Estoppel and reliance considerations

In his brief on behalf of the petitioner, counsel refers to instances in which he was supposedly guaranteed that his clients' petitions would be approved. Counsel states that in 1992 he was given a model petition and advised that if he patterned his investment structures in the same way, his clients' petitions would be approved.

In the fall of 1996, counsel met with "the Senior INS representative in charge of immigrant investor programs" and this person

expressly approved the $120,000 initial payment option, the six year schedule of payments in the sell-option or redemption agreement available after all of the payments

> have been made. The only limitation placed upon any of these provisions was that the redemption agreement could not be exercised until all of the payments had been made by the investor.

Brief at 46. Counsel states, at page 14, "Thereafter, INS kept its word. Approximately 95 petitions of AELP were approved by INS including over 50 petitions involving the initial payment option of $120,000." The opinions of a single Service official, however, are not binding, and as stated earlier, no Service officer has the authority to pre-adjudicate an immigrant-investor petition.

Counsel states that he has submitted 11 different partnership plans to the Service and that they are all identical; since the first petitions were approved, the Service is bound to approve the petition at issue here. Counsel further claims that on more than 30 occasions, he had been promised that no "changes" would be made except by formal rulemaking. Counsel is saying, in effect, that the approval of his programs is nonreviewable except upon a writing of formal regulations. Opinions purportedly expressed by a few Service officials cannot remove the AAU's regulatory authority to review these cases. To say that an agency's knowledge cannot grow, and that an agency is prohibited from benefiting from its experience, is unreasonable.

The petitioner argues that the OGC opinion of December 19, 1997, constitutes a rule change that the Service is now retroactively applying in violation of the Administrative Procedure Act ("APA"). Brief at 4-7, 114-43; Second Supplemental Brief at 5-12. This OGC opinion, however, is not a "rule." Under the APA, a rule is a binding legal principle "designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551. As noted in the OGC opinion itself, the opinion in no way modifies existing law, but is intended merely to provide guidance to the Service in understanding many factual issues that have arisen over the years with respect to immigrant-investor petitions. Providing this type of guidance is the very mission of OGC, as specifically provided at 8 C.F.R. § 100.2(a)(1) and 103.1(b)(1). These regulations do not delegate any authority to OGC to establish binding legal principles or to exercise any other rulemaking power. Neither the AAU nor other Service adjudicators, therefore, are bound to follow the OGC opinion of December 19, 1997. The AAU's decision in this case is based entirely on the application of longstanding statutory and regulatory law to the facts presented in this petition.

The petitioner incorrectly argues that the Service should be estopped from finding that his investment plan is inconsistent with § 203(b)(5) of the Act and the relevant regulations. The Supreme Court has never upheld a claim that a Government agency may be estopped from deciding a case before it, such as this case, in accordance with the law. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 422 (1990).

Furthermore, even if estoppel were applicable to the Service under these circumstances, the petitioner has completely failed to establish the requisite elements therefor. For example, the petitioner has shown no affirmative misconduct on the part of the Service.

Moreover, the petitioner has not shown that he has detrimentally relied on any prior representation by a Service official. First, no basis exists for a claim that the petitioner or his counsel "reasonably" or "justifiably" believed that informal discussions between counsel and any Service officer were an acceptable substitute for following the normal rules applicable to the filing and adjudication of investor-visa petitions. It is basic immigration law that the only way to obtain a determination on eligibility for immigrant-investor classification is to file a petition with the Service. *See* section 204(a)(1)(F); 8 C.F.R. § 2.1 and 204.6(a), Furthermore, the Service may approve a petition only if the Service makes a formal adjudication "[a]fter an investigation of the facts in each case," that the alien is eligible for the classification sought, § 204(b) of the Act.

In addition, even if the petitioner were able to establish reasonable reliance, he has not shown that he has done so to his detriment. For example, according to the investment plan, the petitioner is only obligated to pay the required investment upon the approval of his visa petition. Brief at 29.

THE PETITIONER HAS NOT ESTABLISHED A NEW COMMERCIAL ENTERPRISE

8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of:

> (1) The creation of an original business;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
>
> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. § 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. § 204.6(j)(4)(ii).

8 C.F.R. § 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years,

has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of § 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise that **he** has established. As counsel maintains, the new commercial enterprise at issue here is AELP. AELP, however, was established on March 25, 1996. The petitioner executed the various partnership documents on October 14, 1997. The petitioner did not indicate, at Part 4 of the Form I-526, in what way he was creating a new enterprise.

While AELP is a new commercial enterprise, in that it was formed after November 29, 1990, the petitioner had no hand in its creation and was not present at its inception.[29] Therefore, the petitioner must demonstrate that he will restructure or reorganize AELP to the degree that a new business will result, or he must demonstrate that he will expand AELP's net worth or number of employees by 40 percent, or he must demonstrate that AELP is a troubled business as defined above.

AELP was an ongoing business prior to the petitioner executing the investment agreement, and it intends to continue in its current form; therefore, the petitioner has not established the requisite restructuring or reorganization. As the petitioner has noted on numerous occasions, 95 investors have previously been approved with respect to AELP. Taking his claims at face value, and assuming that all 95 investors have made capital investments of $500,000, it is not possible for this petitioner to expand AELP by 40 percent with a single "investment" of $500,000. Finally, the petitioner has not submitted evidence to show that AELP has suffered the degree of loss in net worth specified by 8 C.F.R. § 204.6(e) to qualify as a troubled business; in addition, AELP was not in existence for at least two years prior to the time the petitioner signed the investment agreement.

The AAU recognizes that the Service has previously approved petitions involving plans in which limited partners joined partnerships over varying periods of time. Experience has shown, however, that some of these pool-

[29]It could perhaps be argued that the date of filing of the Certificate of Limited Partnership was not the date of AELP's creation, that AELP is still in the process of being created, and that therefore the petitioner is part of the original creation of AELP. If so, the petition has been filed prematurely; the Act requires that the petitioner "has established" the commercial enterprise already. Accomplishment of a business's purposes would be too speculative if it was based on successfully attracting unidentified future investors.

ing arrangements are being used to circumvent the establishment requirement set forth by Congress.

The petitioner has failed to show that he has established a new commercial enterprise, as required by § 203(b)(5)(A)(i) of the Act.

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(g) deals with multiple investors and states, in pertinent part:

> (1) The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time employees.
>
> (2) The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

As discussed earlier, the petitioner has failed to demonstrate that the subsidiary credit corporation has extended loans in the past to export-related businesses located within the geographical limitation of the regional center. Similarly, the credit corporation's loan prospects do not appear to involve businesses within the geographical limitation. No reason exists to believe that this petitioner's money will be lent to businesses within the geographical area. Therefore, he must establish direct employment creation.

The petitioner has failed to show that AELP has hired or will hire a sufficient number of employees to allocate 10 full-time positions to each of the 95 previously-approved petitioners as well as to this petitioner and the remaining 64 petitioners whose cases have not been decided.

CONCLUSION

In his brief, counsel states, "INS is supposed to *grant* immigrant investor petitions, not to *deny* them. INS is to interpret the laws and regulations liberally and generously so as to achieve [this] Congressional purpose." He presents statistics showing that, of the total number of visas made available, only six percent has been used. The fact that counsel considers this category to be under-utilized is irrelevant. The alien-entrepreneur classification is for a special kind of person, and it is not surprising that, notwithstanding the random number fixed by Congress, few people have both the financial means and the entrepreneurial spirit to apply. The Service will not eviscerate the meaning of the regulations or the essence of the law simply to "fill up" the numbers. The measure of success or failure of the EB-5 program is not the number of petitions granted; rather, it is the extent to which proper compliance is achieved and genuine investments are made.

Counsel continues, "Failing to comply reflects adversely upon INS as having failed to properly communicate to those attempting to comply, that which is necessary to comply." The foregoing decision should offer some guidance as to what is necessary to comply.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the petition is denied.

ORDER: The decision of the director is affirmed. The petition is denied.

(b)(6)

In re SOFFICI, Petitioner

In Visa Petition Proceedings

Designated as a precedent by the Commissioner, June 30, 1998.
(Decided by the Associate Commissioner, Examinations, June 25, 1998.)

(1) A petitioner under § 203(b)(5) of the Immigration and Nationality Act cannot establish the requisite investment of capital if he lends the money to his new commercial enterprise.

(2) Loans obtained by a corporation, secured by assets of the corporation, do not constitute capital invested by a petitioner. Not only is such a loan prohibited by 8 C.F.R. § 204.6(e), but the petitioner and the corporation are not the same legal entity.

(3) A petitioner's personal guarantee on a business's debt does not transform the business's debt into the petitioner's personal debt.

(4) A petitioner must present clear documentary evidence of the source of the funds that he invests. He must show that the funds are his own and that they were obtained through lawful means.

(5) A petitioner who acquires a pre-existing business must show that the investment has created, or at least has a reasonable prospect of creating, 10 full-time positions, in addition to those existing before acquisition. The petitioner must, therefore, present evidence concerning the pre-acquisition level of employment. Simply maintaining the pre-acquisition level of employment is not sufficient, unless the petitioner shows that the pre-existing business qualifies as a "troubled business."

ON BEHALF OF PETITIONER: LARRY J. BEHA
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FORT LAUDERDALE FL 33316

The preference visa petition was approved by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be reversed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5). The director determined that the petitioner had adequately

established that he was actively in the process of investing the requisite amount of capital. The director further found that the investment would result in full-time positions for not fewer than 10 qualifying employees.

In response, counsel urges the Administrative Appeals Office to affirm the director's decision. He asserts that the petitioner's investment exceeds one million dollars and points out that the hotel is commercially active. He states that the petitioner's investment has already created at least 10 full-time jobs.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT.

The petitioner indicates that the petition is based on an investment in an existing business located in a targeted employment area, for which the required amount of capital invested has been adjusted downward.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

The petitioner's company, Ames Management, Inc., does business as a Howard Johnson Hotel located at 950 South Federal Highway in Stuart, Florida. The City of Stuart is in Martin County. The petitioner has submitted a March 1996 letter from the Florida Department of Labor and Employment Security indicating that Martin County qualified as a rural area in 1995. In addition, the Ft. Pierce metropolitan statistical area, which encompassed Martin County, experienced a sufficiently high unemployment rate to qualify as a targeted employment area in 1995.

A petitioner has the burden to establish that his enterprise does business in an area that is considered "targeted" as of the date he files his petition.

The fact that a business may be located in an area that was once rural, for example, does not mean that that area is still rural. The letter from the Florida Department of Labor and Employment Security contains the following statement: "This listing will only remain in effect until 1996 annual averages are available in early 1997." The petitioner here filed his Form I-526 in January 1998, and his data are at least a year, if not two years, out of date.

The Service has nevertheless independently obtained current employment information from the Florida Department of Labor and Employment Security. While Martin County is no longer a rural area, the "Ft. Pierce-Port St. Lucie" metropolitan statistical area does constitute an area of high unemployment; all of Martin County is contained in this new metropolitan statistical area. Therefore, the amount of capital necessary to make a qualifying investment in this matter is $500,000.

THE PETITIONER HAS NOT MADE, AND IS NOT IN THE PROCESS OF MAKING, A QUALIFYING INVESTMENT OF CAPITAL.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suf-

fice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred), Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

Purchase of the hotel.

Ames Management, Inc. filed its articles of incorporation with the State

of Florida on June 27, 1997. All 1000 authorized shares were issued to the petitioner in July 1997. On October 31, 1997, Ames Management purchased a Howard Johnson's Motor Lodge for the sale price of $2.4 million, paid as follows: $25,000 in earnest money, consisting of a $10,000 initial deposit and a subsequent $15,000 deposit; $705,298.79 brought to settlement; and $1.7 million borrowed from 1st United Bank.

In a document entitled Sources of Investment Funds, the petitioner stated that the money used to purchase the hotel came from two sources. Approximately $450,000 were transferred to Barnett Bank from Argentina over the period 1994 to 1997; these funds "originated from personal savings and a sale of a house." An additional $500,000 were transferred from Argentina in December of 1996; these funds originated from the sale of "our business." The petitioner explained that, for both sources, "[t]hese monies were loaned to me by my father and I loaned them back to my company Ames Management, Inc. It has not been stipulated when I should return the funds."[1]

The balance sheet for the petitioner's hotel, dated November 30, 1997, confirms that the business's liabilities include long-term loans, totaling $922,136.09, payable to the shareholder (the petitioner), *See also* the Continuing and Unconditional Subordination of Debt discussed below. The accompanying "Transactions by Account" breaks down the amount, date, and destination of each loan. It is clear from this document that the $25,000 in earnest money and the $705,298.79 brought to the settlement table are mere loans from the petitioner to Ames Management. As specified in the definition of "invest" set forth in 8 C.F.R. § 204.6(e), debt arrangements between a petitioner and his business do not constitute qualifying contributions of capital. Therefore, the $730,298.79 paid toward the purchase of the hotel cannot be considered to be an "investment" by the petitioner.

Ames Management financed the balance of the purchase price, or $1.7 million, through 1st United Bank. According to the Mortgage and Security Agreement, the loan is secured by the hotel and all of its contents, including inventory, accounts, leases, the franchise agreement, furniture, patio umbrellas, landscaping, etc. First, it should be noted that a loan obtained by a corporation is not the same as a loan obtained by an individual, and it cannot be said that this loan through 1st United Bank is an investment of the *petitioner's* personal capital. Second, even if it were assumed, arguendo, that the petitioner and Ames Management were the same legal entity for purposes of this proceeding, indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital." *See* 8 C.F.R. § 204.6(e).

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[1]The petitioner has not disclosed the terms of the loan from his father, and it is not known if, for example, it is secured by assets of Ames Management.

Counsel points out that the petitioner has personally guaranteed the payment of the loan. In a Continuing and Unconditional Subordination of Debt dated October 31, 1997, Ames Management and the petitioner agreed that all debts owed by Ames to 1st United would receive priority; all obligations owed by Ames to the petitioner would be subordinated to those owed to 1st United. In case of default by Ames with regard to its loan from 1st United, the petitioner would not seek or accept payment from Ames with regard to Ames's debts to the petitioner. In an Unconditional and Irrevocable Guaranty of Payment, also dated October 31, 1997, the petitioner agreed to make the mortgage payments if Ames Management did not. 1st United would have the right to proceed against the petitioner without first proceeding against Ames Management or against any property securing the note.

As the guarantee does not **obligate** 1st United to proceed against the petitioner, it does not prohibit 1st United from first seeking payment from the business.[2] The petitioner's personal guarantee of payment does not change the character of the mortgage; the assets of Ames Management are still primarily securing the mortgage. As such, the $1.7 million that the mortgage represents cannot properly be considered an investment of the petitioner's capital.

Purchase of the van, pre-opening expenses, and corporate accounts.

On November 1, 1997, Ames Management purchased a van to be used as the hotel shuttle. The petitioner made a down payment of $8,000 and Ames Management financed the balance of $17,477.06 through Primus. Counsel and the petitioner count this van as part of the petitioner's investment. The loan through Primus does not constitute a qualifying investment of capital because it is secured by the van itself, which is an asset of Ames Management; moreover, it is not an investment of the *petitioner's* capital because it is a loan obtained by Ames and not by the petitioner.

The $8,000 down payment also does not qualify as an "investment" of the petitioner's funds; according to the Transactions by Account referenced above, it is part of the $922,136.09 in long-term loans payable to the petitioner. In other words, the $8,000 must be repaid to the petitioner.

Counsel and the petitioner include bank accounts and pre-opening expenses as investments in Ames Management. The pre-opening expenses of $44,836.09, however, appear on the Transactions by Account and are part of the long-term loans payable to the petitioner. The amounts transferred to the bank accounts also appear on the Transactions by Account as long-term loans and therefore cannot constitute qualifying investments.

