AMERICAN IMMIGRATION LAWYERS ASSOCIATION

September 9, 2018

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Manual, Volume 6: Immigrants, Part G, Investors, Geographic Area of a Regional Center

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to updated USCIS policy guidance regarding a regional center's geographic area, requests to expand the geographic area, and how such requests impact the filing of Form I-526 petitions, found in Volume 6: Immigrants, Part G, Investors, of the USCIS Policy Manual ("Policy Manual").[1]

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Policy Manual and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

As an initial matter, we appreciate the opportunity to provide comments to USCIS on its Policy Manual. In the highly complex area of EB-5 adjudications, stakeholder feedback is essential to developing policy that is both consistent with legal authorities and sensible to commercial practicalities.

A. Procedural and Due Process Concerns

As AILA previously noted in our comment submitted on May 29, 2018, in response to a May 15,

[1] *See* U.S. CITIZENSHIP & IMMIGRATION SERV., DEPT. OF HOMELAND SECURITY, PA-2018-06, GEOGRAPHIC AREA OF A REGIONAL CENTER (AUG. 24, 2018) https://www.uscis.gov/policymanual/Updates/20180824-EB5GeographicArea.pdf.

2018 Policy Alert, ten (10) business days is an insufficient period of time for stakeholders to meaningfully provide comments to changed policy, particularly in the complex area of EB-5 adjudication.[2] We respectfully request that stakeholders be granted at least 60 days for comment to Policy Manual revisions in the future.

More concerning to us, however, is that the instant Policy Alert is silent on the effective date of the announced policy changes. It merely states that the updated Policy Manual guidance is "controlling and supersedes any prior guidance." This statement suggests that the policy changes are effective as of the date of their announcement. If correct, the retroactive impact of an immediate effective date alone runs counter to due process.[3] At a minimum, any policy change should be made after public comment and, axiomatically, after due consideration of comments with a clear prospective effective date.

Finally, and most concerning, USCIS exceeds its authority in creating a new eligibility requirement for EB-5 petitions by policy "update." In announcing that changes in regional center affiliation constitute material change, USCIS imposes a new substantive rule requiring notice and comment rulemaking under the Administrative Procedure Act (APA). Ultimately, this new rule is unmoored from governing statute and regulations and is therefore constitutes arbitrary and capricious agency action contravening the Immigration and Nationality Act (INA) and the APA.

B. Comments to USCIS Policy Manual

The changes to the Policy Manual mainly pertain to regional center geographic areas and changes in regional center affiliation. Specifically, the Policy Alert includes five bulleted items under the heading of "Policy Highlights." We discuss each Policy Highlight below.

i. Policy Highlight #1 - Clarifies that USCIS reviews whether an economic methodology is reasonable to demonstrate that a regional center's geographic area is limited, to include whether the multipliers and assumptions about a project's geographic impact are reasonable.

Policy Highlight #1 conflates the concept of EB-5 regional center investor-petitioners using "reasonable methodologies for determining the number of jobs created[4]," with the requirement that a regional center have "jurisdiction over a limited geographic area".[5] These are two distinct concepts that relate to different adjudications.

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[2] The following USCIS Policy Alert is dated August 24, 2018 and provides stakeholders until September 9, 2018 for comments. *See supra* note 1.

[3] We note that USCIS issued a "Technical Update" on its prior Policy Manual update regarding rescission of the tenant-occupancy methodology, clarifying that the effective date of that new policy was indeed prospective, following the publication of the Policy Alert issued in that instance. We appreciate USCIS's responsiveness to our prior comments on that point.

[4] 8 USC §115(c).

[5] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No 107-273, Sec. 11037(a)(3), 116 Stat. 1758 (2002).

The limited geographic area requirement was incorporated in legislation adopted in 2002, which states:

> *A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in 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 will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.*[6]

AILA has no objection to the requirement that a regional center have a clearly defined geographic scope, and that its jurisdiction be limited to the outer boundary of that geographic scope. These concepts are consistent with the statute. However, the concept of "reasonable methodologies" relates to the calculation of jobs in the statute and regulations. But by conflating these concepts, we are concerned that USCIS seeks to re-adjudicate the geographic scope of a regional center in the course of investor petition review. This would be problematic as contrary to the USCIS deference policy as well as from the point of view of maintaining distinct requirements for distinct benefit adjudications.