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[2]It is not clear why, in the event of default, 1st United would prefer to research and pursue the petitioner's personal assets, which are not specified in the guarantee and which do not total $1.7 million, in lieu of seizing the easily accessible hotel itself.

Resources to invest.

As discussed above, the petitioner has not made a qualifying investment in Ames because the amounts he has paid on behalf of Ames are mere loans to Ames, prohibited by the regulations. It should be noted that the petitioner has not documented that he has the means to begin the process of investing, either. He submits a personal net worth report as of November 30, 1997, purporting to show that his net worth is $761,747.02. It is not clear who prepared this report, and the report contains certain irregularities. For example, the hotel, which belongs to Ames Management, is counted among the petitioner's personal assets. Also, the mortgage held by Ames Management is included among the petitioner's personal liabilities. On the other hand, the hotel van owned by Ames Management is correctly omitted from the report. In effect, with this personal net worth report the petitioner is attempting to show that he has sufficient wealth to invest in the hotel because he has invested in the hotel. Subtracting the hotel entries leaves the petitioner's alleged net worth at $61,747.02.

The petitioner counts the funds in various personal bank accounts as part of his personal assets. A letter and bank statements from Barnett Bank reveal that the petitioner has held *joint* accounts with his father since October 1994. It is not possible to determine what portions of these accounts belong to the petitioner's father and what portions to the petitioner. Unlike the situation of a husband and wife, funds in a pooled joint account cannot be attributed to only one person.

A letter from Bank Boston states that, since April 1997, "Ames Resources Limited maintains an International Private Banking Relationship" with BankBoston. The petitioner is the secretary of Ames Resources Limited, and the account has always had balances in the mid seven figures. These funds belong to Ames Resources Limited, a corporation, and do not belong to the petitioner, an individual. Furthermore, "Ames Resources Limited" is not the same thing as "Ames Management, Inc.," and at most, this letter indicates that the petitioner serves as an officer at a separate corporation in addition to his own corporation, and that this separate corporation has a bank account with BankBoston.

Source of funds.

The source of the funds lent to the petitioner (and in turn lent to Ames Management) has also not been adequately documented. The petitioner claims that the first $450,000 came from personal savings and the sale of "a house." The second $500,000 came from the sale of "our business." No

documentation, such as a sales contract or deed establishing ownership and price, has been submitted regarding the house or the business. Such documentation is relevant to the question of whether the funds have been lawfully obtained, which is a requirement under 8 C.F.R. § 204.6(j)(3).[3] Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In summary, the petitioner has failed to demonstrate that he has invested, or is actively in the process of investing, the requisite amount of capital obtained by lawful means. The amounts referenced by the petitioner either do not constitute qualifying "capital," because they are not his, or have not been properly "invested," because they are debt arrangements between the petitioner and his business. Even if the petitioner and Ames were to be considered one and the same entity, the loans obtained by Ames from other banks would not be considered qualifying capital because they are secured by assets of the business. The petitioner has also failed to document the source of his funds other than to say that the funds are a loan from his father.

THE PETITIONER HAS FAILED TO ESTABLISH A NEW COMMERCIAL ENTERPRISE.

8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of:

> (1) The creation of an original business;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
>
> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. § 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. § 204.6(j)(4)(ii).

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[3] A petitioner must also establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his own. The petitioner has already conceded that the funds lent to Ames are not his; the funds belong to his father and must be repaid.

8 C.F.R. § 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Although Ames Management was incorporated in 1997, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. The Howard Johnson's Motor Lodge purchased by Ames Management had been in operation for approximately 24 years and was an ongoing business at the time of purchase; Ames Management, doing business as Howard Johnson Hotel, has merely replaced the former owner.

The petitioner has provided no documentation whatsoever to establish that the Howard Johnson's was a "troubled business," as defined above, prior to his purchase. He also does not claim that he will expand the hotel by 40 percent as provided in 8 C.F.R. § 204.6(h)(3). The petitioner has not shown the degree of restructuring and reorganization required by 8 C.F.R. § 204.6(h)(2); the hotel has always been a Howard Johnson and is still a Howard Johnson today. A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership. Therefore, it cannot be concluded that the petitioner has created a new commercial enterprise.

THE PETITIONER HAS NOT ESTABLISHED THE REQUISITE EMPLOYMENT CREATION.

8 C.F.R. § 204.6(j)(4) discusses job creation, and states:

> (i) *General.* To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(ii) *Troubled business.* To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

8 C.F.R. § 204.6(e) states, in pertinent part:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

In a letter dated January 15, 1998, the petitioner states that Ames Management employs 23 full-time United State citizens or lawful permanent residents. It also employs part-time employees on an as-needed basis, as well as multiple subcontractors.

Section 5.1.19 of the Agreement for Sale and Purchase refers to an Exhibit H containing the payroll of the Howard Johnson's Motor Lodge as of the date of the petitioner's purchase. The petitioner has furnished copies of the neatly-labeled exhibits, but the only document between Exhibit G and Exhibit I is an unlabeled, one-page worksheet. This worksheet, for the 1997 quarter to date, merely provides the amount of taxes withheld, wages paid, etc. It does not name any of the employees or specify the positions held or hours worked, although it does mention the number of employees as 29.

To show the current level of employment at the hotel, the petitioner has supplied the payroll journal for the period ending November 28, 1997. Assuming that this journal reflects one week of work and not two, only 16 individuals clearly worked at least the minimum 35 hours to be considered full-time employees.[4] Another three were paid salaries and not by the hour, while the last three worked fewer than 35 hours and must be considered part-time employees. The petitioner has submitted a Form I-9 for one other person who was hired after the date of the payroll journal. At most, the hotel employs 20 full-time workers. The petitioner has not established that this figure constitutes either the maintenance of the previous level of full-time

[4]If the payroll journal reflects *two* weeks of work instead of one, then only two individuals worked at least the minimum 70 hours to be considered full-time employees.

employment or the addition of 10 new, full-time positions. As noted above, the hotel previously had 29 employees of unknown designation.

If a petitioner has not already created the requisite number of positions, he must submit a comprehensive business plan clearly demonstrating that the business will need the applicable level of employment. 8 C.F.R. § 204.6(j)(4)(i)(B), The plan must contain a timetable for hiring and must be credible. The petitioner has provided a Marketing Plan 1998 for the hotel. The plan discusses, in detail, the petitioner's marketing strategies and employee-incentive programs, among other things. It does not address the issue of hiring, however. While the plan states that a new position will be created in sales, the person named to occupy this position, Janet Mills, has been working at the hotel since 1994.

CONCLUSION.

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to show that he has invested, or is actively in the process of investing, the requisite amount of money. In every transaction, he has attempted to distance himself from making an actual investment in Ames Management by instead becoming Ames Management's creditor. The petitioner has not shown that Ames Management has been established with anything but loans; in essence, the petitioner has attempted to create something from nothing. The petitioner has further failed to demonstrate that he has established a "new" commercial enterprise, and he has failed to show that his business has or will engage in either employment maintenance or employment creation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the petition is denied.

ORDER: The decision of the director is reversed. The petition is denied.

U.S. Citizenship and Immigration Services

Lawful Source of Funds: OFAC requirements

Iranian Transaction Regulations (ITR)

- 31 CFR 560 Prohibits certain U.S. Transactions with Iran
- Pursuant to Section 3 of Executive Order 12959, all federal agencies are "directed to take all appropriate measures within their authority to carry out the provisions" of the ITR.
- Civil monetary penalties ITR violation can be $250,000 or twice the value of the transaction at issue, whichever is greater.
- Criminal penalties can include a fine of up to $1,000,000, and possible incarceration of up to 20 years. The statute of limitations on these violations is 5 years.

- OFAC has confirmed that the U.S. recipients of funds from Iranian investors as well as any individuals involved in structuring/facilitating these transactions would be in violation of the ITR.
- Investment of funds that have passed through prohibited banks would also be in violation of the ITR. For a list of prohibited banks and Specially Designated Nationals (SDN) see: http://www.ustreas.gov/offices/enforcement/lists/.
- These investors are required to apply for and received a license from OFAC, or a letter stating that no license is needed
- OFAC will determine if such transactions will get a license or not via the application procedure set forth in 31 CFR 501.801(b).

- the only instance where a license would not be required is when the Iranian national resides outside Iran and the money is shown to be obtained through a lawful source and transferred to the United States without having traveled through a prohibited bank.
- In all other situations, any U.S. recipient of prohibited funds and facilitators of such transaction (attorneys, accountants etc.) should apply for a license from OFAC , who will determine if the transaction is or is not prohibited by the ITR and, if prohibited, whether to grant a license to permit the transaction.
- OFAC has indicated that each individual transaction must be licensed separately

RFE for OFAC License

- Specifically, [CHOOSE ALL THAT APPLY FROM THE FOLLOWING] [A] the petitioner is located "in" Iran at [STATE LOCATION], [or B] the petitioner is in [name of country] but is resident of Iran, [C] the petitioner's source of funds include(s) [LIST ASSET(S) e.g. sale of real estate] located in Iran, and [D] the petitioner's source of funds include(s) funds, which flowed through [LIST ALL BANKS], a prohibited bank(s) or an affiliate of a prohibited bank. This action may subject the petitioner to Executive Orders 12613, 12957, 13059 and Iranian Transaction Regulations, 31 CFR Part 560.

- In this situation, the U.S. person(s) facilitating or otherwise involved in the investment by the petitioner may be required to obtain a specific license from OFAC to ensure that the transactions contemplated in the petition, **both past and future** are authorized under OFAC regulations, including the Iranian Transactions Regulations, 31 C.F.R. Part 560.
- If OFAC grants a specific license to such U.S. person(s), please submit a copy of such specific license along with the documents submitted to OFAC and any related documentation sufficient to demonstrate that the specific license covers **all of** the transactions contemplated in the petition.
- In the event that OFAC determines that no specific license is required to engage in the transactions contemplated in the petition, it will issue written guidance to that effect.
- Please submit a copy of such written guidance issued by OFAC along with the documents submitted to OFAC and any related documentation sufficient to demonstrate that the guidance applies to **each and every** transaction **listed above and prospective transactions contemplated in the petition.**
- **Failure to submit OFAC guidance address each transaction may result in denial of your petition.**

Denial for lack of OFAC License

- Per AAO, if the OFAC license appears to be limited and does not appear to cover all of the transactions presented in the I-526 petition, then the petitioner has failed to establish lawful source of funds (unpublished decision).
- Per AAO, if the license does not authorize any transactions that occurred prior to the date of issuance, then the license cannot cover the transfer of funds from Iran included in the petition where the license was obtained after the petition was filed (unpublished decision)

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Westlaw Delivery Summary Report for MILES,JOHN D

Date/Time of Request:	Thursday, April 29, 2010 11:51 Central
Client Identifier:	DHS
Database:	FEDFIND
Citation Text:	327 F.3d 911
Lines:	1167
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Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0026; Exp. 01/31/2012

Form I-526, Immigrant Petition by Alien Entrepreneur

Do Not Write in This Block - For USCIS Use Only (Except G-28 Block Below)		
Classification	**Action Block**	Fee Receipt
Priority Date		**To be completed by Attorney or Representative, if any** ☐ G-28 is attached Attorney's State License No.
Remarks:		

START HERE - Type or print in black ink.

Part 1. Information About You

Family Name | Given Name | Middle Name

In care of Street Number and Name:

Address: | Apt. Number

City | State or Province | Country | Zip/Postal Code

Date of Birth (mm/dd/yyyy) | Country of Birth | Social Security # (if any) | A # (if any)

If you are in the United States, provide the following information: Date of Arrival (mm/dd/yyyy) | I-94 #

Current Nonimmigrant Status | Date Current Status Expires (mm/dd/yyyy) | Daytime Phone # with Area Code

Part 2. Application Type *(Check one)*

a. ☐ This petition is based on an investment in a commercial enterprise in a targeted employment area for which the required amount of capital invested has been adjusted downward.

b. ☐ This petition is based on an investment in a commercial enterprise in an area for which the required amount of capital invested has been adjusted upward.

c. ☐ This petition is based on an investment in a commercial enterprise that is not in either a targeted area or in an upward adjustment area.

Part 3. Information About Your Investment

Name of commercial enterprise in which funds are invested

Street Address

Phone # with Area Code | Business organized as (corporation, partnership, etc.)

Kind of business (e.g. furniture manufacturer) | Date established (mm/dd/yyyy) | IRS Tax #

RECEIVED: _____ RESUBMITTED: _____ RELOCATED: SENT _____ REC'D _____

Part 3. Information About Your Investment *(Continued)*

Date of your initial investment (mm/dd/yyyy)		Amount of your initial investment $	
Your total capital investment in the enterprise to date $		Percentage of the enterprise you own	

If you are not the sole investor in the new commercial enterprise, list on separate paper the names of all other parties (natural and non-natural) who hold a percentage share of ownership of the new enterprise and indicate whether any of these parties is seeking classification as an alien entrepreneur. Include the name, percentage of ownership, and whether or not the person is seeking classification under section 203(b)(5). **NOTE:** A "natural" party would be an individual person, and a "non-natural" party would be an entity such as a corporation, consortium, investment group, partnership, etc.

If you indicated in **Part 2** that the enterprise is in a targeted employment area or in an upward adjustment area, name the county and State: County State

Part 4. Additional Information About the Enterprise

Type of Enterprise (check one):

- ☐ New commercial enterprise resulting from the creation of a new business.
- ☐ New commercial enterprise resulting from the purchase of an existing business.
- ☐ New commercial enterprise resulting from a capital investment in an existing business.

Composition of the Petitioner's Investment:

Total amount in U.S. bank account	$
Total value of all assets purchased for use in the enterprise	$
Total value of all property transferred from abroad to the new enterprise	$
Total of all debt financing	$
Total stock purchases	$
Other (explain on separate paper)	$
Total	$

Income:

When you made the investment	Gross	$		Net	$
Now	Gross	$		Net	$

Net worth:

When you made investment	Gross	$		Now	$

Part 5. Employment Creation Information

Number of full-time employees in the enterprise in U.S. (excluding you, your spouse, sons, and daughters)

When you made your initial investment? | Now | Difference

How many of these new jobs were created by your investment?

How many additional new jobs will be created by your additional investment?

What is your position, office, or title with the new commercial enterprise?

Briefly describe your duties, activities, and responsibilities.

What is your salary? $ | What is the cost of your benefits? $

Part 6. Processing Information

Check One:

☐ The person named in **Part 1** is now in the United States, and an application to adjust status to permanent resident will be filed if this petition is approved.

☐ If the petition is approved and the person named in **Part 1** wishes to apply for an immigrant visa abroad, complete the following for that person:

Country of nationality:

Country of current residence or, if now in the United States, last permanent residence abroad:

If you provided a United States address in **Part 1**, print the person's foreign address:

If the person's native alphabet is other than Roman letters, write the foreign address in the native alphabet:

Are you in deportation or removal proceedings? ☐ Yes (Explain on separate paper) ☐ No

Have you ever worked in the United States without permission? ☐ Yes (Explain on separate paper) ☐ No

Part 7. Signature *Read the information on penalties in the instructions before completing this section.*

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking.

Signature | Date

NOTE: *If you do not completely fill out this form or fail to the submit the required documents listed in the instructions, you may not be found eligible for the immigration benefit you are seeking and this petition may be denied.*

Part 8. Signature of Person Preparing Form, If Other Than Above (Sign below)

I declare that I prepared this application at the request of the above person, and it is based on all information of which I have knowledge.

Signature | Print Your Name | Date

Firm Name | Daytime phone # with area code

Address

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Domestic Operations
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQDOMO 70/6.1.8
AD09-04

Memorandum

To: SERVICE CENTER DIRECTORS
REGIONAL DIRECTORS
DISTRICT DIRECTORS
FIELD OFFICE DIRECTORS
NATIONAL BENEFIT CENTER DIRECTOR

From: Donald Neufeld /S/
Acting Associate Director, Domestic Operations

Date: June 17, 2009

Subject: EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (AFM Update AD 09-04)

1. Purpose

This AFM update provides United States Citizenship and Immigration Services (USCIS) personnel with instructions related to the timing of job creation and the meaning of "full-time" positions in the EB-5 program.

The AFM update clarifies that each petitioner must submit a business plan, along with their Form I-526, Immigrant Petition by Alien Entrepreneur, which provides an accounting of the required number of qualifying jobs that will be created within the two-year period of conditional residency. This AFM update also clarifies that there may be some flexibility with respect to the timing of job creation at the Form I-829, Petition by Entrepreneur to Remove Conditions, stage. Finally, this AFM update clarifies the meaning of full-time position as it relates to job creation.

The AFM update conforms the filing locations with the Federal Register Notice dated January 9, 2009, 74 Fed. Reg. 912-913.

2. Relevant Laws

INA § 203(b)(5) creates a class of immigrant visas (EB-5) for individuals who invest a specified amount of capital in the United States and who will "create full-time employment

for not fewer than 10" qualified employees. INA § 216A places conditions upon the permanent resident status of aliens admitted in the EB-5 classification that must be removed at the end of a two-year period of conditional residency. In order to have the conditions removed, EB-5 visa holders must file a Form I-829 that demonstrates that the petitioner is, among other requirements, "conforming to the requirements of INA § 203(b)(5)." INA § 216A(d)(1)(B).

Consistent with the two-year period of conditional residency, USCIS regulations generally require evidence to obtain approval of a Form I-526, including a business plan that demonstrates that jobs will be created within the two-year period of conditional residence. 8 C.F.R. § 204.6(j)(4)(i)(B).

USCIS regulations relating to the removal conditions from the lawful permanent resident status of alien entrepreneurs status provide that a petitioner must demonstrate that "the alien has created or can be expected to create within a reasonable period of time" the required jobs. 8 C.F.R. § 216.6(c)(1)(iv).

3. Field Guidance Summary

Effective immediately, USCIS personnel are directed to comply with the following instructions, as set forth in revisions to the *Adjudicator's Field Manual* (AFM) noted in section 5, as summarized below.

For purposes of the Form I-526 adjudication and the job creation requirements, USCIS will deem the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) to commence six months after the adjudication of the Form I-526. USCIS officers should ensure that the business plan filed with the Form I-526 reasonably demonstrates that the requisite number of jobs will be created by the end of this two-year period.

For Regional Center petitions and for purposes of indirect job creation, USCIS officers may consider economic models that rely on certain variables to show job creation and the amount of investment to determine whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.

USCIS also has concluded that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years may now count as permanent jobs for Form I-526 and I-829 purposes.

4. Use

This AFM update is intended solely for the guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other

form or manner. In addition, the instruction and guidance in this AFM update is in no way intended to and does not prohibit enforcement of the immigration laws of the United States.

5. **Contact Information**

Questions related to this memorandum should be directed to Joseph P. Whalen, USCIS Headquarters Office of Service Center Operations, through appropriate supervisory channels.

6. **Field Guidance and AFM Update**

Chapter 22.4(c)(4)(D) of the AFM is amended to number it as three subsections and include the new subsections (ii) and (iii) at the end of Paragraph (D) and prior to the Note.

(D) **Job Creation.**

(i) The petition must be supported with evidence the new commercial enterprise will create no fewer than 10 full-time positions (or the equivalent). ....

****

(ii) **Clarification of the Two-Year Period for Job Creation.**

(a) Petitioners who are filing a Form I-526 must submit "a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two-years, and when each employee will be hired." 8 C.F.R. § 204.6(j)(4)(i)(B) (emphasis added). The requirement for a business plan that shows jobs will be created in two years applies to all Form I-526 petitions, including those filed under the Regional Center Program, that will rely on indirect job creation to satisfy the statutory employment creation requirement.

The regulations, however, do not clearly state when the two-year period commences for purposes of adjudicating the Form I-526. The reference to a two-year period relates to the two-year period of conditional residence, and the time requirement of 8 C.F.R. § 204.6(j)(4)(i)(B) 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. Nevertheless, at the time of adjudication of Form I-526, the alien entrepreneur will not have attained conditional permanent residence, and the officer adjudicating Form I-526 cannot be certain when the period of conditional residence will in fact commence.

USCIS has determined that the average processing times for EB-5 petitioners filing for immigrant visas via consular processing and EB-5 petitioners filing

for adjustment of status is approximately six months. Accordingly, in order to best approximate the two-year period of conditional residence, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) will be deemed to commence six months after the adjudication of Form I-526. USCIS officers should ensure that the business plan filed along with Form I-526 reasonably demonstrates that the requisite number of jobs will be created by the alien's investment by the end of the two-year period that commences six months after the adjudication of the petition. If, in the future, processing times significantly change, this paragraph may be amended.

(b) **Special considerations for Regional Center based I-526 petitions**:

(i) Aliens filing I-526 petitions for investments to be made through a regional center may use reasonable methodologies to establish the number of jobs created. 8 C.F.R. § 204.6(j)(4)(iii). However, some of the economic models may not expressly consider temporal aspects of job creation, and will not be able to conclusively state that indirect jobs will be created within two years. In such circumstances, officers should first explore whether there are reasonable and/or accepted temporal assumptions that can be attributed to the particular economic model and consider such assumptions in determining compliance with the two-year requirement.

For example, the RIMSII handbook states the following about the RIMSII economic model, which is often used to demonstrate indirect job creation:

> RIMS II, like all I-O models, is a "static equilibrium" model, so impacts calculated with RIMS II have no specific time dimension. However, because the model is based on annual data, it is customary to assume that the impacts occur in 1 year. For many situations, this assumption is reasonable.

This assumption supports the conclusion that the indirect jobs will be created within the requisite two-year period.

If, however, there are no reasonable and/or accepted temporal assumptions that can be made with respect to a particular economic model, USCIS may presume that the jobs will be created within the required period of time provided that the alien can demonstrate compliance with paragraph (ii) below.

(ii) Many economic models used to demonstrate indirect job creation rely on certain assumptions or variables to show the requisite job creation. For example, a model might demonstrate that the requisite jobs will be created

> if a Regional Center infuses $10 million into a particular industry. Similarly, a model might demonstrate that, using accepted multipliers, the creation of 100 direct jobs will result in a certain number of indirect jobs. Under such circumstances, the I-526 petition should demonstrate that the required infusion of capital or the creation of the direct jobs will occur within two years.

Nothing in this paragraph should be construed to alter in any way the current adjudication procedures. Officers may review the evidence required by the petitioner to demonstrate the number of jobs that will be created by the investment. For example, Form I-526s filed under the Regional Center Program which rely on indirect job creation must also comply with the evidentiary requirements of 8 C.F.R. § 204.6(j)(4)(iii) to demonstrate the number of jobs created. Officers may also continue to determine the reasonableness of a business plan to ensure that the jobs are likely to be created.

(iii) **Clarification of the Meaning of Full-Time Position.**

Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position." USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. See, e.g., Spencer Enterprises v. U.S., 229 F.Supp.2d 1025 (E.D.Cal. 2001). For example, historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent.

USCIS, however, now interprets that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years, inclusive of when the petitioner's I-829 is filed, may now count as permanent jobs. Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the position, as described in the petition, is continuous full-time employment rather than intermittent, temporary, seasonal or transient. For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if, for example, the same project called for electrical workers to provide services during three to four five week periods over the course of the project,

such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.

Generally, it is the position that is critical to the full-time employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment. For example, the positions described above would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week as long as the need for the position remains constant. This interpretation is consistent with 8 C.F.R. § 204.6(e), which, as part of the regulatory definition of full-time employment includes job sharing arrangements.

It is important to note, however, that this new interpretation does not override the regulatory definitions of employee and full time employment at 8 C.F.R. § 204.6(e). Thus, the positions must still be filled by qualifying employees, and such positions may not be filled by independent contractors. In addition, multiple part time positions may not be combined to create one full time position.

2. Chapter 25.2(e)(1) of the AFM is amended to include the following new paragraph at the beginning of Paragraph (1). The existing Paragraph (1) will now become Paragraph (2) and so on.

(1) **Initial Review.** Form I-829 petition is intended to examine whether the alien entrepreneur has satisfied the conditions of his admission to the United States. Primarily, USCIS is determining whether the alien has invested the requisite capital and created the requisite jobs through that investment. Form I-829 petition is to be filed within 90 days prior to the second anniversary of the alien's admission to the United States in conditional resident status.

3. Chapter 25.2(e)(4)(D) of the AFM is amended to include the following new paragraphs at the end of Paragraph (D).

Recognizing that circumstances may change after an alien secures admission to the United States, USCIS chose to implement INA § 216A with some "flexibility." See, 59 FR 1317-01, 1317-18 (Jan. 10, 1994) (proposed rule). Consistent with this flexibility, USCIS provides that Form I-829 must contain evidence that the petitioning alien "has created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees." 8 C.F.R. § 216.6(a)(4)(iv).

In making the "reasonable time" determination, officers should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526,

the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner.

If after considering the evidence, the officer determines that the jobs are more likely than not going to be created within a reasonable time, Form I-829 should be approved consistent with 8 C.F.R. § 216.6(d)(1) if the petitioner is otherwise eligible to have his or her conditions removed. If, however, the officer determines that the jobs will not be created within a reasonable period of time, Form I-829 should be denied consistent with 8 C.F.R. § 216.6(d)(2).

4. Chapters 22.4(b), 25.2(a), 25.2(b), 25.2(g)(1), and 25.2(i)(2)(C) of the AFM are revised to reference that all petitions and applications related EB-5 immigrant classifications and Regional Center proposals must be filed at the California Service Center (CSC).

Chapter 22.4(b) [fourth bullet]

- The petition must be filed with the California Service Center.

Chapter 25.2(a)

California Service Center director, regional directors and field office directors in offices with a high volume of Form I-829s shall designate an EB-5 trained and certified officer as an EB-5 point of contact (POC) to facilitate the review and management of Form I-829. For purposes of clarity in these instructions, references to service center management and field office management includes the appropriate EB-5 POC.

Chapter 25.2(b)

Officers are reminded that, in accordance with the Notice in the Federal Register at 74 Fed. Reg. 912-913, published on, and in effect since, January 9, 2009, Form I-829 petitions are to be filed with the California Service Center.

Chapter 25.2(g)(1)

All such Form I-829s shall be returned to the California Service Center.

Chapter 25.2(i)(2)(C)

The California Service Center shall generate weekly a printout from the MFAS to determine those conditional residents within its jurisdiction who have failed to file a timely Form I-829 to have the conditions on their status removed in accordance with section 216A(c) of the Act and will take the actions described above in this section to terminate the status of such conditional residents and their dependents.

5. The *AFM* **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD 09 -04 (02-xx-2009)	**Chapter 22.4(c)(4)(D)** **Chapter 22.4(b)** **Chapter 25.2(a)** **Chapter 25.2(b)** **Chapter 25.2(e)(1)** **Chapter 25.2(g)(1)** **Chapter 25.2(i)(2)(C)**	This memorandum adds five paragraphs at the end of **Chapter 22.4(c)(4)(D)**; adds a new first paragraph to Chapter 25.2(e)(1); adds three new paragraphs at the end of Chapter 25.2(e)(1); and makes changes to both Chapter 22.4 and 25.2 to reference that all EB-5 petitions and applications are now filed with the California Service Center all in the AFM.

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQPRD70/23.12

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, ARTESIA

FROM: Michael Aytes
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DATE: DEC 21 2006

SUBJECT: Delegation of Authority to Service Center Directors to Adjudicate Form I-829, Petition by Entrepreneur to Remove Conditions; Adjudication of Form N-400, Applications for Naturalization when a Form I-829 is Still Pending.

AFM Update: Chapter 25.2: Immigrant Investor (AD06-31 & AD06-04).

1. Purpose

This memorandum revises Chapter 25.2 of the *Adjudicator's Field Manual* (*AFM*) by amending previously published guidance on the adjudication of petitions on Form I-829, Petition by Entrepreneur to Remove the Conditions. This memorandum also supersedes the March 3, 2000 memorandum issued by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations entitled "EB-5 Field Memorandum Number 9: Form I-829 Processing."

This memorandum also delegates to USCIS Service Center Directors the authority to deny a Form I-829 where the Service Center Director determines that the petition is deniable because on its face, and based on evidence supporting the petition, the eligibility requirements for approving the petition have not been met. Currently, this authority resides solely with the USCIS District Directors.

Additionally, this memorandum provides guidance regarding the adjudication of the Form N-

400, Application for Naturalization, filed by a conditional resident (CR) who has a pending Form I-829.

This guidance is effective immediately. This amended *AFM* Chapter will be included in the next I-LINK release.

2. Contact Information

Questions regarding this memorandum and USCIS policy regarding EB-5 adjudication may be directed through appropriate supervisory channels to the Foreign Trader, Investor and Regional Center Program (FTIRCP), HQSCOPS.

3. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of Form I-829s and Form N-400s, Applications for Naturalization when a Form I-829 is pending adjudication. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

4. AFM Update

Accordingly, AFM Chapter 25.2 is revised in its entirety to read as follows:

25.2 Entrepreneurs

(a) Commitment to Trained and Experienced Officers. All USCIS offices must ensure that only officers who have been specially trained and certified by USCIS Headquarters EB-5 program management adjudicate EB-5 immigrant investor casework. In addition, all such offices must ensure that the officers adjudicating petitions on Form I-829 have received training in the Marriage Fraud Amendment System (MFAS).

Service center directors in Texas and California, regional directors and field office directors in offices with a high volume of Form I-829s shall designate an EB-5 trained and certified officer as an EB-5 point of contact (POC) to facilitate the review and management of Form I-829. For purposes of clarity in these instructions, references to service center management and field office management includes the appropriate EB-5 POC.

(b) Filing the Form I-829. These instructions provide procedures consistent with those provided for the adjudication of Form I-751, Petition to Remove Conditions on

Residence (for alien spouse) where possible. Under 8 CFR 216.6(a), immigrant investors in conditional resident status must file a Form I-829 at the appropriate service center within 90 days prior to the second anniversary of their admission to the United States as a conditional permanent resident.[1] Officers are reminded that, in accordance with the Notice in the Federal Register at 63 FR. 67135, published on, and in effect since, December 4, 1998, Form I-829 petitions are to be filed as followed:

> (1) The Texas Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously within the jurisdiction of the Vermont and Texas Service Centers, or
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> (2) The California Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously within the jurisdiction of the Nebraska and California Service Centers.

See paragraph (i)(1)(A) and (i)(2) below for procedures when a Form I-829 has not been timely filed.

(c) Receipt of Form I-829. Parallel to the procedures for processing Form I-751, Petition to Remove Conditions on Residence, upon receipt of Form I-829, the service center director shall issue the conditional resident a fee receipt notice on Form I-797 that includes the following paragraph:

> Your Permanent Resident Card (Form I-551), also known as a "green card," is extended one (1) year – employment and travel is authorized during this extension. Processing your petition for removal of conditions will require a minimum of one hundred and twenty (120) days. Thirty (30) days before the expiration of this extension, if you have not been notified by USCIS of a decision on your petition, please contact the field office nearest to where you are living for further documentation for employment and/or travel purposes.

(d) Notice. A receipt notice and any written notice of any decision, request for evidence (RFE) or interview appointment should be provided to the conditional resident if he or she is not represented. However, for other than receipt notices, if the conditional resident is represented as evidenced by a signed G-28, the notice should be sent to the attorney or representative of record and, in the case of a denial or termination of conditional resident status, to the conditional resident as well. Any transfer notice should state that as necessary the conditional resident may take his or her receipt notice to the nearest field office and receive evidence of status in

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[1] The instructions in this memorandum and AFM section update also apply to processing I-829s for spouses and dependent children pursuant to 8 CFR 216.6(a)(1) and (6) (i.e. derivatives, who subsequent to obtaining conditional resident status are: (1) children who are married, (2) former spouses who are divorced from the principal, and (3) widow or widowers of the principal alien investor).

accordance with procedures set forth in paragraph (k) below.