With respect to the Policy Manual's new language in Chapter 2, which states the following:

> *when reviewing the geographic level of the multipliers used in an input-output model, the following factors, among others, may be considered:*
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> - *The area's demographic structure (for example, labor pool supply, work force rate, population growth, and population density);*
> - *The area's contribution to supply chains of the project; and*
> - *Connectivity with respect to socioeconomic variables in the area (for example, income level and purchasing power)*[7]

we caution that opacity in past USCIS guidance relating to reasonable methodology has resulted in difficulties applying the guidance for examiners and regional centers alike.[8] We are concerned about terms like "demographic structure" which may be open to varying interpretations. Similarly, the term "connectivity" is open to interpretation and not used in the Bureau of Economic Analysis's *RIMS II: An Essential Tool for Regional Developers and Planners* (RIMS II User Guide).[9] As lawyers and not economists, we are not competent to opine substantively on whether the revised Policy Manual will be transparent to economists. In furtherance of clarity in this important area of indirect job-creation calculation to all stakeholders, we urge USCIS to use plain terms in its guidance, or terms universally understood by competent economists.

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[6] *Id.*
[7] 6 USCIS-PM G(2)(D).
[8] *See* AILA's critique of the 2012 USCIS tenant-occupancy guidance in our comments to the USCIS Policy Manual revision of May 2018.
[9] *See* https://www.bea.gov/sites/default/files/methodologies/RIMSII_User_Guide.pdf.

We also note the new language in Chapter 4 with concern:

> *To demonstrate that the proposed geographic area is limited, the regional center applicant should submit evidence demonstrating the linkages between proposed economic activities within the proposed area based on different variables.*

The enacting legislation provides that regional centers may offer a proposal including general predictions about the kinds of commercial activities, job creation, and other positive economic effects.[10] AILA is concerned that instead of the general proposals that the law allows, the Policy Manual update may be interpreted to limit the geographic scope of a regional center to the geographic boundaries of whatever multiplier is used to predict job creation for the hypothetical or exemplar project(s) included in an I-924, Application for Regional Center Designation Under the Immigrant Investor Program. There would be no authority for this limitation.

Most regional centers intend to target activities to promote economic growth throughout a region that will in many cases cover a geographic area that contains two or more metropolitan statistical areas (MSAs), along with slivers of land in-between. AILA is concerned the Policy Manual may be interpreted to prohibit the inclusion of those slivers of land between the MSAs in the regional center geographic scope. AILA seeks confirmation that USCIS will continue to designate regional centers based on general proposals, and will not require every sliver of the proposed regional center to be captured within the multiplier table used to make a general prediction about job creation for a particular project.

Conversely, we observe that acceptable job creation in a given project may take place beyond the boundaries of the regional center as this is established USCIS policy. Neither the statute nor the regulations mandate that all indirect job creation occur within the bounds of the regional center. To the contrary, the statute states that visas shall be made available to qualified immigrants seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise "which will benefit the *United States economy* and create full-time employment for not fewer than 10 U.S. citizens or aliens lawfully admitted permanent residents…"[11]

Moreover, 8 CFR §204.6(j)(4)(iii), which governs job creation in the regional center context, states that a new commercial enterprise located within a regional center can show that it meets the statutory employment creation requirement by including evidence that the "investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the pilot program."[12] Nothing in this regulation limits the job creation to the bounds of the regional center. The current Policy Manual affirms:

> *Indirect jobs can qualify and be counted as jobs attributable to a new commercial enterprise associated with a regional center, based on reasonable methodologies,*

[10] *Supra* note 5.
[11] 8 USC §1153(b)(5)(A)(ii) (emphasis added).
[12] 8 CFR §204.6(j)(4)(iii).

> *even if the jobs are located outside of the geographic boundaries of a regional center.*

To summarize, job creation multipliers are not necessarily limited by approved regional center geography, and regional center geography is not limited by job creation multipliers. Regional center geography and job creation multipliers are independent of one another under current policy, which correctly reflects the statute and regulations. We understand the Policy Manual update to leave these long-standing policies undisturbed. If we are mistaken, the Policy Manual updates do not sufficiently provide notice of changes and furthermore make substantive changes which require notice and comment rulemaking pursuant to the APA.

ii. Policy Highlight #2 - Explains that a regional center's geographic area must be limited, contiguous, and consistent with the purpose of concentrating pooled investment in defined economic zones.