(e) Adjudication by a Service Center. With respect to a properly filed Form I-829, a service center may approve the petition or issue an RFE. Service center directors also have now been delegated the authority to deny[2] a Form I-829 if the eligibility requirements under section 216A and 8 CFR 216.6(c) have not been met or refer it to a field office for adjudication. There is no appeal of a denial of a Form I-829; however, a conditional resident may seek review of the decision in removal proceedings. 8 CFR 216.6(d)(2).

(1) Initial Review. The service center must initially review the petition in order to determine which course to take. The petition must be adjudicated with the A-file and normal procedures are to be followed for requesting the A-file (see paragraph (f) for procedures in the event of delay in receipt of a requested A-file). In addition, the service center is to follow normal procedures for consultation and referral to operational and investigative units such as the Office of Fraud Detection & National Security (FDNS) if the facts of the case warrant it and where appropriate. If necessary, such units may coordinate the referral of a Form I-829 to the Department of Treasury's Financial Crimes Enforcement Network (FINCEN) with a request for appropriate research.

(2) Request for Evidence. The service center may also issue an RFE based on a determination by the service center that in order to adjudicate the petition, the conditional resident must provide either: (A) required initial evidence and/or (B) additional evidence needed by the Service to assess whether the alien has met the requirements for removal of conditions. In the case of a request for additional evidence, service centers also may request that a conditional resident respond to questions related to the information on the petition and/or to documentation

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[2] Section 216A(d)(3) of the Act provides USCIS with authority to waive the deadline for an interview or the interview itself, if that is appropriate. Accordingly, an interview is not required to either approve or deny the petition. Under current regulations, both service center and district directors have authority in appropriate cases to waive the interview and adjudicate the petition. However, in the past, a service center director only had authority to waive an interview if the petition was approvable. A service center director could not waive the interview if the petition appeared to be deniable. With the issuance of this AFM Update, the authority to waive the interview and deny the Form I-829 has been delegated to Service Center Directors. Service Center Directors may waive the interview and deny the petition if they determine that, upon review of the petition supporting evidence, the conditional resident has not met the eligibility requirements for removal of the conditions.

NOTE: The guidance provided in this AFM Update does not pertain to the denial of Form I-829s for those aliens who may qualify for benefits based on the provisions of the 21st Century Department of Justice Appropriations Authorization Act of 2001, Public Law 107-273, 116 Stat. 1757 (Nov. 2, 2002). Until such time as regulations are promulgated implementing the procedures regarding the denial of Form I-829s affected by Public Law 107-273, such cases will be not be denied by service center or field office directors.

previously submitted in support of the petition. In such a case, any questions posed must be stated with specificity. Under 8 CFR 103.2(b)(8), a conditional resident is to be provided a specified period of time to respond to an RFE. Upon receipt of the conditional resident's response to the RFE, the service center must either approve or deny the petition, or refer the Form I-829 to the field office.

(3) Derogatory Information. In accordance with 8 CFR 216.6(c)(2), if the review of the petition, or the interview itself, reveals derogatory information concerning the requirements for removal of conditions, the service center shall provide the conditional resident with the opportunity to rebut such information pursuant to paragraph (h) of this instruction.

(4) Approval. The service center may approve a Form I-829 if USCIS is satisfied that the conditional resident has met all the requirements for the removal of the conditions as specified under Section 216A of the Act and 8 CFR 216.6(c)(1), namely that:

(i) a commercial enterprise was established by the conditional resident;

(ii) the conditional resident invested or was actively in the process of investing the requisite capital;

(iii) the conditional resident sustained the establishment and investment activities throughout the relevant period of his or her residence in the United States (i.e., the conditional resident, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence); and

(iv) the conditional resident created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees. (**Note**: in the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the conditional resident must establish that he or she maintained the number of existing employees at no less than the pre-investment for the previous two years.)

In addition, pursuant to section 216A(c)(3) of the Act, USCIS must also determine that the facts and information contained in the petition are true.

(5) Action upon Approval. If the petition is approved, the service center will remove the conditions on the conditional resident's status as of the second anniversary of his or her admission as a conditional permanent resident. 8 CFR 216.6(d). If biometrics have not already been collected at an Application Support Center (ASC),

the conditional resident must be notified to report for processing of a new permanent resident card (Form I-551). Normal procedures should be followed for entering the decision into MFAS and for card production.

(6) Denial. The service center may deny a petition if the initial review of the petition or review of a response to a request for initial and/or additional evidence reveals that the requirements for removal of conditions, as prescribed under Section 216A of the Act and the regulation at 8 CFR 216.6(c)(1), have not been met and the service center adjudicator determines that the case can be denied without an interview.

(i) Grounds for Denial. USCIS may deny a Form I-829 on the following grounds:

(A) Denial Due to Alien's Failure to Meet the Statutory and Regulatory Requirements as a Factual Matter. USCIS lacks authority to grant a Form I-829 if the petition does not meet the statutory and regulatory requirements. If the service center director determines that the conditional resident has not established eligibility to have the conditions removed under the statute and regulations, the petition must be denied.

(B) Denial due to fraud or other criminal grounds. When it is determined that a petition may be deniable for fraud or other criminal grounds, the Form I-829 must first be referred to the FDNS POC in the service center in accordance with the Fraud Detection Standard Operating Procedures. The processing site may also coordinate the referral of a Form I-829 to FINCEN with a request for appropriate research. USCIS shall not make a final decision on the petition until a report of the results of the referral or investigation is obtained. In most instances, if the decision to deny the petition is based on derogatory information considered by the service center of which the petitioner is unaware, he or she shall be advised of this fact and offered an opportunity to rebut the information and present evidence in his or her own behalf prior to a final decision being rendered by USCIS. (See with 8 CFR 103.2(b)(16)(i))

(ii) Action upon Denial. The service center director shall provide written notice in accordance with 8 CFR 216.6(d)(2) if the petition is denied and shall follow established procedures for the issuance of an NTA to initiate removal proceedings. No appeal shall lie from this decision. The conditional resident may seek review of the decision to deny the petition in removal proceedings. In issuing this denial notice, the service center director shall:

(A) Advise the conditional resident of the specific reasons for the denial and that:

(1) the conditional resident's status, and that of his or her spouse or children, is terminated as of the date of the decision;

(2) the conditional resident must surrender to the field office any permanent resident card, Form I-551, previously issued by legacy INS or USCIS; and

(3) there is no appeal from the decision, although the conditional resident may seek review of the decision in removal proceedings;

(B) Follow established procedures for the issuance of an NTA to initiate removal proceedings.

(C) Enter the denial information into MFAS.

(D) Ensure that the A-file includes all relevant documents and is forwarded to the appropriate office.

(7) Referral to Field Office. The service center director may refer a Form I-829 to a field office if he or she determines that referral is appropriate and that an interview is necessary to adjudicate the petition and render a decision in the case. When transferring a Form I-829 to a field office, the service center should indicate the basis for referral in a memorandum to the field office. In that memorandum, the service center also may specifically recommend that an interview be conducted as part of the field office's review and adjudication. Such a recommendation must: (i) be clearly identified in the memorandum, (ii) detail the reasons for the interview recommendation, and (iii) include specifics as to questions the service center recommends the field office ask the conditional resident during the interview. After coordination with the regional EB-5 POC, service centers shall transfer the referred cases to the assigned field office by express mail, flagging it in red marker "**to the attention of the EB-5 POC**." The service center must record the referral of the case in MFAS in accordance with routine procedures and update the Central Index System (CIS) accordingly.

(f) Regional Office Coordination. Each regional director shall designate an officer in their regional office to coordinate the management of Form I-829s within each region's jurisdiction. The responsibilities of the regional EB-5 POCs include:

(1) Determining appropriate field offices to receive Form I-829s;
(2) Coordinating referral procedures;
(3) Ensuring that Form I-829s referred to field offices are adjudicated by EB-5 trained and certified field office adjudicators;
(4) Facilitating the return of petitions to service centers as appropriate; and

(5) Keeping track of Form I-829 processing and cases within the jurisdiction of the region.

The regional EB-5 POC is also responsible for assisting when a requested A-file has not been received within the appropriate period of time and for requesting A-files according to established procedures.

The regional EB-5 POC shall keep a list of field offices with trained EB-5 adjudicators, and shall coordinate service center referrals of Form I-829s to the field offices. The regional EB-5 POCs shall direct the referral in accordance with the availability of trained EB-5 adjudicators at the appropriate field office, and may direct the referral of a Form I-829 to another office as necessary or to coordinate the detail of trained EB-5 adjudicators as required.

In a specific case, field management may determine and recommend to the regional EB-5 POC that, due to the limited availability of EB-5 trained adjudicators in a particular area, the field office director should delegate his or her authority to another field office director to complete the interview and adjudication of the case. Such delegation of authority must be clear and in writing. In such cases, the regional EB-5 POC is responsible for ensuring that a written delegation of authority from the field office director with jurisdiction is transmitted by fax, mail, or e-mail (with hard-copy of e-mail placed in the file) to the field office director under whose authority the interview and adjudication will be performed.

(g) Adjudication by a Field Office. With respect to a properly filed Form I-829, a field office may approve the petition, issue a request for further evidence, conduct an interview, or deny the petition[3] if the petition is deniable because the eligibility requirements have not been met. A field office may also refer a Form I-829 back to the appropriate service center for processing if the case has not been previously reviewed by a trained and certified service center EB-5 adjudicator.

(1) Procedures for a Form I-829 Not Referred According to Instructions. Field offices that receive Form I-829s transmitted in a manner that is NOT consistent with the procedures outlined herein should return those files to the service center, with the A-file, marked to the attention of the service center EB-5 POC and, in red, "Form I-829 return". The field office must update CIS accordingly.

All such Form I-829s shall be returned to the service centers as follows:

(A) to the Texas Service Center, if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Vermont and Texas Service Centers; or

[3]Field offices may not deny Form I-829s that are covered by Pub. L. 107-273. *See* footnote 1 *supra*.

(B) to the California Service Center, if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Nebraska and California Service Centers.

Field offices receiving a Form I-829 that does not contain the recommendation required under paragraph (e)(7) should return the I-829 to the sending service center. Upon receipt of a returned file, the service centers are instructed to prepare and transmit the file with the required recommendation directly to the field office while simultaneously notifying the regional office EB-5 POC of the file transfer in accordance with these instructions.

When a Form I-829 file is returned to the service center, the field office must notify the conditional resident or representative pursuant to section (1) of this paragraph. The notice of file transfer should state that as necessary, the conditional resident may take the receipt notice to the nearest field office and receive evidence of status in accordance with the procedures set forth in paragraph (k).

(2) Initial Review. Field offices may approve or deny the petition with or without an interview. A field office director, or his or her delegate, must initially review the petition in order to determine whether or not an interview will be conducted. In adjudicating the petition, the field office may accept or reject the service center director's recommendation for interview and/or for suggested questions to ask the conditional resident during the interview to establish eligibility when the district director determines upon review of the record that the petition is approvable.

Pursuant to 8 CFR 216.6(b)(1), a field office may waive the interview on the Form I-829 and adjudicate the case. If the interview is waived, the petition must be annotated and MFAS updated in accordance with routine procedures. The field office director may also schedule the applicant for an interview, within 90 days of the date on which the petition was properly filed. 8 CFR 216.6(b)(2).

Instead of proceeding to approve or deny a case based on a determination that an interview is not essential to the adjudication and thus should be waived, a field office director may return a Form I-829 to a service center for adjudication if the initial review reveals that: (1) the case was not reviewed by a trained and certified service center EB-5 adjudicator; (2) an interview is not necessary; or (3) the petition is deniable because the eligibility requirements for approving the petition have not been met. All such returns must be made in coordination with the appropriate regional EB-5 POC. When a Form I-829 file is returned to the service center, the field office must manually send the petitioner, or the attorney or representative of record if the petitioner is represented, a notice of the file transfer.

(3) Interview. If an interview is necessary to approve or deny the petition, the field office director will notify the conditional resident of the location and date of the scheduled interview. The interviewing officer shall create a record of the interview, placing a memorandum in the file that responds to the issues raised in the service center director's referral memorandum as well as sets forth any new or additional information or issues arising from the interview. The officer who conducts the interview shall render a final adjudication of the Form I-829 and recommend a decision to the field office director. If a conditional resident fails to appear for an interview, the alien's permanent resident status shall be terminated automatically in accordance with the procedures outlined at 8 CFR 216.6(b)(3).

(4) Request for Evidence. A field office may issue a request for initial evidence or additional evidence (RFE). An RFE must be based on a determination that initial evidence, additional evidence or explanations are necessary to the adjudication of the petition. Any questions posed must be stated with specificity. If the questions cannot be answered in writing, the petition must be referred for an interview. An RFE is not required if there is evidence of ineligibility in the record and the petition is clearly deniable. 8 CFR 103.2(b)(8). If the conditional resident was issued an RFE for initial evidence by the field office and failed to respond to the request, the petition will be considered abandoned and denied in accordance with 8 CFR 103.2(b)(13). Under 8 CFR 103.2(b)(8), field offices should provide the conditional resident the specified period of time for response to an RFE.

(5) Derogatory Information. In accordance with 8 CFR 216.6(c)(2), if the review of the petition, or the interview itself, reveals derogatory information concerning the requirements for removal of conditions, the field office shall provide the conditional resident with the opportunity to rebut such information. See paragraph (h) below.

(6) Approval. A field office director may approve a Form I-829 if satisfied that the conditional resident has met all the requirements for the removal of the conditions as specified under Section 216A of the Act and 8 CFR 216.6(c)(1), namely that:

(i) a commercial enterprise was established by the conditional resident;

(ii) the conditional resident invested or was actively in the process of investing the requisite capital;

(iii) the conditional resident sustained the establishment and investment activities throughout the relevant period of his or her residence in the United States (i.e., the conditional resident, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence); and

(iv) the conditional resident created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees. (**Note**: in the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the conditional resident must establish that he or she maintained the number of existing employees at no less than the pre-investment for the previous two years.)

In addition, pursuant to section 216A(c)(3) of the Act, the field office director must also determine that the facts and information contained in the petition are true.

(7) Action upon Approval. If the petition is approved, the field office will remove the conditions on the conditional resident's status as of the second anniversary of the alien entrepreneur's admission as a conditional permanent resident. If the conditional resident's biometrics have not already been collected at an ASC, the conditional resident must be notified to report for processing of a new permanent resident card. The field office shall ensure that the file, including all relevant documents, is returned to the appropriate service center director. Normal procedures should be followed for entering the decision into MFAS and for card production.

(8) Denial. A field office director may deny a petition if the initial review of the petition, the information obtained during the interview, or review of a response to a request for initial and/or additional evidence reveals that the requirements for removal of conditions, as prescribed under Section 216A of the Act and the regulation at 8 CFR 216.6(c)(1), have not been met. The decision to deny a petition will be issued and signed by the appropriate district office director or his or her designee in accordance with standard field office practice.

(i) Grounds for Denial. USCIS may deny a Form I-829 on the following grounds:

(A) Denial Due to Alien's Failure to Meet the Statutory and Regulatory Requirements as a Factual Matter. USCIS lacks authority to grant a Form I-829 if the petition does not meet the statutory and regulatory requirements. If the field office director determines that the conditional resident has not established eligibility to have the conditions removed under the statute and regulations, the petition must be denied.