Relevant to the concerns raised above, Policy Highlight #2 asserts the geographic scope of a regional center must be contiguous. This requirement is without foundation, and it appears nowhere in the enacting statute, which states:

> *A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic **zones**.*[13]

Not only is the concept of contiguity not present, but the statute uses the plural "zones" instead of the singular "zone," which can only be interpreted to mean more than one economic zone may be included in the limited geographic area over which a regional center has jurisdiction.

"Economic zone" is not a defined term. RIMS II, which is the most commonly used economic modeling tool in the EB-5 industry, models economic impact on "regions." The RIMS II User Guide explains that while RIMS II uses multiplier tables organized according to region, the ripple effects of economic activity are nation-wide, and not limited to a circumscribed local area. The RIMS II User Guide states:

> *RIMS II is based on national I-O relationships that are adjusted to account for local supply conditions. These adjustments account for the fact that local industries often do not supply all of the intermediate inputs needed to produce the region's output. Industries must purchase some intermediate inputs from suppliers outside the region.*[14]

Therefore, it is not unreasonable to suggest that while a regional center application may present a general proposal to conduct commercial activities at project sites in two or more separate

[13] *Supra* note 5.
[14] RIMS II User Guide, https://www.bea.gov/sites/default/files/methodologies/RIMSII_User_Guide.pdf (last visited September 6, 2018).

metropolitan statistical areas, economic benefits can be experienced by the entire geographic region encompassed by the requested regional center geographic area.

Accordingly, AILA requests that USCIS confirm that the geographic scope of existing regional centers is preserved, and that going forward, the non-statutory concept of "contiguity" is not used to rigorously require that all economic zones in a regional center application "touch" each other to qualify.

Finally, we observe as above the potential difficulties in understanding and applying the new policy language in Chapter 3, which provides:

> *To demonstrate that the proposed geographic area is limited, the regional center applicant should submit evidence demonstrating the linkages between proposed economic activities within the proposed area based on different variables. Examples of variables to demonstrate linkages between economic activities can include but are not limited to:*
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> - *Regional connectivity;*
> - *The labor pool and supply chain; and*
> - *Interdependence between projects.*
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> *Moreover, in assessing the likelihood that the proposed economic activity will promote economic growth in the proposed geographic area, an officer reviews the impact of the activity relative to relevant economic conditions. The size of the proposed area should be limited and consistent with the scope and scale of the proposed economic activity, as the regional center applicant is required to focus on a geographical region of the United States.*[15]

We again note the possible multiple interpretations to the word "connectivity" and the hazards such openness invite. Similarly, it is not immediately clear what "relative to relevant economic conditions" means. What makes an economic condition "relevant"? The term "scale" is used for the first time in policy guidance relating to regional center geography and has no statutory or regulatory anchor. What is meant and how does it differ from "scope"? How is consistency with proposed geographic area and "scale" to be measured?

We request that any comments submitted by economists be given careful consideration, any refinements to the policy be made prospectively, a more meaningful comment period be provided for fuller industry-wide consideration, and paramount care be given to using simple and clear language in promulgating USCIS guidance on "reasonable methodology."

[15] 6 USCIS-PM G(3)(A) (footnote omitted).

iii. Policy Highlight #3 - Affirms that a Form I-924 amendment must be filed and approved in order to expand the regional center's geographic area for requests made on or after February 22, 2017.

AILA has no objection to the memorialization of this USCIS policy.

iv. Policy Highlight #4 - Clarifies how USCIS adjudicates regional center-associated Form I-526 petitions where the regional center has requested an expansion of its geographic area.

AILA has no objection to the memorialization of this USCIS policy.

v. Policy Highlight #5 - Explains that USCIS considers a change in regional center affiliation a material change in cases where the change takes place after Form I-526 has been filed.

This new policy adds the below paragraph to Chapter 4 of the Policy Manual:

> *Further, if a regional center immigrant investor changes the regional center with which his or her immigrant petition is associated after filing the Form I-526 petition, the change constitutes a material change to the petition. Similarly, the termination of a regional center associated with a regional center immigrant investor's Form I-526 petition constitutes a material change to the petition.*[16]

The creation of this new ground of ineligibility is arbitrary and capricious agency action in violation of the INA and the APA, an ultra vires action that exceeds USCIS's statutory authority, and an improper rulemaking without notice and comment.