(B) Denial due to fraud or other criminal grounds. When it is determined that a petition may be deniable for fraud or other criminal grounds, the Form I-829 must first be referred to the FDNS POC in the field office in accordance with the Fraud Detection Standard Operating Procedures. The processing site may also coordinate the referral of a Form I-829 to

FINCEN with a request for appropriate research. USCIS shall not make a final decision on the petition until a report of the results of the referral or investigation is obtained. In most instances, if the decision to deny the petition is based on derogatory information considered by the field office director of which the petitioner is unaware, he or she shall be advised of this fact and offered an opportunity to rebut the information and present evidence in his or her own behalf prior to a final decision being rendered by USCIS. (See with 8 CFR 103.2(b)(16)(i))

(ii) Action upon Denial. The field office director shall provide written notice in accordance with 8 CFR 216.6(d)(2) if the petition is denied and shall follow established procedures for the issuance of an NTA to initiate removal proceedings. No appeal shall lie from this decision. The conditional resident may seek review of the decision to deny the petition in removal proceedings. In issuing this denial notice, the field office director shall:

(A) Advise the conditional resident of the specific reasons for the denial and that:

(1) the conditional resident's status, and that of his or her spouse or children, is terminated as of the date of the decision and, in the case of a conditional resident that is not represented;

(2) the conditional resident must surrender to the field office any permanent resident card, Form I-551, previously issued by legacy INS or USCIS; and

(3) there is no appeal from the decision, although the conditional resident may seek review of the decision in removal proceedings;

(B) Follow established procedures for the issuance of an NTA to initiate removal proceedings;

(C) Enter the denial information into MFAS.

(D) Ensure that the A-file includes all relevant documents and is forwarded to the appropriate office.

(h) Derogatory Information. If, in accordance with 8 CFR 216.6(c)(2), derogatory information is revealed during the adjudication of the Form I-829, USCIS shall provide the conditional resident with an opportunity to rebut such information through issuance of an RFE or a Notice of Intent to Deny (NOID). The field office shall issue a Form I-72, Form Letter for Returning Deficient Applications/Petitions or the service center shall

issue a Form I-797 notice, with a short explanation of the derogatory information, requesting that the conditional resident respond to the derogatory information and other issued identified in the RFE or NOID noting the date the response is due. Derogatory information should be limited to information that the alien has not previously had an opportunity to address and the opportunity to rebut should not reopen the entire case. The opportunity to rebut shall also be provided if it is determined that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs).

Depending on the response to a Form I-72, Form I-797 or NOID, a conditional resident may or may not be able to overcome the derogatory information.

Example 1:

An interview may reveal that a conditional resident has created positions for only seven full-time employees. If, in rebuttal, the conditional resident (CR) states that he or she intends to create three additional positions at an indefinite time in the future, the CR has not met the requirements of the regulations and the petition should be denied. If, in rebuttal, the CR provides credible evidence that demonstrates recruitment for the three remaining full-time positions, that the positions are in the process of being posted and actively recruited, and that they clearly will be filled, approval may be considered.

Example 2:

An interview may reveal that while a CR claims to have created positions for ten full-time employees, only nine are actually working. The CR may present rebuttal information by demonstrating that he or she actively recruited the tenth employee, and the tenth employee is expected to be hired and begin employment. USCIS may determine, after considering this information as well as all of the evidence supporting the petition as a whole, that such a petition is approvable.

If the conditional resident fails to overcome the derogatory information or evidence that the investment funds were obtained through other than legal means, USCIS may deny the petition in accordance with 8 CFR 216.6(d), terminate the conditional resident's status, and follow established procedures relating to the issuance of an NTA to initiate removal proceedings.

If derogatory information unrelated to any of the requirements for removal of conditions is identified during the course of an interview or review of the petition (for example, an arrest or criminal conviction or other egregious public safety issue), such information

shall be referred to the Office of Fraud Detection and National Security (FDNS) in accordance with Fraud Detection Standard Operating Procedures for appropriate action. Any action on the petition should be held until FDNS determines whether a referral for investigation should be made to Immigration and Border Enforcement (ICE) or no further action is required based on the information provided.

(i) Termination of Conditional Resident Status.

(1) Grounds for Termination. USCIS may automatically terminate an alien's conditional resident status in the following instances:

(A) Failure to Timely File a Form I-829. Generally, when a conditional resident fails to properly file a Form I-829 within the 90-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence, the alien's status will automatically terminate. USCIS will issue a notice of termination and follow established procedures for the issuance of an NTA to initiate removal proceedings. There is no appeal from an automatic termination on this ground but the alien can seek review of the decision in removal proceedings. See 8 CFR 216.6(a)(5).

(B) Failure to Appear for Interview on a Form I-829. Generally, if a conditional resident fails to appear for interview on a Form I-829, his or her conditional resident status will be automatically terminated as of the second anniversary of the date on which the alien obtained lawful permanent residence. USCIS will issue a notice of termination and follow established procedures for the issuance of an NTA to initiate removal proceedings. The field office director may reschedule or waive the interview requirement if the alien establishes good cause for the failure to appear. See 8 CFR 216.6(b)(3).

(2) Action on Termination for Failure to Timely File. Where it is determined that Form I-829 has not been timely filed, the appropriate service center or field office shall:

(i) Issue a notice which states that the failure to file has resulted in the automatic termination of the alien's status;
(ii) Update the alien's MFAS file to reflect "Automatic Termination" and the notice of automatic termination shall be generated and mailed to the alien's last known address; and
(iii) Follow established procedures for the issuance of an NTA to initiate removal proceedings, ensure that the A-file includes all relevant documents and is forwarded to the appropriate office with jurisdiction over the alien's last known address.

The California Service Center and the Texas Service Center shall each generate weekly a printout from the MFAS to determine those conditional residents within their respective jurisdictions who have failed to file a timely Form I-829 to have the conditions on their status removed in accordance with Section 216A(c) of the Act and will take the actions described above in this section to terminate the status of such conditional residents and their dependents.

(j) Form I-829 Withdrawal Requests. Pursuant to 8 CFR 103.2(b)(6), a petitioner may withdraw a Form I-829 at any time until a decision is issued by USCIS. However, a withdrawal may not be retracted. The petitioner must request the withdrawal of the Form I-829 in writing. The written request may be executed by the petitioner and/or his or her attorney or representative of record. The petitioner's conditional lawful permanent resident status and that of his or her spouse and any children shall be terminated as of the second anniversary of the date on which the alien obtained this status. In such cases, USCIS shall follow established procedures for the issuance of an NTA to initiate removal proceedings.

(k) Extension of Status for Conditional Residents with a Pending or Denied Form I-829. Officers are advised that no extension of status can be given to an alien who has not timely filed a Form I-829, unless USCIS accepts a late petition based upon the alien's showing of good cause in accordance with 8 CFR 216.6(a)(5).

Upon receipt of a properly filed Form I-829, USCIS is authorized by 8 CFR 216.6(a)(1) to extend automatically a conditional resident's status, if necessary, until such time as USCIS has adjudicated the petition. Therefore, if necessary, a field immigration information officer (IIO) in receipt of a request for documentation for travel or employment purposes from a petitioner who requires an extension of status based on a filed Form I-829 shall check the status of the petitioner in MFAS. If the Form I-829 has been denied, the IIO should check DACS to determine if an NTA has been issued and follow established procedures for the issuance of an NTA to initiate removal proceedings.

If the Form I-829 is still pending or has been denied but no final order of removal has been entered, the IIO must collect the expired Permanent Resident Card and follow established procedures for providing a temporary extension of the alien's conditional resident status. Documentation of conditional resident status must be issued until a final order of removal is issued. An order of removal is administratively final if a decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals.

Where the Form I-829 has been denied for failure to properly file a timely Form I-829 or for failure to appear for an interview, the alien's permanent resident status will be automatically terminated. Temporary evidence of permanent resident status as stated

above should only be issued if the conditional resident's status is restored as described in 8 CFR 216.6(a)(5) and (b)(3).

(l) Lawful Permanent Residents Whose Conditions have been Removed. Officers are reminded that, as stated in the field memorandum of June 26, 1998, absent a finding of fraud or other improper acts, USCIS will not initiate rescission proceedings in the cases of aliens who have obtained lawful permanent resident status (without conditions) based on petitions that may have not complied with the statute and regulations, as discussed in the General Counsel's memorandum of December 19, 1997.

(m) Adjudication of Form N-400, Applications for Naturalization when a Form I-829 is Pending with the Service Center or Field Office.

(1) General. The procedures for adjudicating a Form N-400 for a conditional resident (CR) who still has a Form I-829 pending at a service center or field office differ depending on whether the Form I-829 is subject to Pub. L. 107-273 or standard EB-5 procedures under Section 216A of the Act and 8 CFR 216.6. Before taking any final action on a Form N-400, the naturalization adjudicator should confirm whether the case is subject to Pub. L. 107-273 by contacting the Chief Adjudications Officer, Foreign Trader, Investor, and Regional Center Program (FTIRCP), Headquarters for further instructions. The FTIRCP will coordinate any action with the relevant service center or regional office EB-5 POC.

(2) Public Law Cases. Form I-829s filed by conditional residents are subject to Pub. L. 107-273 if the Form I-526 was approved after January 1, 1995 and prior to August 31, 1998, and the Form I-829 was timely filed prior to November 2, 2002. Even if the Form I-829 was denied before November 2, 2002, the Form I-829 falls under the Pub. L. provisions if a motion to reopen was filed before January 2, 2003. Section 11033 of Pub. L. 107-273 states that USCIS cannot deny any of these applications until implementing regulations have been published. As a result, these cases generally must remain pending until the regulations are published and USCIS commences its review of them pursuant to such regulations.

(3) Identifying EB-5 Cases Prior to Adjudication of the Form N-400. Generally, EB-5 CRs will have one of the following EB-5 classification codes: N51-N58, T51-T53, T56-T58, I51-I53, I56-I58, C51-C53, C56-C58, R51-R53, or R56-R58.

If a CR has a status in the "N" series, the service center or field office adjudicator should first check the U.S. Department of Justice Executive Office for Immigration Review (EOIR) system to see if the person has been ordered removed by the IJ and then follow the March 3, 2000 EB-5 Field Memo Number 9: Form I-829 Processing and the January 18, 2005 Memo on Extension of Status for Conditional Residents

with Pending or Denied Form I-829s Subject to Public Law 107-273.

The E51- E58 classification codes are given only once the conditions are removed. If an adjudicator checks the Central Index System (CIS) history and only sees an E51-E58 classification without the alien previously having a conditional classification (i.e. C51-C58, T51-T58, I51-I58, R51-R58), the adjudicator should then check the A-file to determine if there was a classification error at the time of admission or adjustment or if the error was in updating CIS. This issue must be resolved before moving forward on the adjudication of the N-400.

(4) Eligibility to File for Naturalization While a Form I-829 is Pending. A conditional resident who has timely filed a Form I-829 may submit a Form N-400 prior to the adjudication of the I-829. Section 216A(e) and the regulations at 8 CFR 216.1 allow a conditional resident to apply for naturalization and the conditional resident may file a Form N-400 whether or not the Form I-829 filed by the CR has been adjudicated.

(5) Scheduling of the Naturalization Interviews for EB-5 Cases.

(A) Non-Public Law Cases. Field offices or service centers may schedule for interview Form N-400s for non-Public Law cases as provided in subparagraph 6(ii)(C) below.

(B) Public Law Cases. Except as provided in subparagraph 6(i) below, field offices or service centers will not schedule for interview any Public Law cases where a Form N-400 has been filed and the Form I-829 is still pending. If a case has already been scheduled for interview, but the applicant has not yet appeared, the field office or service center with the Form N-400 should de-schedule the interview. The California Service Center (CSC) also will de-schedule in Claims 4 the examination of any naturalization applicant who has not had his or her conditional resident status removed and whose Form I-829 is subject to Pub. L. 107-273. Field offices or other service centers should forward any such Form N-400s to the California Service Center to the EB-5 POC for consolidation with the A-file containing the Form I-829. USCIS will not permit a Pub. L. 107-273 case with a pending Form N-400 to proceed to initial interview (even after all required background checks have been completed) until the conditions have been removed.

(6) Adjudicating the Form N-400 if the Form I-829 is Pending. For Form N-400s that are pending adjudication prior to the effective date of this memorandum, service centers and field offices should ascertain the current status of the Form I-829 prior to proceeding with a final adjudication of the N-400.

NOTE: An N-400 shall not be approved under any circumstances prior to the adjudication of a pending Form I-829 and the removal of conditions on the CR's status, unless the applicant has obtained lawful permanent resident status (LPR) through another avenue or is eligible to naturalize based on military service under section 329 of the Act.

(i) N-400 filed with a pending I-829 where the applicant has since obtained LPR status on other grounds (applies to all EB-5 cases, including Pub. L. 107-273 cases). An alien who is already a CR cannot seek to obtain LPR status, based on other grounds, through filing of an application for adjustment of status while in the United States. Section 245(d) of the Act; 8 CFR 245.1(c)(5). However, if the alien's CR status is properly terminated prior to filing of a subsequent application for adjustment of status, USCIS may, in its discretion, adjust the alien to LPR status again, if the alien remains admissible, has an immigrant visa immediately available, and favorable exercise of discretion to adjust is warranted. If the alien's CR status has not been terminated or rescinded, the alien may only obtain LPR status again via consular processing and admission to the United States on a new immigrant visa.

A CR is eligible for naturalization and may be interviewed, notwithstanding a currently pending I-829, if he or she visa processed abroad and reentered on a new immigrant visa, or subsequently adjusted status on other grounds (e.g., marriage to a U.S. citizen) after termination of the original CR status. The naturalization adjudicator should refer the pending Form I-829 to their supervisor for further instructions on how to close out the original Form I-829 and document that the CR status on which it was based was either terminated, rescinded, or superseded by a subsequent admission on an immigrant visa.

(ii) N-400 filed with a pending Form I-829 where the applicant has not obtained LPR status on other grounds.

(A) Public Law Cases Where Form N-400 Interview has Already Occurred. If prior to the effective date of this AFM update, an applicant has appeared for examination on his or her Form N-400 but is still a CR, the field adjudicator must ensure that the Form I-829 is adjudicated prior to a final decision on the Form N-400. If the Form I-829 cannot be approved and, because the Form I-829 is subject to Pub. L. 107-273, also cannot be denied, the Form N-400 may still be denied under Section 318 of the Act (along with any other applicable ground that may be the basis for a finding of ineligibility for naturalization), when review of the A-file by a fully trained EB-5 adjudicator reveals that the applicant did not properly obtain EB-5 status or that the Form I-829 would not be approvable due to the applicant's failure to comply with the EB-5 requirements. A report of the analyses and findings made by the EB-5

service center adjudicator who reviewed the entire case file will be forwarded to the field office adjudicator to support the Form N-400 denial.

(B) Sample Denial Language for Applications Subject to Pub. L. 107-273. When the field adjudicator determines that the Form N-400 must be denied, the field adjudicator may use the following language to address the issue of ineligibility under section 318 of the Act.

* * * *

Except as otherwise specifically provided, no person shall be naturalized unless he or she has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Immigration and Nationality Act (INA). See INA § 318. The term "lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed". INA § 101(a)(20).

A person may only be naturalized if he or she was granted resident status in accordance with the immigration laws, and not if status was obtained by mistake, fraud, or otherwise not in compliance with the law. Matter of Koloamatangi, 23 I & N Dec 548, 550 (2003) (holding that "the term 'lawfully admitted for permanent residence' did not apply to aliens who had obtained their permanent residence by fraud, or had otherwise not been entitled to it"); see also, Arellano-Garcia v. Gonzales, 429 F.3d 1183 (8th Cir. 2005) (holding that an alien who received permanent residency status by a mistake could not be considered an alien "lawfully admitted for permanent residence"); Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir. 1973) (same).