Though USCIS is accorded substantial deference in interpreting its own governing regulations, such deference is not warranted, however, when the agency's interpretation "is plainly erroneous or inconsistent with the regulation."[17] In finding this new ground of ineligibility for Form I-526 petition approval, USCIS cites to regulations a 8 CFR §204.6(j) and 8 CFR §204.6(m)(7). However, neither regulation supports the proposition that a change in regional center association constitutes material change to the Form I-526 petition.

Moreover, not only is this new requirement actually contrary to the cited regulations, it is contrary also to the statute as well as USCIS's own "material change" standard. The new rule calls on adjudicating officers to form a legal conclusion of "materiality" without any factual basis to support it, other than the single fact of change in regional center association. However, a change in regional center affiliation has no impact on the investment of EB-5 capital in the new commercial enterprise (NCE) or its job creating activities. These factors go to the core eligibility requirements for EB-5 petition approval in statute and regulations, whereas a change in regional center association – typically effected by simple contract or even merely implied -- does not.

[16] 6 USCIS-PM G(4)(C) (footnote omitted).
[17] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

Finally, the adoption of this policy provision would penalize NCEs and EB-5 investors with clean hands who have done no wrong. In undertaking action, agencies are required not only to consider its own authority but also relevant and important factors in making a decision.[18] Program integrity and fairness to good faith investors and EB-5 visa program participants are critical factors USCIS should consider when promulgating any new rule or policy. Clearly, USCIS disregards the impact of this new policy on individual immigrant investors and their families who may be disqualified from immigration benefits through no fault of their own or of the new commercial enterprise in which they have invested.

For the foregoing reasons, USCIS should forego creating a rule that would equate the lone fact of regional center association change with "material change." Instead, USCIS should engage in case-by-case analysis of the facts involving regional center association change to determine whether a "material change" has occurred.

The serious legal flaws and avoidable harmful impact of this new rule occasion our fuller discussion of Policy Highlight #5 below.

a. Relevant Authority

The Administrative Procedure Act

The APA requires regulatory officials to publish notice of proposed rule-making in the Federal Register and provide a period of 30 days for comment prior to the rule's effective date.[19] With regard to the standards of judicial review of agency action that a court will use to evaluate whether an agency's action is valid, the APA states:

> *The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be –*
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> *(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*
> *(B) contrary to constitutional right, power, privilege, or immunity;*
> *(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*
> *(D) without observance of procedure required by law;*
> *(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or*
> *(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*
>
> *In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.*[20]

[18] *See, e.g.*, Dep't of State v. Coombs, 482 F.3d 577, 581 (D.C. Cir. 2007).
[19] 5 U.S.C. §553, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.
[20] 5 U.S.C. §706(2).

Immigration and Nationality Act

To evaluate whether this USCIS policy is in accordance with law and not in excess of statutory jurisdiction, we look to the INA. Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. 102-395, 106 Stat. 1828, 1874 (October 6, 1992), as amended, provides for the following with respect to regional center-based Form I-526 petitions:

> *(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the program described in this section. Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) [subsec. (b)(5) of this section] may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence.*[21]

The statute thus only indicates, expansively, that priority may be given to petitions filed by regional center program investors and nowhere prohibits change in association in any form or manner.

Regulations at 8 CFR 204.6(j) and 8 CFR 204.6(m)

The revised Policy Manual's cited regulations at 8 CFR §204.6(j) relate to evidentiary requirements for Form I-526 Petitions and nowhere relate to regional center association. The regulations at 8 CFR §204.6(m)(7) state requirements for investors in the regional center program. The regulations here state that an investor must invest "within ***a*** regional center approved pursuant to paragraph (m)(4)."[22]

Policy Manual on "Material Change"

With respect to USCIS's "material change" standard, citing *Matter of Izummi*[23] and 8 CFR §103.2(b)(1), the USCIS Policy Manual states at Volume 6, Part G, Chapter 4, Section C:

> *Changes that are considered material that occur after the filing of an immigrant investor petition will result in the investor's ineligibility if the investor has not obtained conditional permanent resident status.*
>
> . . . .
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> *A change is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision*.[24]

[21] Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. 102-395, 106 Stat. 1828, 1874 (October 6, 1992), as amended.
[22] 8 CFR §204.6(m)(7) (emphasis added).
[23] *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).
[24] 6 USCIS-PM G(4)(C).