You were accorded conditional resident status pursuant to the Employment Creation immigrant visa category under INA § 203(b)(5). To qualify under this immigrant visa category, an alien must invest $1,000,000 (or $500,000 in certain targeted areas) of lawfully obtained capital such as cash, inventory or other tangible property. In addition, the alien's investment must create at least ten full-time jobs for United States citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. A review of your file reflects that you did not make the required investment and/or create the required number of full-time jobs. Thus, your admission to the United States was not in accordance with all applicable provisions of the INA and you are therefore ineligible for naturalization.

* * * *

The language suggested above should be modified to address the specific circumstances in each case (for example, to account for N-400 applicants who were EB-5 derivatives).

(C) Applications not subject to Pub. L. 107-273. The field adjudicator may conduct the naturalization examination, but must immediately contact the service center with jurisdiction over the Form I-829 before taking any final action.

Only officers fully trained and certified in EB-5 law, procedures, and the relevant precedent decisions may adjudicate Form I-829s. As a result, the field adjudicator conducting the naturalization examination shall not attempt to adjudicate the Form I-829, but instead must contact the appropriate service center or regional office EB-5 POC to obtain adjudication of the Form I-829 before proceeding with a determination on the N-400.

Once the Form I-829 is adjudicated, including the appropriate update in MFAS, the field adjudicator may proceed with the adjudication of the Form N-400. If the service center approves the Form I-829, the service center will update MFAS. If the Form I-829 is approved, the Form N-400 may be granted if the applicant is otherwise eligible for naturalization.

If the Form I-829 is denied, the Form N-400 must be denied based on Section 318 of the Act because the applicant no longer has the required lawful permanent resident status.

Because 8 CFR 336.1(a) requires that "the Service shall serve a written notice of denial upon an applicant for naturalization no later than 120 days after the date of the applicant's first examination on the application...", it is imperative that the service center or field office with jurisdiction over the Form I-829 adjudicate it expeditiously so that if the Form I-829 is denied, denial of the Form N-400 can occur within the 120-day timeframe.

5. AFM Transmittal Memoranda

The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD 06-31 & AD06-04 [INSERT	Chapter 25.2	Updates guidance on the adjudication of Form I-829s for the removal of conditions for

SIGNATURE DATE]		conditional permanent residents under the immigrant investor visa categories and for N-400s filed by EB-5 conditional residents with pending Form I-829s.

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection

OMB No. 1615-0061; Expires 09/30/2012

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program

Do Not Write in This Block - for USCIS Use Only (except G-28 block below)	
Action Block	Fee Receipt ☐ G-28 attached Attorney's State License No.

Part 1. Information About Principal of the Regional Center

Name: Last	First	Middle

C/O:

Street Address/P.O. Box:

City:	State:	Zip Code:

Date of Birth (mm/dd/yyyy):	Fax Number (include area code):	Telephone Number (include area code):

Web site address:

Part 2. Application Type (Check one)

☐ **a.** Initial Application for Designation as a Regional Center

☐ **b.** Amendment to an approved Regional Center application. Note the previous application receipt number, if any (also attach the Regional Center's previous approval notice): _____

Part 3. Information About the Regional Center

(Use a continuation sheet, if needed, to provide information for additional management companies/agencies, Regional Center principals, agents, individuals or entities who are or will be involved in the management, oversight, and administration of the regional center.)

A. Name of Regional Center:

Street Address/P.O. Box:

City:	State:	Zip Code:

Web site address:	Fax Number (include area code):	Telephone Number (include area code):

Part 3. Information About the Regional Center *(Continued)*

B. Name of Managing Company/Agency:

Street Address/P.O. Box:

City:	State:	Zip Code:
Web site address:	Fax Number (include area code):	Telephone Number (include area code):

C. Name of Other Agent:

Street Address/P.O. Box:

City:	State:	Zip Code:
Web site address:	Fax Number (include area code):	Telephone Number (include area code):

D. Continuation, if needed, to provide information for additional management companies/agencies, regional center principals, agents, individuals or entities who are or will be involved in the management, oversight, and administration of the regional center.)

Part 3. Information About the Regional Center *(Continued)*

Note: If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and provide the response.

1a. Describe the structure, ownership and control of the regional center entity.

b. Date the Regional Center was established(mm/dd/yyyy): _____

c. Organization Structure for the Regional Center:

- ☐ **1.** Agency of a U.S. State or Territory (identify) _____
- ☐ **2.** Corporation
- ☐ **3.** Partnership (including Limited Partnership)
- ☐ **4.** Limited Liability Company (LLC)
- ☐ **5.** Other (Explain) _____

2. Has this regional center's designation ever been formally terminated by USCIS, or has the regional center ever filed a Form I-924 or regional center proposal or amendment that was denied?

☐ No ☐ Yes - Attach a copy of the adverse decision, with an explanation, the date of decision, and case number, if any.

3. Describe the geographic area of the regional center. **Note:** This area must be contiguous. Provide a map of the geographic area.

4. Describe the regional center's administration, oversight, and management functions that are or will be in place to monitor all EB-5 capital investment activities and the allocation of the resulting jobs created or maintained under the sponsorship of the regional center.

Part 3. Information About the Regional Center *(Continued)*

5. Describe the past, current, and future promotional activities for the regional center. Include a description of the budget for this activity, along with evidence of the funds committed to the regional center for promotional activities. Submit a plan of operation for the regional center that addresses how EB-5 investors will be recruited, the method(s) by which the capital investment opportunities will be offered to the investors, and how they will subscribe or commit to the investment interest.

6. Describe whether and how the regional center is engaged in supporting a due diligence screening of its alien investor's lawful source of capital and the alien investor's ability to fully invest the requisite amount of capital. Also, describe the regional center's prospective plans in this regard if they differ from past practice.

7. Identify each industry that has or will be the focus of EB-5 capital investments sponsored through the regional center.

Industry Category Title: ______ NAICS Code for the Industry Category: _ _ _ _ _ _	Is the Form I-924 application supported by an economic analysis and underlying business plan for the determination of prospective EB-5 job creation through EB-5 investments in this industry category? ☐ No - Attach an explanation ☐ Yes
Industry Category Title: ______ NAICS Code for the Industry Category: _ _ _ _ _ _	Is the Form I-924 application supported by an economic analysis and underlying business plan for the determination of prospective EB-5 job creation through EB-5 investments in this industry category? ☐ No - Attach an explanation ☐ Yes
Industry Category Title: ______ NAICS Code for the Industry Category: _ _ _ _ _ _	Is the Form I-924 application supported by an economic analysis and underlying business plan for the determination of prospective EB-5 job creation through EB-5 investments in this industry category? ☐ No - Attach an explanation ☐ Yes

Part 3. Information About the Regional Center *(Continued)*

8a. Describe and document the current and/or prospective structure of ownership and control of the commercial entity(s) in which the EB-5 alien investors have or will make their capital investments.

b. Date commercial enterprise established, if any (mm/dd/yyyy): _____

c. Organization Structure for commercial enterprise:

☐ **1.** Corporation

☐ **2.** Partnership (including Limited Partnership)

☐ **3.** Limited Liability Company (LLC)

☐ **4.** Other (Explain) _____

d. Has or will the Regional Center or any of its principals or agents have an equity stake in the commercial enterprise?

☐ No ☐ Yes - Attach an explanation and documentation that outlines when and under what circumstances these remittances will be paid.

e. Has or will the Regional Center or any of its principals or agents receive fees, profits, surcharges, or other like remittances through EB-5 capital investment activities from this commercial enterprise, beyond the minimum capital investment threshold required of the EB-5 alien entrepreneurs?

☐ No ☐ Yes - Attach an explanation and documentation that outlines when and under what circumstances these remittances will be paid.

Part 4. Applicant Signature *Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition, he or she must compete* ***Part 5****.*

I certify, under penalty of perjury under the laws of the United States of America, that this form and the evidence submitted with it are all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought. I also certify that I have authority to act on behalf of the Regional Center.

Signature of Applicant	**Daytime Phone Number** *(Area/Country Codes)*	**Date** *(mm/dd/yyyy)*
Printed Name of Applicant	**E-Mail Address**	
Relationship to the Regional Center Entity (Managing Member, President, CEO, etc.)		

Part 5. Signature of Person Preparing This Form, If Other Than Above *(Sign Below)*

I declare that I prepared this application using information provided by someone with authority to act on behalf of the Regional Center, and the answers and information provided by the Regional Center.

Attorney or Representative: In the event of a Request for Evidence (RFE), may the USCIS contact you by Fax or E-mail? ☐ No ☐ Yes

Signature of Preparer		**Printed Name of Preparer**	**Date** *(mm/dd/yyyy)*
Firm Name and Address			
Daytime Phone Number *(Area/Country Codes)*	**Fax Number** *(Area/ Country Codes)*	**E-Mail Address**	

OMB No. 1615-0061; Expires 09/30/2012

Department of Homeland Security
U.S. Citizenship and Immigration Services

Instructions for Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program

What Is the Purpose of This Form?

This form is used to:

1. Apply to U.S. Citizenship and Immigration Services (USCIS) to request designation of an entity to be a regional center under the Immigrant Investor Pilot Program.

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. Capital investment projects, to include changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities and industrial clusters;

      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 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.

Who May File This Form?

This form may be filed by an individual on behalf of a State or local governmental agency, a partnership, or any other existing business entity established in the United States and its territories by an individual, who has the executive or managerial authority to seek the Regional Center designation, or an amended designation.

General Instructions

Fill Out the Form

1. Type or print legibly in black ink.

2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.

3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."

Who Must File a Form I-924 Supplement for Each Fiscal Year?

Each designated regional center entity must file a Form I-924 Supplement for each fiscal year (October 1 through September 30) within 90 days after the end of the fiscal year (on or before December 29) of the calendar year in which the fiscal year ended.

Initial Evidence Requirements

1. Initial Evidence Requirements for filing:

   A. A request for the Approval and Designation of a Regional Center; or

   B. An Amendment to a Previously Approved Regional Center Designation.

2. The Regional Center must focus on a geographical area. This area must be contiguous and clearly identified in the application by providing a detailed map of the proposed geographic area of the Regional Center.

3. Each Regional Center must fully explain how at least 10 new full-time jobs will be created by each individual alien investor within the Regional Center either directly or indirectly.

Provide an economic analysis that relies on statistically valid forecasting tools that shows and describes how jobs will be created for each industrial category of economic activity (for example, manufacturing, food production/ processing, warehousing, tourism and hospitality, transportation, power generation, agriculture, etc.)

The job creation analysis for each economic activity must be supported by a copy of a business plan for an actual or exemplar capital investment project for that category. **Note:** A business plan provided in support of a regional center application should contain sufficient detail to provide valid and reasoned inputs into the economic forecasting tools and must demonstrate that the proposed project is feasible under current market and economic conditions. The form of the EB-5 investment from the commercial enterprise into the job creating project (equity, loan, or some other financial arrangement) should be identified.

The business plan should also identify any and all fees, profits, surcharges, or other like remittances that will be paid to the regional center or any of its principals or agents through EB-5 capital investment activities.

Provide the industry category title and the North American Industry Classification System (NAICS) code for each industrial category. The NAICS code can be obtained from the U.S. Department of Commerce, Census Bureau (**www.census.gov/epcd/www/naics.htm**). Enter the code from left to right, one digit in each of the six boxes provided in the form in **Part 3, item 7**. If you use a code with fewer than six digits, enter the code left to right and then add zeros in the remaining unoccupied boxes.

The application should be supported by a statement from the principal of the Regional Center that explains the methodologies that the Regional Center will use to track the infusion of each EB-5 alien investor's capital into the job creating enterprise, and to allocate the jobs created through the EB-5 investments in the job creating enterprise to each associated EB-5 alien investor. The anticipated minimum capital investment threshold (either $1,000,000 or $500,000) for each investor should also be identified.

NOTE: INA section 203(b)(5)(A)(ii) requires that each EB-5 alien investor *must create full-time employment for not fewer than 10 U.S. citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States.* (Jobs created for the EB-5 alien investor and his or her spouse, sons, or daughters do not qualify.)

8 CFR 204.6(j)(4)(ii) and 8 CFR 216.6(a)(4) provide a means for EB-5 alien investors to meet the statutory requirement of creating at least 10 jobs for qualifying U.S. workers through capital investments in a "troubled business." 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 or her admission as a conditional permanent resident.

In order to meet the requirements of INA 203(b)(5)(A)(ii), each alien investor must create or maintain at least 10 jobs through the capital investment in a troubled business. If a regional center plans to focus on capital investments in "troubled businesses" within the geographic area of the regional center, then the economic analysis, business plan, and feasibility study submitted must show that each EB-5 alien investor's capital investment in a "troubled business" commercial enterprise will create or maintain at least 10 direct or indirect jobs.

4. Provide a detailed description of the past, current and, future promotional activities for the regional center. Include a description of the budget for this activity, along with evidence of the funds committed to the regional center for promotional activities.

   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 be obtained from lawful sources.

5. Provide a general prediction which addresses the prospective impact of the capital investment projects sponsored by the regional center, regionally or nationally, with respect to increases in household earnings; greater demand for business services, utilities, maintenance and repair; and construction both within and without the regional center.

6. The application must fully describe and document the organizational structure of the regional center. In addition, it is helpful for the regional center to show that the capital investment offering instruments, business structure, and operating agreements of the proposed commercial enterprises that will be affiliated with the regional center are compliant with the EB-5 statutory and regulatory requirements, as well as the binding EB-5 precedent decisions.

NOTE: There are four EB-5 precedent decisions, which may be accessed at **http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html**:

i. *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998);

ii. *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998). **Note:** Pub. L. 107-273 eliminated the requirement set forth in *Izummi* that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations;

iii. *Matter of Hsiung*, 22 I&N, Dec. 201 (BIA 1998); and

iv. *Matter of Ho*, 22 I&N Dec. 206 (BIA 1998).

Documentation of the above should be included but not limited to:

A. A description and documentation of the business structure of both the regional center entity and the commercial enterprises that are or will be affiliated with the regional center, such as articles of incorporation, certificate of incorporation, or legal creation as a partnership or limited liability company (LLC), partnership or LLC agreements, etc.;

B. Draft subscription agreement for investment into the commercial enterprise;

C. Draft escrow agreement and instructions, if any;

D. List of proposed financial institutions that will serve as the Escrow Agent, if any;

E. Draft of an offering letter, memorandum, private placement memorandum, or similar offering to be made in writing to an immigrant investor offering capital investments through the regional center; and

F. Draft memorandum of understanding, interagency agreement, contract, letter of intent, or similar agreement to be entered into with any other party, agency or organization to engage in activities on behalf of or in the name of the regional center.

NOTE: For your application submission and supporting evidence for items 1 through 6 above, please use fasteners to attach the documents at the top of each page, and individually tab the corresponding written materials and statements.

General Evidence

Translations. Any document containing foreign language submitted to USCIS must be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Copies. Unless specifically required that an original document be filed with an application or petition, an ordinary legible photocopy (standard 8 1/2 x 11 letter size) may be submitted. Original documents submitted when not required will remain a part of the record.

Where To File?

Submit Form I-924 and all supporting documentation to:

For direct mail, send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
P.O. Box 10526
Laguna Niguel, CA 92607-0526

For non-U.S. Postal Service deliveries (e.g., private couriers), send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
24000 Avila Road, 2nd Floor
Laguna Niguel, CA 92677

What Is the Filing Fee?

The filing fee for this form is **$6,230**.

NOTE: There is no separate filing fee for the filing of Form I-924A Supplement.

Use the following guidelines when you prepare your check or money order for filing the fee:

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; and
2. Make the check or money order payable to **U.S. Department of Homeland Security**, unless:
   - **A.** If you live in Guam and are filing your petition there, make it payable to **Treasurer, Guam.**
   - **B.** If you live in the U.S. Virgin Islands and are filing your petition there, make it payable to **Commissioner of Finance of the Virgin Islands.**

NOTE: Spell out U.S. Department of Homeland Security; do not use the initials "USDHS" or "DHS."