The term "material" in general usage is defined variously as "significant," or "important." Merriam Webster defines it as "having real importance or great consequences,"[25] and Black's Law Dictionary defines "material" as:

> *Important; more or less necessary; having influence or effect; going to the merits; having to do with matter,* ***as distinguished from form***.[26]

Finally, with respect to a rule that would be simple to administer but on balance would create great harm, the Court in *Duarte-Ceri v. Holder*[27] held that where refusal to undertake an analysis that presents additional burden will result in a great loss, the ends of justice require the agency to set aside concerns of inconvenience.

b. Discussion

As outlined above, the APA requires agencies to act non-arbitrarily in its rule-making. In reviewing agency action, to test comportment with the APA, a federal court will review whether the agency considered the "purposes of the immigration laws or the appropriate operation of the immigration system."[28] An agency is expected to provide detailed documentation and explanation of what they are doing for the inspection of Congress, participating parties, reviewing courts, and the general public.[29] Accordingly, it has been observed that "the courts seem to be concerned not only whether the agencies have provided minimally coherent, legally sufficient explanations of their decisions, but also whether they are pursuing their statutory missions – the goals set forth in the preambles to their organic statutes – conscientiously."[30]

USCIS has not met this requirement in its publication of updates to the Policy Manual declaring, without explanation or rationale consistent with the statutory mission, that a change in regional center affiliation is considered a material change. Furthermore, USCIS's cited regulatory authority for the policy update supports the proposition that a change in regional center association is permissible rather than disqualifying. Accordingly, USCIS's categorical new rule rendering petitions ineligible as a result of a regional center association change is arbitrary and capricious as contrary to the statute and regulations.

The New Policy Contradicts the Statute

As legacy INS acknowledged in the preamble to the final regulation at 8 CFR §204.6, Congress's purpose in establishing regional centers was to increase interest in the EB-5 Program[31] and to promote economic growth. Accordingly, the primary requirement for an applicant seeking regional center designation is to show that the entity applying for regional center designation will promote

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[25] https://www.merriam-webster.com/dictionary/material (last visited September 3, 2018).
[26] https://thelawdictionary.org/material/ (last visited September 3, 2018) (emphasis added).
[27] Duarte-Ceri v. Holder, 630 F. 3d 83 (2nd Cir. 2010).
[28] Judulang v. Holder, 132 S. Ct. 476, 485 (2011).
[29] "Can the Administrative State be Tamed?," by Christopher DeMuth, *Journal of Legal Analysis*, published by Harvard Law School, Vol. 8, Issue 1, Pages 121–190, (June 1, 2016), *see* https://doi.org/10.1093/jla/law003.
[30] *Id.*
[31] 58 Fed. Reg. No. 162, 44606 (August 24, 1993).

economic growth within a specified geographic area. As further evidence of the priority accorded this statutory mission, section 610(a) authorizes USCIS to give priority to "aliens seeking admission under the program described in this section".[32]

Under no stretch of this language, particularly given the statutory mission and context, is there any support for the proposition that changing regional center association would render a petition ineligible for approval. The policy is thus contrary to the statute and its promulgation exceeds agency authority.

The New Policy Contradicts Regulations

To establish eligibility, an investor's I-526 petition must be accompanied by evidence that his investment "is within ***a*** regional center" so designated by USCIS.[33] Approval of an I-526 petition requires affirmative evidence on three yes/no questions: (a) is there a USCIS-designated regional center; (b) is there an affiliation between the regional center and the new commercial enterprise ("NCE"), and (c) is the job creating activity within the approved geographic area of the regional center's designation? The merits, or structure, or activities of the affiliated regional center is not relevant to the approvability of the I-526 petition; those merits are determined by USCIS at the time of regional center designation by USCIS, which requires the applicant on Form I-924 to outline its oversight and reporting standards.[34]

Therefore, it is arbitrary and capricious and contrary to regulations for USCIS to now require continued association with the initial regional center as a new factor for I-526 petition approval. As the new policy is contrary to the plain language of current regulations, it cannot be given effect in the current form of revised policy or policy "update."[35] Because there is no basis in current regulations or policy concerning regional center association, rendering a change in regional center association to be "material change" logically exceeds merely changing existing policy.[36] To the extent that USCIS needs to amend existing regulations to authorize this new policy, such a new rule must be promulgated under the APA with notice and comment.[37]

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[32] *Supra* note 21.
[33] *See* 8 CFR §204.6(m)(7) (emphasis added).
[34] In fact, the instructions to Form I-924 *require* a regional center amendment when the regional center seeks to change the regional center's name, ownership, or organizational structure, or *any changes to the regional center's administration that affect its oversight and reporting responsibilities*, or to add or remove any of the regional center's principals, immediately following the changed circumstances. [Emphasis added]. Accordingly, at the time of Form I-924 adjudication, either for an initial designation or any required amendment thereafter that seeks to change the regional center's oversight, USCIS makes its determination regarding the center's ability to properly oversee any projects or NCEs under its sponsorship.
[35] *See* Christensen v. Harris County, 529 U.S. 576 (2000) ("The regulation in this case, however, is not ambiguous-it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.").
[36] *Cf.* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
[37] *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

We discuss the regulations the Policy Manual cites as authority for the new policy to show that no regulatory basis exists to authorize the new policy, or to support any characterization of the new policy as an "update" to existing policy.

Specifically, the cited regulations at 8 CFR §204.5(j) require an immigrant investor to establish the following facts for I-526 petition approval. As these facts establish eligibility for petition approval, they may also be deemed "material":

(1) Petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk;
(2) Petitioner has invested, or is actively in the process of investing, capital obtained through lawful means;
(3) The new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees. To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of [Section 204.6]; and
(4) The petitioner will be engaged in the management of the new commercial enterprise.

Similarly, the cited regulation at 8 CFR §204.6(m)(7) dealing on point with petitioners associated with regional centers merely states that an investor must invest "within ***a*** regional center approved pursuant to paragraph (m)(4)."[38] The use of the indefinite article "a" as opposed to the definite article "the" here is dispositive. The regulation clearly indicates that a petitioner's investment must be associated with a regional center, but does not further limit or define the regional center. USCIS by the Policy Manual update would add a new limitation, in essence substituting the indefinite "a" with "the original". This is contrary to the plain language of the regulation and is therefore arbitrary and capricious and exceeds express authority conferred by the clear regulatory language.

Accordingly, USCIS goes beyond amending or updating its own prior interpretive rule or policy here. Instead, USCIS attempts to amend the underlying legislative rules, that is, the regulations themselves. USCIS may do so only pursuant to notice-and-comment rulemaking under section 4 of the APA.

Finally, insofar as the revised Policy Manual is thus inconsistent with the cited regulations, the agency action is arbitrary and capricious in violation of section 10 of the APA.

The New Policy Contradicts USCIS's Own Material Change Policy

Turning now to application of USCIS's own "material change" policy to changing regional center associations, we see that there is no basis for finding such a change to be "material change." None of the eligibility requirements discussed above in 8 CFR §204.6(j) or 8 CFR §204.6(m)(3) is

[38] 8 CFR §204.6(m)(7) (emphasis added).

affected by a change in regional center association to another USCIS-designated regional center as a matter of course. Assuming that the same NCE is legally existent in the United States, the petitioner has invested capital obtained through lawful means, and the petitioner is engaged in the management of the NCE, he or she meets the requirements of the regulations at 8 CFR §204.5(j)(1), (3), and (5), irrespective of which regional center is sponsoring the NCE. Accordingly, USCIS cannot find that a change of regional center sponsorship is "material" to these sections of the regulations as such a change does not "predictably affect the decision" on the I-526 Petition.

As for 8 CFR §204.5(j)(2), the investor also must show that he or she has placed the required amount of capital at risk for the purpose of generating a return. *Matter of Izummi* requires that 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. In *Izummi*, the petition was found to not be sufficiently associated with a regional center because the entities associated with job creation, the credit company and the borrowers in that case, were located outside the regional center boundaries. Thus, as long as the job-creating entity is located within the boundary of ***a*** regional center approved by USCIS, the immigrant investor meets the requirement of 8 CFR 204.5(j)(2) and *Matter of Izummi*.[39] The regulation and decision do not require maintenance of association with the initial regional center, and USCIS exceeds its authority in so requiring under its new policy.

For the same reason, if an NCE associates with a new regional center and the project is located within its approved geographic area, such a change cannot be considered to naturally affect the decision, and thus, cannot be found material to the adjudication. Again, if the job-creating entities and project location remain the same and are within the boundaries of the new regional enter, the petitioner remains eligible under 8 CFR §204.5(j)(2) and *Matter of Izummi*.