Notice to Those Making Payment by Check. If you send us a check, it will be converted into an electronic funds transfer (EFT). This means we will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will usually take 24 hours and will be shown on your regular account statement.

You will not receive your original check back. We will destroy your original check, but we will keep a copy of it. If the EFT cannot be processed for technical reasons, you authorize us to process the copy in place of your original check. If the EFT cannot be completed because of insufficient funds, we may try to make the transfer up to two times.

How to Check If the Fees Are Correct

The form fee on this form is current as of the edition date appearing in the lower right corner of this page. However, because USCIS fees change periodically, you can verify if the fees are correct by following one of the steps below:

1. Visit our Web site at **www.uscis.gov**, select "check Filing Fees," and check the appropriate fee;
2. Review the Fee Schedule included in your form package, if you called us to request the form; or
3. Telephone our National Customer Service Center at **1-800-375-5283** and ask for the fee information.

Address Changes

If you change your address and you have a Form I-924 application pending with USCIS, you may change your address by sending notification to:

For direct mail, send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
P.O. Box 10526
Laguna Niguel, CA 92607-0526

For non-U.S. Postal Service deliveries (e.g., private couriers), send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
24000 Avila Road, 2nd Floor
Laguna Niguel, CA 92677

Processing Information

Acceptance. Any application that is not signed or accompanied by the correct fee will be rejected with a notice that it is deficient. You may correct the deficiency and resubmit the application. However, an application is not considered properly filed until accepted by USCIS.

Initial processing. Once Form I-924 has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form or file it without required initial evidence, you will not establish a basis for eligibility, and we may deny your Form I-924.

Requests for more information or evidence. We may request more information or evidence. We may also request that you submit the originals of any copy. We will return these originals when they are no longer needed.

Decision. The decision on Form I-924 involves a determination of whether you have established eligibility for the requested designation, or an amendment to a previously approved designation. You will be notified of the decision in writing.

Approval. If you have established that you qualify for Regional Center designation, or a designation amendment, then the application will be approved. The approval notice will provide information as to your responsibilities and obligations as a USCIS-designated regional center, and the evidence to submit in support of regional center-affiliated individual EB-5 petitions with USCIS, as well as details on the reporting and oversight requirements for Regional Centers.

NOTE: Beginning with the fiscal year following approval, each designated Regional Center entity must file the Form I-924A Supplement for each fiscal year (October 1 through September 30) within 90 days after the end of the fiscal year (on or before December 29) of the calendar year in which the fiscal year ended.

Designated Regional Centers must notify USCIS within 30 days of a change of address, contact information, regional center principal(s), contracting agents or similar changes in the operation or administration of the Regional Center. Notification can be made by sending an e-mail to the EB-5 Program mailbox at: **USCIS.ImmigrantInvestorProgram@dhs.gov**.

NOTE: An original Form G-28 must also be provided through the mail as outlined in the Form G-28 filing instructions for changes in the attorney of record.

Denial. If you have not established that you qualify for the benefit sought, the application will be denied. You will be notified in writing of the reasons for the denial, and of the regional center's right to appeal the decision to deny the application to the Administrative Appeals Office as specified in 8 CFR 103.3.

USCIS Forms and Information

To order USCIS forms, call our toll-free number at **1-800-870-3676**. You can also get USCIS forms and information on immigration laws, regulations, and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our Internet Web site at www.uscis.gov.

To make an inquiry or ask a question about the Regional Center Program you may send an e-mail to: **USCIS.ImmigrantInvestorProgram@dhs.gov**

USCIS Compliance Review and Monitoring

By signing this form, you have stated under penalty of perjury (28 U.S.C. 1746) that all information and documentation submitted with this form is true and correct. You also have authorized the release of any information from your records that USCIS may need to determine eligibility for the benefit you are seeking and consented to USCIS verification of such information.

The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking at any time. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, and 205. To ensure compliance with applicable laws and authorities, USCIS may verify information before or after your case has been decided.

Agency verification methods may include but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile, or other electronic transmission or telephone; unannounced physical site inspections of residences and places of employment; and interviews. Information obtained through verification will be used to assess your compliance with the laws and to determine your eligibility for the benefit sought.

Subject to the restrictions under 8 CFR part 103.2(b)(16), you will be provided an opportunity to address any adverse or derogatory information that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on your case, or after the agency has initiated an adverse action which may result in revocation or termination of an approval.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 40 hours per response for each application.

The estimated reporting burden for this collection of information the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Ave., N.W., Washington, D.C. 20529-2020, OMB No. 1615-0061. **Do not mail your application to this address.**

OMB No. 1615-0061; Expires 09/30/2012

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-924A, Supplement to Form I-924

Part 1. Information About Principal of the Regional Center

Name: Last	First	Middle

In Care Of:

Street Address/P.O. Box:

City:	State:	Zip Code:

Date of Birth *(mm/dd/yyyy)*:	Fax Number *(include area code)*:	Telephone Number *(include area code)*:

Web site address:

USCIS-assigned number for the Designated Regional Center (attach the Regional Center's most recently issued approval notice)

Part 2. Application Type (Check one)

☐ **a.** Supplement for the Fiscal Year Ending September 30, _____ *(YYYY)*

☐ **b.** Supplement for a Series of Fiscal Years Beginning on October 1, _____ *(YYYY)* and Ending on September 30, _____ *(YYYY)*

Part 3. Information About the Regional Center

(Use a continuation sheet, if needed, to provide information for additional management companies/agencies, regional center principals, agents, individuals, or entities who are or will be involved in the management, oversight, and administration of the regional center.)

A. Name of Regional Center:

Street Address/P.O. Box:

City:	State:	Zip Code:

Web site Address:	Fax Number *(include area code)*:	Telephone *(include area code)*:

B. Name of Managing Company/Agency:

Street Address/P.O. Box:

City:	State:	Zip Code:

Web site Address:	Fax Number *(include area code)*:	Telephone *(include area code)*:

C. Name of Other Agent:

Street Address/P.O. Box:

City:	State:	Zip Code:

Web site Address:	Fax Number *(include area code)*:	Telephone *(include area code)*:

Part 3. Information About the Regional Center *(Continued)*

Answer the following questions for the time period identified in **Part 2** of this form. **Note:** If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and provide the response.

1. Identify the aggregate EB-5 capital investment and job creation has been the focus of EB-5 capital investments sponsored through the regional center. (**Note:** Separately identify jobs maintained through investments in "troubled businesses.")

Aggregate EB-5 Capital Investment	Aggregate Direct and Indirect Job Creation	Aggregate Jobs Maintained

2. Identify each industry that has been the focus of EB-5 capital investments sponsored through the Regional Center, and the resulting aggregate EB-5 capital investment and job creation. (**Note:** Separately identify jobs maintained through investments in "troubled businesses".)

a. Industry Category Title:		NAICS Code for the Industry Category — — — — — —
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:
b. Industry Category Title:		NAICS Code for the Industry Category — — — — — —
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:
c. Industry Category Title:		NAICS Code for the Industry Category — — — — — —
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:

3. Provide the following information for each job creating commercial enterprise located within the geographic scope of your regional center that has received EB-5 investor capital:

a. Name of Commercial Enterprise:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:	
Does this EB-5 commercial enterprise serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes?		☐ No	☐ Yes

Part 3. Information About the Regional Center *(Continued)*

If yes, then identify the name and address of each job creating business, as well as the amount of EB-5 capital investment and job creation/maintenance associated with each job creating business.

(1) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	
(2) Business Name		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

b. Name of Commercial Enterprise:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:	

Does this EB-5 commercial enterprise serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes? ☐ No ☐ Yes

If yes, then identify the name and address of each job creating business, as well as the amount of EB-5 capital investment and job creation/maintenance associated with each job creating business.

(1) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code
EB-5 Capital Investment	Direct and Indirect Job Creation	Jobs Maintained	

Part 3. Information About the Regional Center *(Continued)*

(2) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

c. Name of Commercial Enterprise:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:	

Does this EB-5 commercial enterprise serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes? ☐ No ☐ Yes

If yes, then identify the name and address of each job creating business, as well as the amount of EB-5 capital investment and job creation/maintenance associated with each job creating business.

(1) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

(2) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

Part 3. Information About the Regional Center *(Continued)*

d. Name of Commercial Enterprise:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:	

Does this EB-5 commercial enterprise serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes? ☐ No ☐ Yes

If yes, then identify the name and address of each job creating business, as well as the amount of EB-5 capital investment and job creation/maintenance associated with each job creating business.

(1) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

(2) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

e. Name of Commercial Enterprise:		Industry Category Title:	
Address Street Number and Name:	City:	State:	Zip Code:
Aggregate EB-5 Capital Investment:	Aggregate Direct and Indirect Job Creation:	Aggregate Jobs Maintained:	

Does this EB-5 commercial enterprise serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes? ☐ No ☐ Yes

Part 3. Information About the Regional Center *(Continued)*

If yes, then identify the name and address of each job creating business, as well as the amount of EB-5 capital investment and job creation/maintenance associated with each job creating business.			
(1) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	
(2) Business Name:		Industry Category Title:	
Address (Street Number and Name):	City:	State:	Zip Code:
EB-5 Capital Investment:	Direct and Indirect Job Creation:	Jobs Maintained:	

4. Provide the total number of approved, denied and revoked Form I-526 petitions filed by EB-5 investors making capital investments sponsored by the regional center. (**Note:** If an adverse action was ultimately reversed and the petition was approved, then note the case as approved.)

Form I-526 Petition Final Case Actions		
Approved	**Denied**	**Revoked**

5. Provide the total number of approved, denied and revoked Form I-829 petitions filed by EB-5 investors making capital investments sponsored by the regional center. (**Note:** If an adverse action was ultimately reversed and the petition was approved, then note the case as approved.)

Form I-829 Petition Final Case Actions		
Approved	**Denied**	**Revoked**

NOTE: USCIS may require case-specific data relating to individual EB-5 petitions and the job creation determination and further information regarding the allocation methodologies utilized by a regional center in certain instances in order to verify the aggregate data provided above.

Part 4. Applicant Signature *Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition, he or she must compete* ***Part 5.***

I certify, under penalty of perjury under the laws of the United States of America, that this supplemental form and the evidence submitted with it are all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought. I also certify that I have authority to act on behalf of the Regional Center.

Signature of Applicant	**Printed Name of Applicant**	**Date** *(mm/dd/yyyy)*
Daytime Phone Number *(Area/Country Codes)*	**E-Mail Address**	
Relationship to the Regional Center Entity (Managing Member, President, CEO, etc.)		

Part 5. Signature of Person Preparing This Form, If Other Than Above *(Sign Below)*

I declare that I prepared this form using information provided by someone with authority to act on behalf of the Regional Center, and the answers and information are those provided by the Regional Center.

Attorney or Representative: In the event of a Request for Evidence (RFE), may the USCIS contact you by Fax or E-mail? ☐ No ☐ Yes

Signature of Preparer	**Printed Name of Preparer**	**Date** *(mm/dd/yyyy)*
Firm Name and Address		

Daytime Phone Number *(Area/Country Codes)*	**Fax Number** *(Area/ Country Codes)*	**E-Mail Address**

OMB No. 1615-0061; Expires 09/30/2012

Department of Homeland Security
U.S. Citizenship and Immigration Services

Instructions for Form I-924A, Supplement to Form I-924

What Is the Purpose of This Form?

This form is used to demonstrate a Regional Center's continued eligibility for the Regional Center designation. Each designated Regional Center entity must file a Form I-924A for each fiscal year (October 1 through September 30) within 90 days after the end of the fiscal year (on or before December 29) of the calendar year in which the fiscal year ended.

Failure to timely file a Form I-924 Supplement for each fiscal year in which the regional center has been designated for participation in the Immigrant Investor Pilot Program will result in the issuance of an intent to terminate the participation of the regional center in the Pilot Program, which may ultimately result in the termination of the approval and designation of the regional center.

Who May File This Form?

This form may be filed by an individual who has the executive or managerial authority to act on behalf of the Regional Center with respect to the Regional Center's designation.

Filing Instructions for Form I-924A

Provide a detailed statement which describes for the **last fiscal year**, (and prospectively if noted):

A. The aggregate amount of EB-5 alien capital invested through your regional center [Form I-924A Supplement, **Part 3**, No. 1];

B. The aggregate number of new direct and/or indirect jobs created by EB-5 investors through your regional center [Form I-924A Supplement, **Part 3**, No. 1] ;

C. The aggregate number of jobs "maintained" jobs by EB-5 capital investments into a "troubled business" through your regional center, if applicable [Form I-924A Supplement, **Part 3**, No. 1];

D. The industry(s) that have been the focus of EB-5 capital investments sponsored through the regional center, and the resulting aggregate EB-5 capital investment and job creation. (**Note**: Separately identify jobs maintained through investments in "troubled businesses") [Form I-924 Supplement, **Part 3**, No. 2];

E. The names, addresses, and industry category title of each job creating commercial enterprise located within the geographic scope of your regional center that has received alien investor capital. Also, provide the aggregate amount of EB-5 capital investment, the aggregate number of new direct and/or indirect jobs created by EB-5 investors, and if applicable, the aggregate number of jobs that have been "maintained" through EB-5 capital investments into a "troubled business," for each commercial enterprise located within the geographic scope of your regional center [Form I-924A Supplement, **Part 3**, No. 3];

F. If the EB-5 commercial enterprise(s) serve as a vehicle for investment into other business entities that have or will create or maintain jobs for EB-5 purposes, then please identify the names, addresses, amount of EB-5 capital investment, and the number of jobs created or maintained by the actual job creating businesses through EB-5 investments [Form I-924A Supplement, **Part 3**, No. 3];

G. The total number of approved, denied, or revoked Form I-526 petitions filed by EB-5 alien investors, for capital investments sponsored through your regional center [Form I-924A Supplement, **Part 3**, No. 4];

H. The total number of approved, denied, or revoked Form I-829 petitions filed by EB-5 alien investors, for capital investments sponsored through your regional center [Form I-924A Supplement, **Part 3**, No. 5];

NOTE: USCIS may require case-specific data relating to individual EB-5 petitions and the job creation determination and allocation methodologies utilized by a regional center in certain instances in order to verify the aggregate data provided **A-H** on **Page** 1.

General Evidence

Translations. Any document containing foreign language submitted to USCIS must be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Copies. Unless specifically required that an original document be filed with an application or petition, an ordinary legible photocopy (standard 8 1/2 x 11 letter size) may be submitted. Original documents submitted when not required will remain a part of the record.

Where To File?

Submit Form I-924A and all supporting documentation to:

For direct mail, send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
P.O. Box 10526
Laguna Niguel, CA 92607-0526

For non-U.S. Postal Service deliveries (e.g., private couriers), send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
24000 Avila Road, 2nd Floor
Laguna Niguel, CA 92677

What Is the Filing Fee?

There is no filing fee for filing Form I-924A.

Address Changes

If you change your address and you have a Form I-924A application pending with USCIS, you may change your address by sending notification to:

For direct mail, send to:

U.S. Citizenship and Immigration Services
California Service Center
Attn: EB-5 Processing Unit
P.O. Box 10526
Laguna Niguel, CA 92607-0526

For non-U.S. Postal Service deliveries (e.g., private couriers), send to:

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24000 Avila Road, 2nd Floor
Laguna Niguel, CA 92677

Processing Information

Acceptance. Any application that is not signed. will be rejected with a notice that it is deficient. You may correct the deficiency and resubmit the application. However, an application is not considered properly filed until accepted by USCIS.

Initial processing. Once Form I-924A has been received, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form or file it without required initial evidence, USCIS may initiate proceedings to terminate your Regional Center's designation under the Immigrant Investor Pilot Program.

Requests for more information or interview. We may request more information or evidence. We may also request that you submit the originals of any copy. We will return these originals when they are no longer needed.