Similarly, under 8 CFR §204.5(j)(4), the investor also must show that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. If a new regional center sponsors an NCE and that new regional center was designated previously by USCIS to cover the geographic area of the job-creating entity and the project, then petitioner meets the standard outlined in *Matter of Izummi* as discussed above.

Moreover, nothing in the regulations or the Policy Manual require that the modeled geographic area be exactly the same as the designated area of the regional center; instead, USCIS reviews the economic methodology on the above standard outlined in the Policy Manual. Assuming the location of the project has not changed and the project is located within the previously-approved boundaries of the new regional center, then USCIS must simply determine whether the economic methodology used to determine job creation is reasonable, consistent with the statute, regulations, and the Policy Manual.

The identity of the regional center entity, itself, is immaterial to this analysis assuming its approved geography covers the project's job-creating activities. When each of the regulatory criteria at 8

[39] *See supra* note 23.

CFR §204.5(j) are thus examined independently, it is clear that the change of a regional center does not materially affect eligibility for petition approval. Should a new regional center sponsor an NCE, and the JCE and the project are located within the boundaries of the new regional center, then the eligibility criteria are not impacted and therefore cannot be considered to naturally affect the decision, and thus, cannot be found material to the adjudication.

There is even less basis to find a change in regional center association to be capable of affecting the adjudication under 8 CFR §204.6(m)(7). As discussed above, that regulation refers to association with a regional center not otherwise circumscribed, identified, defined, or limited. Therefore, continued association with "a regional center" duly designated cannot be found material to the adjudication either.

Accordingly, thus carefully examined, it is clear that a bare change in affiliation from one designated regional center to another designated regional center operating in the same geographic area would not and should not be "predictably capable of affecting the decision." Therefore, a change in regional center association should not be deemed a "material change."

The New Policy Ignores Its Harsh Effects

We note that agency action is arbitrary and capricious if it ignores an important factor relevant to the action, such as the policy effects of the decision.[40] In addition to the legal flaws of the new policy discussed above, USCIS states no policy rationale for deeming a change in regional center association material in every case. There is no requirement in the regulations that the regional center participate in the business activities of the NCE. In many cases the NCE pays the regional center a fee for the privilege of affiliation, and aside from annual reporting requirements that is in large part the extent of the regional center's involvement. In the vast majority of contexts, whether the NCE is affiliated with one regional center or another is of little or no consequence to the determination of whether the business activities of the NCE are likely to spur economic growth and result in the requisite job creation.

In short, aside from penalties directly resulting from the updates to USCIS policy at issue here, a change in regional center affiliation would have little to no impact on and would not disrupt the business activities of a bona fide new commercial enterprise and its job creating activities. Moreover, we reiterate that it is the encouragement of the economic benefits of the new commercial enterprises' job-creating activities that is at the core of Congressional intent in creating the regional center program.

We understand that USCIS is properly concerned with ensuring it has an opportunity to review the integrity of the replacement regional centers and their principals. However, all regional centers are by definition USCIS-designated regional centers. The designation indicates that USCIS already evaluated the background and bona fides of the replacement regional centers in the adjudication of their initial designation applications and subsequent annual reviews. Moreover, USCIS may assure itself of a regional center's continuing eligibility by conducting a regional center compliance review and performing site visits. USCIS could, as an alternative to deeming regional

[40] *See* Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1124 (9th Cir. 2012).

center association changes as "material change," require filing a Form I-924 or I-924A so that it can adjudicate the continuing eligibility of the new regional center to satisfy it's the goals of maintaining program integrity.

Harmful Effect on Good Faith Immigrant Investors

Despite the fact that a change in regional center affiliation would not diminish the ability of the new commercial enterprise and job-creating entities to carry out the activities described in their business plans, the new policy deems it a disqualifying material change, and requires investors who have not yet obtained conditional permanent resident status to start the process over with the filing of a new I-526 petition and assignment of a new priority date.

In this era of lengthy visa backlogs and adjudication backlogs, wherein one's priority date determines whether one must wait only a few months or numerous years to immigrate, re-filing a new I-526 petition will result in the children of many immigrant investors no longer being eligible to immigrate with the family unit due to their having turned 21 years of age. As the likelihood of a change in regional center affiliation becoming necessary or advisable increases with the passage of time, it is likely that applicants who have spent many years waiting for visa availability would be disproportionately impacted by this policy. For these individuals, the already unreasonably long waiting period would be effectively rendered more than twice as long, perhaps putting immigration out of reach during the applicants' working lifetime. Any retroactive effect of the new policy would multiply these harmful effects by imposing these hardships on those who had no notice of this new potential catastrophe.