Use of Information. The information collected through the Form I-924A permits USCIS to determine whether the Regional Center continues to serve the purposes of the Immigrant Investor Pilot Program. USCIS may initiate termination proceedings to terminate a Regional Center's designation for participation in the Immigrant Investor Pilot Program if a Regional Center fails to submit the information required by this form, 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.

USCIS Forms and Information

To order USCIS forms, call our toll-free number at **1-800-870-3676**. You can also get USCIS forms and information on immigration laws, regulations, and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our Internet Web site at **www.uscis.gov**.

To make an inquiry or ask a question about the Regional Center Program you may send an e-mail to: **USCIS.ImmigrantInvestorProgram@dhs.gov**

USCIS Compliance Review and Monitoring

By signing this form, you have stated under penalty of perjury (28 U.S.C. 1746) that all information and documentation submitted with this form is true and correct. You also have authorized the release of any information from your records that USCIS may need to determine eligibility for the benefit you are seeking and consented to USCIS verification of such information.

The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking **at any time**. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, and 205. To ensure compliance with applicable laws and authorities, USCIS may verify information before or after your case has been decided.

Subject to the restrictions under 8 CFR part 103.2(b)(16), you will be provided an opportunity to address any adverse or derogatory information that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on your case or after the agency has initiated an adverse action which may result in revocation or termination of an approval.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 3 hours per response for Form I-924A.

The estimated reporting burden for this collection of information includes the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Ave., N.W., Washington, D.C. 20529-2020, OMB No. 1615-0061. **Do not mail your application to this address.**

OMB No. 1615-0045; Expires 04/30/2011

Department of Homeland Security
U.S. Citizenship and Immigration Services

I-829, Petition by Entrepreneur to Remove Conditions

Do not write in this block - For USCIS use only (Except G-28 Block Below)		
☐ Applicant Interviewed	**Action Block**	Fee Receipt
		To be completed by Attorney or Representative, if any ☐ G-28 is attached Attorney's State License No. _____
Remarks:		

START HERE - Type or print in black ink.

Part 1. Information About You

A # (if any) _____ Form I-526 Receipt Number _____

Family Name _____ Given Name _____ Middle Name _____

Address:

In care of _____

Number and Street _____ Apt. # _____

City _____ State or Province _____

Country _____ Zip/Postal Code _____ Daytime Phone # _____

Date of Birth (mm/dd/yyyy) _____ Country of Birth _____ U.S. Social Security # (if any) _____

Since becoming a conditional permanent resident, have you ever been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance (excluding traffic regulations), or committed any crime for which you were not arrested?

☐ Yes ☐ No (If yes, explain on separate sheet(s) of paper, including disposition, if any.)

Part 2. Basis for Petition *(Check one)*

a. ☐ My conditional permanent residence is based on an investment in a commercial enterprise.

b. ☐ Reserved.

c. ☐ Reserved.

d. ☐ I am a conditional permanent resident spouse or child of an entrepreneur, and I am unable to be included in a Petition by Entrepreneur to Remove Conditions (Form I-829) filed by my conditional resident spouse or parent.

e. ☐ I am a conditional permanent resident spouse or child of an entrepreneur who is deceased.

Part 3. Information About Your Husband or Wife

Family Name _____ Given Name _____ Middle Name _____

Gender ☐ Male ☐ Female Date of Birth (mm/dd/yyyy) _____ Date of Marriage (mm/dd/yyyy) _____

Other names used (including maiden name or aliases) _____

A# (If any) _____ Current Immigration Status _____ Is your current immigration status based on the petitioner's current status? ☐ Yes ☐ No

RECEIVED: _____ RESUBMITTED: _____ RELOCATED: SENT _____ REC'D _____

Part 4. Children *(List all your children. Attach another sheet(s) of paper, if necessary.)*

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Family Name | Given Name | Middle Name

A# (if any) | Current Immigration Status | Date of Birth (mm/dd/yyyy) | Living with you? ☐ Yes ☐ No

Part 5. Information About Your Commercial Enterprise

Type of Enterprise *(Check one)*:

☐ New commercial enterprise resulting from the creation of a new business.

☐ New commercial enterprise resulting from the reorganization of an existing business.

☐ New commercial enterprise resulting from a capital investment in an existing business.

Kind of Business *(Be as specific as possible)*:

Date Business Established *(mm/dd/yyyy)* | Amount of Initial Investment

Date of Initial Investment *(mm/dd/yyyy)* | % of Enterprise You Own

Number of full-time employees in enterprise in United States (excluding you, your spouse, sons, and daughters):

At the time of your initial investment: | Presently: | Difference:

How many of these new jobs were created by your investment?

Part 5. Information About Your Commercial Enterprise (continued)

Subsequent Investment in the Enterprise:

Date of Investment	Amount of Investment	Type of Investment

Provide the gross and net incomes generated annually by the commercial enterprise since your initial investment. Include all income generated up to date during the present year.

Year	Gross Income	Net Income

Has your commercial enterprise filed for bankruptcy, ceased business operations, or have any changes in its business organization or ownership occurred since the date of your initial investment? ☐ Yes (Explain on separate sheet) ☐ No

Has your commercial enterprise sold any corporate assets, shares, property, or had any capital withdrawn since the date of your initial investment? ☐ Yes (Explain on separate sheet) ☐ No

Part 6. Signature (Read the information on penalties in the instructions before completing this section.)

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct. I further certify that the investment was made in accordance with the laws of the United States and was not for the purpose of evading United States immigration laws. I also authorize the release of any information from my records that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought.

Signature of Applicant	Print Name	Date

NOTE: If you do not completely fill out this form or fail to submit any required documents listed in the instructions, you may not be found eligible for the requested benefit and this petition may be denied.

Part 7. Signature of Person Preparing Form, If Other Than Above

I declare that I prepared this petition at the request of the above person and it is based on all information of which I have knowledge.

Signature	Print Name	Date

Firm Name and Address (Include Telephone Number with Area Code and E-Mail Address.)

OMB No. 1615-0045; Expires 04/30/2011

Department of Homeland Security
U.S. Citizenship and Immigration Services

Instructions for I-829, Petition by Entrepreneur to Remove Conditions

Instructions

Read these instructions carefully to properly complete this form. If you need more space to complete an answer, use a separate sheet of paper. Write your name and Alien Registration Number (A-Number), if any, at the top of each sheet of paper and indicate the part and number of the item to which the answer refers. Also, note the filing fee for Form I-829 is $3,750 plus an $85 biometric fee, if required. For more information, see "What is the Filing Fee?" on Page 3.

What Is the Purpose of Form I-829?

This form is for a conditional permanent resident who obtained such status through entrepreneurship to petition to the U.S. Citizenship and Immigration Services (USCIS) to remove the conditions on his or her residence.

When Should I Use Form I-829?

You must file this petition during the 90 days immediately before the second anniversary of the date that you obtained conditional permanent resident status. This is the date your conditional permanent residence expires.

Effect of Filing

Filing this petition extends your conditional permanent residence for six months. You will receive a filing receipt that you should carry with your Permanent Resident Card. If you travel outside the United States during this period, you may present your Permanent Resident Card and the filing receipt in order to be readmitted.

Effect of Not Filing

If this petition is not filed, you will automatically lose your permanent resident status as of the second anniversary of the date that you were granted conditional status. As a result, you will become removable from the United States. If your failure to file was for good cause and due to extenuating circumstances, you may file your petition late with a written explanation and request that USCIS excuse the late filing.

Who May File Form I-829?

If you were granted conditional permanent resident status through entrepreneurship, use this form to petition for the removal of those conditions. You may include your conditional permanent resident spouse and children in your petition, or they may file separately subsequent to your petition. If filing subsequently, attach a copy of Form I-797, Notice of Action, relating to the principal's petition.

If you obtained conditional permanent resident status through your entrepreneur spouse or parent, and your spouse or parent has died, you may use this form to petition for removal of the conditions.

General Instructions

Step 1. Fill Out Form I-829

1. Type or print legibly in black ink.
2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.
3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "None."

Step 2. General Requirements

You must file your petition with:

1. ***Permanent Resident Card (Form I-551).***
   - **A.** A copy of your Permanent Resident Card and, if applicable; and
   - **B.** A copy of the Permanent Resident Card of your conditional permanent resident spouse and each of your conditional permanent resident children included in your petition.
2. ***Evidence of the Commercial Enterprise.*** Submit the following types of evidence with your petition (Label each type of evidence):
   - **A.** Evidence that you established a commercial enterprise. Such evidence includes, but is not limited to, Federal tax returns;
   - **B.** Evidence that you invested or were actively in the process of investing the amount of capital required for the location of your enterprise. Such evidence includes, but is not limited to, an audited financial statement; and

C. Evidence that you sustained your enterprise and your investment in that business throughout your period of conditional permanent residence. Examples of such evidence include:

1. Invoices and receipts;
2. Bank statements;
3. Contracts;
4. Business licenses; and
5. Federal or State income tax returns or quarterly tax statements.

D. Evidence of the number of full-time employees at the beginning of the investment and at present. Such evidence includes but is not limited to:

1. Payroll records;
2. Relevant tax documents; and
3. Form I-9s.

3. If you are filing as a spouse or child whose entrepreneur spouse or parent has died, submit the following with your petition:

A. Your spouse's permanent resident card;

B. Your spouse's death certificate; and

C. Evidence that the conditions set forth above in "Evidence of the Commercial Enterprise" have been met.

4. Biometrics Services

You will have your photograph, fingerprint, and signature taken by USCIS. When you file Form I-829, USCIS will notify you in writing of the date, time, and location where you must go for the required biometrics services. Failure to appear for the biometrics services may result in a denial of your application.

NOTE: Because USCIS is now taking photographs of applicants, you no longer need to submit two passport-style photos.

5. Criminal History

A. If you have ever been arrested or detained by any law enforcement officer for any reason, and no charges were filed, submit:

i. An original official statement by the arresting agency or applicable court order confirming that no charges were filed.

B. If you have ever been arrested or detained by any law enforcement officer for any reason, and charges were filed, or if charges were filed against you without an arrest, submit:

i. An original or court-certified copy of the complete arrest record, and/or disposition for each incident (e.g., dismissal order, conviction record, **or** acquittal order.)

C. If you have ever been convicted or placed in an alternative sentencing program or rehabilitative program (such as a drug treatment or community service program), submit:

i. An original or court-certified copy of the sentencing record for each incident; **and**

ii. Evidence that you completed your sentence, specifically:

a. An original or certified copy of your probation or parole record; or

b. Evidence that you completed an alternative sentencing program or rehabilitative program.

D. If you have ever had any arrest or conviction vacated, set aside, sealed, expunged, or otherwise removed from your record, submit:

i. An original or court-certified copy of the court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction; **or**

ii. An original statement from the court that no record exists of your arrest or conviction.

NOTE: Unless a traffic incident was alcohol or drug related, you do not need to submit documentation for traffic fines and incidents that did not involve an actual arrest if the only penalty was a fine of less than $500 and or points on your driver's license.

Where To File?

Regardless of the location of the new commercial enterprise, file Form I-829 to:

USCIS California Service Center
P.O. Box 10526
Laguna Niguel, CA 92607-0526

What Is the Filing Fee?

The filing fee for Form I-829 is **$3,750.**

The fee for biometric services is **$85.**

You may submit one check or money order for both the petition and biometric services, for a total of **$3,835.**

NOTE: Each conditional resident dependent, eligible to be included on the principal applicant's Form I-829 and listed under **Part 3** or **Part 4** of Form I-829, is required to submit an additional biometric services fee of **$85.**

The fees must be submitted in the exact amount. It cannot be refunded. **Do not mail cash.**

Use the following guidelines when you prepare your check or money order for the Form I-829 fee:

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; and

2. Make the check or money order payable to **U.S. Department of Homeland Security**, unless:

   A. If you live in Guam, make it payable to **Treasurer, Guam.**

   B. If you live in the U.S. Virgin Islands, make it payable to **Commissioner of Finance of the Virgin Islands.**

NOTE: Spell out U.S. Department of Homeland Security; do not use the initials "USDHS" or "DHS."

Notice to Those Making Payment by Check. If you send us a check, it will be converted into an electronic funds transfer (EFT). This means we will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will usually take 24 hours, and will be shown on your regular account statement.

You will not receive your original check back. We will destroy your original check, but we will keep a copy of it. If the EFT cannot be processed for technical reasons, you authorize us to process the copy in place of your original check. If the EFT cannot be completed because of insufficient funds, we may try to make the transfer up to two times.

How to Check If the Fees Are Correct

The form fee on this form is current as the the edition date appearing in the lower right corner of this page. However, because USCIS fees change periodically, you can verify if the fees are correct by following one of the steps below:

1. Visit our Web site at **www.uscis.gov**, select "Immigration Forms," and check the appropriate fee;

2. Review the Fee Schedule included in your form package, if you called us to request the form; or

3. Telephone our National Customer Service Center at **1-800-375-5283** and ask for the fee information.

Address Changes

If you change your address and you have an application or petition pending with USCIS, you may change your address on-line at **www.uscis.gov**, click on "Change your address with USCIS" and follow the prompts, or you may complete and mail Form AR-11, Alien's Change of Address Card, to:

U.S. Citizenship and Immigration Services
Change of Address
P.O. Box 7134
London, KY 40742-7134

For commercial overnight or fast freight services only, mail to:

U.S. Citizenship and Immigration Services
Change of Address
1084-I South Laurel Road
London, KY 40744

Processing Information

Any Form I-829 that is not signed or accompanied by the correct fee, will be rejected with a notice that Form I-829 is deficient. You may correct the deficiency and resubmit Form I-829. An application or petition is not considered properly filed until accepted by USCIS.

Initial processing

Once Form I-829 has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form, or file it without required initial evidence, you will not establish a basis for eligibility and we may deny your Form I-829.

Requests for more information or interview

We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer required.

Decision

The decision on Form I-829 involves a determination of whether you have established eligibility for the requested benefit. You will be notified of the decision in writing.

USCIS Forms and Information

To order USCIS forms, call our toll-free number at **1-800-870-3676**. You can also get USCIS forms and information on immigration laws, regulations, and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our Internet Web site at **www.uscis.gov**.

As an alternative to waiting in line for assistance at your local USCIS office, you can now schedule an appointment through our Internet-based system, **InfoPass**. To access the system, visit our Web site. Use the **InfoPass** appointment scheduler and follow the screen prompts to set up your appointment. **InfoPass** generates an electronic appointment notice that appears on the screen.

Penalties

If you knowingly and willfully falsify or conceal a material fact or submit a false document with your Form I-829, we will deny your Form I-829 and may deny any other immigration benefit.

In addition, you will face severe penalties provided by law and may be subject to criminal prosecution.

Privacy Act Notice

We ask for the information on this form, and associated evidence, to determine if you have established eligibility for the immigration benefit for which you are filing. Our legal right to ask for this information can be found in the Immigration and Nationality Act, as amended. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your Form I-829.

USCIS Compliance Review and Monitoring

By signing this form, you have stated under penalty of perjury (28 U.S.C.1746) that all information and documentation submitted with this form is true and correct. You also have authorized the release of any information from your records that USCIS may need to determine eligibility for the benefit you are seeking and consented to USCIS verification of such information.

The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking at any time. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, 205, and 214. To ensure compliance with applicable laws and authorities, USCIS may verify information before or after your case has been decided. Agency verification methods may include, but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. Information obtained through verification will be used to assess your compliance with the laws and to determine your eligibility for the benefit sought.

Subject to the restrictions under 8 CFR part 103.2(b)(16), you will be provided an opportunity to address any adverse or derogatory information, that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on your case or after the agency has initiated an adverse action which may result in revocation or termination of an approval.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 1 hour, 5 minutes per response, including the time for reviewing instructions, and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, N.W., Washington, DC 20529-2020. OMB No. 1615-0045. **Do not mail your application to this address.**