Harmful Effect on the EB-5 Market and EB-5 Program Reputation

Visa backlogs have already diminished interest in the EB-5 program, and programs in other countries that offer more stability and lower risk of adverse immigration consequences may draw even more investors away from the U.S. market. Already, the worldwide investor market is suffering from lengthy visa backlogs. Yet another significant risk to EB-5 immigration viability, at a time when the stability of regional center affiliation is paramount, is another hurdle for U.S. projects and investors to overcome in an environment of dampened demand.

Harmful Effect on NCEs

We request USCIS to consider the dilemma of the NCE that believes the regional center is engaged in misconduct. We request USCIS to consider also the NCE that has become aware of problems associated with an unrelated NCE affiliated with its regional center, or an NCE that learns the regional center may be going out of business for business reasons entirely unrelated to EB-5 compliance. In all of these scenarios, the NCE would like to disassociate itself from the regional center, but cannot do so under this USCIS policy without sacrificing the immigration objectives of its EB-5 investors who have not yet obtained conditional residency. With the adoption of the policy on change in regional center affiliation, USCIS renders the NCE operating in good faith powerless to protect the immigration interests of its EB-5 investors. In such a case, adherence to the ill-conceived policy prohibiting the NCE from moving to another regional center would produce a manifestly unjust result for all of the innocent, good faith investors who are waiting to

obtain conditional residency. There is no justification, particularly given the seriousness of the other legal flaws of the new policy, for USCIS to ignore these impacts resulting in devastating consequences for good faith EB-5 program participants.

USCIS Can and Should Adopt Lawful, Less Costly, Alternatives

We recognize a blanket *per se* disqualification based on a single circumstance is efficient. However, the sustainability of the new policy is suspect for the reasons stated above. While it may be inconvenient and relatively time-consuming to analyze the totality of the circumstances surrounding a change in regional center affiliation, such a case-by-case analysis is appropriate in this instance. As the U.S. Court of Appeals for the Second Circuit explained most emphatically in *Duarte-Ceri v. Holder*[41], undertaking a more detailed analysis, even if unconventional, is called for in such cases where the ends of justice require it. It is, after all, a legal fiction to hold that a material change is of no consequence one day after acquiring conditional permanent residence, and of monumental consequence one day before acquiring conditional permanent residence. "The law is not made of such unreasonable and arbitrary rules."[42]

The facts of *Duarte* involved derivative citizenship before reaching the age of 18, and whether the Service should be required to parse the day into hours so as to consider whether Duarte had reached the age of 18 before his mother naturalized. One might argue the facts of *Duarte* are distinguishable from regional center affiliated I-526 petitions, and indeed, they are. In *Duarte*, the respondent had been arrested at least three times, was convicted of assault, possession of stolen property, and attempted sale of a controlled substance. EB-5 investors, on the other hand, are by definition vastly individuals who contribute meaningfully to the U.S. economy. Nevertheless, the *Duarte* Court maintained that the government should not "abide by the legal fiction that a day is indivisible for these purposes," as "it is important to the ends of justice".

The adoption of the new USCIS policy would result in untold numbers of innocent investors who have already contributed significant resources to the U.S. economy to suffer needlessly. Instead, USCIS can reach its objectives, fulfill its statutory mission, and abide by the APA, INA, regulations and precedent decisions by crafting alternative policy promulgated after notice and consideration of public comment.

C. Conclusion

AILA opposes USCIS' adoption of the arbitrary and capricious policy deeming any change in regional center affiliation as material. Not only is this policy deeply flawed as a matter of law, it reflects hallmarks of arbitrary caprice including disregard for significant harmful impact to U.S businesses and lawful immigrants contributing to the U.S. economy. We respectfully request that USCIS immediately rescind the policy reflected in Policy Highlight #5 and clarify the effective date of the other policies announced in the Policy Alert.

[41] 630 F.3d 83 (2nd Cir. 2010).
[42] Portsmouth Sav. Bank, 104 U.S. at 475.

In closing, we thank you for providing this opportunity to comment on the updated USCIS policy guidance. We look forward to a continuing dialogue on this and related matters.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION