AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

April 11, 2017

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529

Re: ANPRM: EB-5 Immigrant Investor Regional Center Program
RIN 1615-AC11
DHS Docket No. USCIS–2016–0008

Submitted via www.regulations.gov

Dear Chief Deshommes,

The American Immigration Lawyers Association (AILA) submits these comments on the Advanced Notice of Proposed Rulemaking (ANPRM), "EB-5 Immigrant Investor Regional Center Program," that was published in the Federal Register on January 11, 2017.

AILA is a voluntary bar association of more than 14,500 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 this notice and believe that the collective expertise and experience of our members makes us particularly well-qualified to offer views that will benefit the public and the government.

In issuing this ANPRM, DHS is seeking comment from interested stakeholders on several topics related to the EB-5 Immigrant Investor Regional Center Program. We offer our comments on each of the designated topics as follows:

A. Process for Initial Designation and Exemplar Approval

1. How can USCIS improve the initial designation process?

RESPONSE: USCIS should promulgate regulations clearly setting forth the required elements for designation, keyed to statutory criteria. USCIS should also clearly state the scope of guidance

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

to be provided by Policy Manual as distinct from regulations. Any departure from prior adjudication or prior Policy Manual guidance should be preceded by sufficient notice. Any such revised policy or adjudication standards should only be applied prospectively after reasonable notice.

Additionally, USCIS should publish clear forms and form instructions for the different regional center benefits applicants seek. To the extent that different workflows within USCIS are assigned to different regional center product lines, forms should clearly identify whether the application is for an initial designation or an amendment, and if an amendment, the type of amendment. We recommend considering different forms for the different types of applications, as each has distinct standards and varying levels of adjudication resource demands.

2. **How would requiring an entity to obtain initial designation as a regional center prior to, and separate from, filing for approval of an exemplar project impact entities seeking regional center designation and investors seeking to associate with designated regional centers?**

RESPONSE: This bifurcated process may yield efficiencies only if the combined timeframe for adjudicating both an initial designation and an exemplar, either sequentially or in tandem, would result in less processing time than the current process which allows adjudication of an exemplar with the initial designation application.

As mentioned above and as DHS notes in the ANPRM, requirements and evidentiary burdens differ between the initial designation and the exemplar. Accordingly, it would appear to make sense to bifurcate or separate adjudication of these two benefits. However, if a regional center applicant is also able to present an exemplar, it may currently do so and receive deference in later associated investor petition adjudications if the exemplar is approved. If this flexibility is taken away, USCIS should present a plan for reducing timeframes for both product lines, for example, through increased staffing for exemplars and exemplar premium processing. Without such mechanisms, stakeholders can only speculate that bifurcation would result in increased delays as well as much higher costs: $35,590 and longer wait times as opposed to $17,795 and current wait times. We would not support regulations that would lead to that outcome.

3. **Would a bifurcated initial application process achieve the benefits discussed above – i.e., reduced overall paperwork burdens and improved processing times? Please provide specific data on how such changes would affect time or other burdens in initial documentation preparation.**

RESPONSE: With sound design and assured execution, a bifurcated process may achieve greater efficiencies as the evidentiary burden for initial designations is generally lower than for exemplars. Having expressed our concerns about implementation, we are open to reviewing DHS process design and execution proposals and will provide workability suggestions and comments at such time.

4. **What additional costs or benefits, if any, would occur as a result of adopting the suggested approach?**

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 I Fax: 202.783.7853 I *www.aila.org*

RESPONSE: Please see above for discussion of possible benefits and costs.

5. **Would adopting the suggested approach impact small entities? If so, how?**

RESPONSE: Small entities would disproportionately be burdened by the increased costs to launching its first EB-5 project. Rather than one filing fee and one pending application serving for both initial designation and exemplar, fees would be doubled and delay-related costs might be incurred.

6. **Would it benefit potential immigrant investors to know whether or not an entity has been designated as a regional center, if the initial designation decision notice is solely for designation and does not include any decisions on exemplar projects?**

RESPONSE: We believe it would benefit potential immigrant investors if USCIS decision notices specified the scope of approval. Such decision notices should clearly state, for example:

- Initial Designation
- Amendment – Regional Center Structure (Geography, Organization, Other)
- Amendment – Regional Center Exemplar

Clear identification of the scope of approval should accompany clear identification and requirements for different regional center applications on the form and instructions.

7. **Would a streamlined exemplar filing process impact any regional center or investor costs?**

RESPONSE: Though "streamlined exemplar filing process" is not defined, the ideal streamlined exemplar filing process is one containing the following elements:

- Efficient and reasonably swift exemplar adjudication;
- Clear means of associating investor petitions with associated exemplars (for example, by field on the Form I-526 for exemplar receipt numbers);
- Eliminating the requirement for each investor petition to include the exemplar project documentation; and
- Reliable deference to approved exemplars in associated investor petition adjudication.

For purposes of discussing the impacts of streamlined exemplar filing process, and assuming that USCIS will not require exemplar approvals ahead of investor petition filings without premium processing or reasonable adjudication timeframes, we strongly endorse such streamlining as it would further the goal of minimizing project eligibility risk from the array of projects from which investors may choose.

In this connection, we also urge USCIS to reinstate online filing for exemplars and EB-5 filings generally, including Forms I-526, I-829, I-924A, and I-924 for initial regional center

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

designations and regional center amendments. Though we assume EB-5 ELIS filings were discontinued for good reason, we support and appreciate the goal of a single upload of project documents in a document library, and requiring investor petitions to certify association with those deal documents. The efficiencies of this approach are manifest, including updating deal documents and eliminating paper waste and physical storage constraints. We recommend that DHS prioritize electronic EB-5 filings, including exemplars, to streamline adjudication of all of EB-5 product lines, beyond merely exemplars.

8. **Should exemplar approval be required prior to a regional center-associated investor submitting an EB-5 immigrant petition? Please support the response by providing information regarding the costs and benefits of alternatives (e.g., by permitting concurrent filing with EB-5 immigrant petitions).**

RESPONSE: We strongly oppose requiring exemplar approvals prior to a regional center-associated investor submitting an EB-5 immigrant petition. A mandatory exemplar filing as opposed to approval, on the other hand, prior to such investor petition submission would be acceptable as long as USCIS commits to its deference policy, correctly matches investor petitions with associated exemplars, and more efficiently adjudicates investor petitions, as project eligibility should be separately adjudicated in the exemplar.

Any mandatory exemplar approval prior to petition filing would shut-down the EB-5 Regional Center Program. The ANPRM offers neither a mandatory timeframe in which USCIS would be required to adjudicate exemplars, nor premium processing. Currently, exemplars (undifferentiated from other Form I-924 applications) are taking 17 months for adjudication.[1] USCIS often issues requests for evidence (RFE) on exemplars which increases processing times. Taken together, EB-5 projects would be required to wait more than a year from the time a project is presented as ripe or “shovel ready” to file an investor petition. Projects would then need to wait an additional length of time for investor capital to be raised and released.

Under this timeframe and given the capital requirements of a shovel-ready project, projects may be completed before an exemplar is approved and investor capital may be available only well after completion. Developers would always be required to acquire bridge capital for one to two years and then wait an indefinite length of time thereafter for investor capital, an extremely unpalatable scenario at best and unworkable for most from a commercial standpoint. Therefore, to require exemplar approvals before petition filings, USCIS adjudication of exemplars would need to achieve commercial reasonableness between 60 to 90 days. To achieve this timeframe from the current timeframe of 17 months, USCIS would need to significantly increase its adjudications staff and efficiencies. Given the pace of processing times with the current level of staff, requiring exemplar approvals is simply unworkable.

Even if USCIS established a regulatory adjudication time period of, for example, 120 days, USCIS has failed to adhere to such requirements in other contexts. For example, although the

[1] IPO reports currently processing I-924 applications filed September 9, 2015. https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=abc2zpKLxqy5g7NXL6uOv

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

law requires all L-1 petitions to be adjudicated within 30 days, it is rare that adjudications meet this deadline without premium processing. In the EB-5 context, the regulations require I-829 petitions to be adjudicated within 90 days. Despite this, the current posted processing time for I-829 petitions exceeds 28 months. Given current staffing, it appears that it would be impossible for USCIS to achieve reasonable processing times even if required by regulation or statute. While premium processing would help, it does not guarantee processing within 15 days, but simply mandates a refund if the premium processing time frame is not met.

A number of solutions, such as those listed below, can be considered as long as no mandatory exemplars are required until premium processing is implemented and USCIS demonstrates the capacity to premium process exemplar applications:

- Eliminate the mandatory aspect of exemplars as contemplated in the ANPRM;
- Effectuate a mandatory exemplar requirement when premium processing is implemented and USCIS demonstrates sufficient capacity to actually adjudicate exemplar applications filed under premium processing within 60 days;
- Retain the mandatory exemplar requirement but permit investors to file Form I-526 petitions if the exemplar application remains unadjudicated by USCIS 90 days after filing once premium processing is implemented; or
- Retain the mandatory exemplar requirement and permit filing Form I-526 petitions as soon as the exemplar application has been received by USCIS.

9. **What additional costs and benefits would regional centers or investors incur as a result of a required exemplar approval prior to submitting EB-5 immigrant petitions?**

RESPONSE: Please see our response to question number 8, above.

10. **What documentation should be required to accompany an exemplar application?**

RESPONSE: We believe the instructions to Form I-924 dated 12/23/16 capture the evidence USCIS currently requires and should require for an exemplar application.

11. **In what circumstances should a regional center be required to file to amend a previously approved exemplar?**

RESPONSE: A regional center should be required to file to amend a previously approved exemplar when it believes there is a “significant change” to the approved exemplar that may rise to the level of “material change.” In this connection, we propose a definition of “material change” that would clarify when a change is material. By requiring a significant change amendment, we also propose that USCIS modify its current policy regarding the effect of “material change.” The proposed modification would allow Forms I-526 associated with approved amended exemplars to remain intact, either as approved or proceeding to approval. Forms I-526 associated with approved amended exemplars would therefore retain their priority dates.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

Proposed Definition of "Material Change"

The Policy Manual defines "material change" as follows:

> A change is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. [FN citing to *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).]

Consistent with the *Kungys* standard, we propose a more specific definition of material change in the EB-5 context. In the EB-5 context, a change is material if, after filing, the change causes the exemplar or EB-5 petition to no longer satisfy the eligibility requirements under INA §203(b)(5) by resulting in the failure to create at least 10 jobs per investor and/or the failure of the investor to make an at risk investment of required capital in the I-526 context, or to sustain the investment in the I-829 context. Any other change may be significant or insignificant, but is not material to the ultimate approvability of the petition. A change that is not material should not result in an investor having to file a new I-526 petition or a regional center having to file a new exemplar application.

A definition tied to the EB-5 eligibility criteria follows from *Kungys*. There the Court reasoned that the date and place of birth of the naturalization applicant are not relevant to the qualifications for naturalization, and therefore the misrepresentation of such facts is not material. Materiality, therefore, is determined by the elements of eligibility for the immigration benefit, and the central question is whether new facts make the applicant or petitioner ineligible for the desired benefit. In essence, the *Kungys* materiality test attempts to cull out the "trifling collateral circumstance"[2] from those that should bear punitive consequence. This interpretation of *Kungys* is already in line with current USCIS policy and long standing precedent that a change should be considered material only if the change would mandate denial of the benefit.[3] Notwithstanding, it is clear from the Policy Manual that USCIS strays from *Kungys*. In elaborating the material change standard, the Policy Manual states:

> A petitioner must establish eligibility at the time of filing and a petition cannot be approved if after filing, the immigrant investor becomes eligible under a new set of facts or circumstances.

This formulation has no relation to *Kungys*. *Kungys* requires examining, counterfactually, the adjudication of the initial benefit application or petition. Inserting what we now know, we ask whether "those facts were themselves relevant to … qualifications" for the immigration benefit.[4] Accordingly, in applying *Kungys* to exemplar or I-526 petition adjudication to determine whether a change is material, USCIS must ask whether the change is relevant to qualifications for exemplar or petition approval – that is, whether the change affects eligibility for approval.

---

[2] *Kungys v. U.S.*, 485 U.S. 759, 769 (1988).
[3] *See U.S. v. Fedorenko*, 455 F. Supp. 893, 915-916 (S.D. Fla. 1978), rev'd 597 F.2d 946 (5th Cir. 1979), reversal upheld on other grounds, 449 U.S. 490 (1991); *U.S. v. Rossi*, 299 F.2d 650 (9th Cir. 1962).
[4] *Kungys* at 774.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

Bearing little relation to *Kungys* itself, the quoted elaboration of the material change standard in the Policy Manual instead appears instead to refer to the Administrative Appeals Office (AAO) precedent decisions *Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971) and/or *Matter of Izummi*, 22 I&N Dec. 169 (AAU 1998). However, the Policy Manual inaccurately reprises both *Katigbak* and *Izummi*, unfortunately carrying over critical errors from the December 2009 USCIS Memorandum.[5]

Katigbak stands for the proposition that a petitioner must be eligible for a benefit at the time of filing in order to retain the priority date. *Izummi* stands for the proposition 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 Service requirements."[6] In addition, the petitioner must "continue to be eligible for classification at the time of adjudication of the petition."[7] Taken together, these authorities consistently state that as applied to EB-5, an ineligible filing *ab initio* cannot be converted to an eligible one by establishing eligibility after filing. However, the Policy Manual would find a change to be material even if a case eligible at the time of filing remains eligible after an interim change. If, at the time of adjudication, the investor is asserting eligibility under a materially different set of facts that did not exist when he or she filed the immigrant petition, the investor must file a new Form I-526 petition.[8]

This material change rule stands *Kungys*, *Katigbak*, *Izummi*, and 8 CFR §103.2(b)(1) on their heads. Instead, consistent with these principles, a change that makes an ineligible exemplar an eligible exemplar is unapprovable under *Katigbak* and *Izummi*. Conversely, a change that makes an eligible project ineligible constitutes a material change and is unapprovable under *Kungys*. A change should not be considered material unless the change would mandate denial of an alien's application.

Examples of Non-material and Material Change

We appreciate that each material change determination will be based on the particular facts of the case. However, other immigration guidance sheds light. In a Memorandum dated August 22, 1996, entitled "Amended H-1B Petitions," the Service stated that a "material change" exists when a change substantially alters the terms or conditions of an H-1B employee's employment. The Adjudicator's Field Manual provides the following examples of changes that are not "material":

- Transfer of a beneficiary from one branch of a firm to another branch of the firm;

[5] USCIS Memorandum, "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)" (Dec. 11, 2009). *See* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudicating%20of%20EB-5_121109.pdf.
[6] *Matter of Izummi,* 22 I. & N. Dec. at 175.
[7] 8 CFR §103.2(b)(1).
[8] *See* 6 USCIS-PM G.4(C); https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter4.html#S-C.

- Change of petitioner's name; and
- Changes in the ownership structure of the petitioning entity.

Examples of material change in the AFM are:

- Transfer of employee from one employer to another employer
- Change from one specialty occupation to another specialty occupation
- Merger that creates a new employing entity.

With respect to L-1 petitions, the Service has stated that even a change from one managerial position to a different managerial position is not material. Only if there is a change from a specialized knowledge to a managerial/executive position, or if there is a transfer from one company to another company, is the change material.[9]

The examples in other immigration contexts show that materiality goes to the core eligibility requirements for the particular benefit. Accordingly, a change in the business plan not affecting required number of jobs, required timing for job creation, nature of the jobs, or even nature of the job creating entity, should be immaterial. On the other hand, if a change affects the employment creation calculations in the economic report such that the requisite indirect employment will not be created within the required timeframe, such a change would be material.

We note that any change, however significant, affecting the project after job creation has been completed and the business plan fully executed would be outside our proposed material change definition, and therefore not be deemed material. This concept is consistent with the treatment of project changes after job creation completion in the August 2015 Draft USCIS EB-5 Policy Memorandum.[10]

Timeframe for Material Change Determination and Effect

If USCIS determines a material change has occurred during pendency of an exemplar or an investor petition, the determination has been made that the filing is not eligible for approval and may be denied.

If, on the other hand, USCIS determines that a change has occurred during pendency of an exemplar or investor petition, but that the change is not material rendering the filing ineligible, then as long as USCIS also determines that the filing was eligible at the time of filing as *Katigbak* requires, the exemplar or petition should be approved.

If USCIS determines a material change has occurred after approval of an exemplar or investor petition, complexities arise. On the one hand, there is clear satisfaction of *Katigbak*, as eligibility at the time of filing is in fact proven by the USCIS approval. On the other hand, USCIS has

[9] *See* "Guidelines for the Filing of Amended H and L Petitions," INS Office of Operations, C0214h-C; C0214L-C (Oct. 22, 1992).
[10] See USCIS Draft Memorandum PM-6020121 (August 10, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Policy_Memo_Guidance_on_the_Job_Creation_Requirement_and_Sustainme.pdf.

determined that the changes would have had a natural tendency to affect the original approval – that is, the approval would have been a denial. In such an instance, given that eligibility at the time of filing was established, the exemplar applicant or petitioner should be provided the opportunity to present further evidence to re-establish eligibility under different facts. Under this adjudication, the proposed process for which is discussed below, USCIS may determine that the different facts establish eligibility in which case the approved exemplar or petition may remain approved with no impairment to priority date or otherwise. If USCIS determines that the evidence fails to re-establish eligibility under different facts, the approved exemplar or petition may be revoked, unless other remedies are available.

We reiterate that any change occurring after job creation completion, regardless of whether there is any further evidence to re-establish eligibility, should not be deemed material and therefore have no adverse impact on an approved exemplar or petition.

Proposed Process for Determining Material Change

We understand that USCIS has an interest in being notified of significant changes that may be material and impair eligibility for EB-5 benefits. For this reason, we recommend that USCIS require amendments for exemplars if the project undergoes a "significant change." "Significant changes" are changes that may or may not be material. They may involve changes to job creation methodology, downward changes to job creation estimates, change in job creation sectors, large scale changes to project budget, lengthy delays, and major changes to the NCE limited partnership or operating agreement. Such an amendment should detail the nature and scope of significant changes as well as any further evidence to establish continuing eligibility or re-establish eligibility. USCIS may adjudicate the exemplar amendment, with the amendment approval signifying the significant change as not material. An amendment denial would signify that the change is material.

If all associated investors have already been admitted in conditional resident status, USCIS still may require exemplar amendments to be notified of significant changes even if no denial or revocation of the exemplar or investor petitions would result from amendment denial. In the case of such amendments, USCIS may still approve and find the change to be not material, thereby preserving deference for Form I-829 adjudication. If the change is material, USCIS can issue a notice of acknowledgement. This would signal that while there is denial or revocation of the exemplar or associated I-526 petitions, that there would be no deference accorded in associated I-829 adjudications.

An alternative process for notifying USCIS of material changes following the admission of all investors as conditional residents may be a separate notification process, perhaps by email or by reporting on the annual Form I-924A. This process has the benefit of not burdening exemplar workflow while still providing notice to USCIS.

Whatever process is in place to map exemplars with associated investor petitions should also track outcome of the exemplar amendment. As discussed in the response to question number 7, above, we recommend establishing a process to associate amendment adjudication with associated petitions to avoid each investor petition making paper supplemental filings with fee.

It would be an unfair hardship as well as waste of investor and government resources and space to require paper filing amendments with fee for investor petitions, when USCIS has already adjudicated the matter at hand in the exemplar.

Requiring amendments for significant changes rather than requiring new petitions is consistent with USCIS policy in other employment-based immigrant classifications. The AFM states that a material change in the terms and conditions of employment or in the beneficiary's eligibility for the benefit requires an amended petition, rather than a new petition. *See also* 8 CFR §214.2(h)(11)(i)(A), which requires an amended petition when there are changes in the terms and conditions of employment of a beneficiary which may affect eligibility for H-1B status. The procedure for O-1 nonimmigrants is consistent with the H-1B procedures. The AFM requires a new petition if there is a change in petitioning employers. However, if the conditions of employment change, even if the changes are material, only an amended petition is required.

With respect to immigrant petitions, the I-140 is the most analogous to the I-526. Legacy INS memoranda either stated specifically that a "material change in the terms and conditions of employment or the beneficiary's eligibility" requires an amended petition or refer to new and amended petitions interchangeably.

Therefore, if the change is significant but materiality is undetermined, an amended petition, rather than a new exemplar or investor petition should be required. Through this process, USCIS would provide a channel for projects to report changes and receive assurance where the change is not material. For instances where the change is material, the process will afford certainty of the adverse consequences to come, particularly important for investors and their planning.

12. For what duration should an exemplar approval be valid, and why?

RESPONSE: We do not recommend a validity period for exemplars due to the variance in the size of projects. An exemplar may contain the blueprint for several series or phases that may be successfully subscribed over several years. We also see no reason to exclude a project that may successfully proceed and create jobs, although the investor recruitment period is protracted. Moreover, it should be the responsibility of investors and their advisors to conduct thorough due diligence of a project whose exemplar approval appears to be stale.

13. Under what circumstances should USCIS seek to terminate a previously approved exemplar?

RESPONSE: USCIS should seek to terminate a previously approved exemplar in the same situations where deference would no longer be due: material change, legal deficiency in the exemplar approval, or misrepresentation or fraud.

14. What effect, if any, should termination or expiration of an approved exemplar have on an investor whose immigrant visa petition has not yet been adjudicated?

RESPONSE: We do not recommend that approved exemplars have an expiration date. See answer to question 12, above.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

15. **What concerns, if any, would be raised by the elimination of the "actual" project deference process, wherein regional centers seek approval of the business plan and economic impact analysis associated with an investment offering, but not the investment offering documents?**

RESPONSE: We do not believe that an amendment seeking "actual" project approval is often used. However, to the extent that USCIS may allow for such an amendment without undue burden, we see no harm in USCIS continuing to offer this process for the limited deference it confers.

16. **Would some projects be deterred by a requirement to have an approved exemplar? DHS is particularly interested in how the exemplar requirement may affect the number of projects that obtain EB-5 investment and associated parties. Additionally, DHS seeks input on how an exemplar requirement might affect costs related to project timeliness, business plan fees, and regional center administrative fees.**

RESPONSE: Please see our response discussing the impact of mandatory exemplar approvals to question 8, above. Additionally, most if not all projects would be deterred by a requirement to have an approved exemplar as a condition to filing an associated Form I-526 petition, unless and until USCIS guaranteed exemplar adjudication would occur within a commercially reasonable time period, such as 60 to 90 days.

Exemplars require shovel-ready projects. Requiring exemplar approval before investors may file petitions would require developers to wait nearly 2 years under current processing times before EB-5 capital becomes available. Many projects will be completed within that time period and bridging capital while awaiting EB-5 capital is simply too risky and expensive. Developers would seek non-EB-5 capital instead.

In order to make EB-5 capital available, projects may turn to subscribing investors and releasing their funds even before I-526 petitions are filed, in similar vein to the early escrow feature prevalent today due to lengthy I-526 petition processing times. Release from escrow only after I-526 approval had been the norm before processing times made this commercially unfeasible. For precisely the same reason, requiring exemplar approval before investors may file petitions presents a commercially unfeasible scenario for use of EB-5 capital unless release before I-526 filing becomes the new norm, greatly enhancing risk to investors. Investing and spending EB-5 capital not only before the exemplar is adjudicated, but also before the investor petition is filed presents multifold risk to investors whose exemplar may ultimately denied, and their money invested, but have not even a USCIS filing to anchor any immigration benefit claim. Such a scenario also presents potential for abuse in addition to the irreparable harm to investors.

An exemplar approval requirement as precondition to petition filing, therefore, would herald a full moratorium on the EB-5 regional center program as regional centers and developers appraise whether waiting approximately 17 months for exemplar approval and EB-5 capital can be

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

commercially viable. Perhaps worse, program revival may usher in a wave of risky practices to allow earlier availability of EB-5 capital when actually needed.

With consistent, speedy adjudication of exemplars, extraordinary efficiencies would be realized across the entire EB-5 industry with mandatory exemplar approvals. Without guaranteed speedy adjudication, however, the delay in the raising and release of EB-5 funds, assuming the safer practice of finding investors and raising capital only after exemplar approval, would effectively eliminate EB-5 capital as a viable funding source for developments. As discussed above, the alternative of raising and releasing capital ahead of exemplar approval would present unacceptable risk, so is not an acceptable alternative to waiting for approval.

17. **Would an exemplar requirement impact the financial structure of regional center investments? For example, would such a requirement decrease or increase the EB-5 capital portion of a project's total finance? Would it impact the overall financing costs and rates of return for investors, regional centers, and developers?**

RESPONSE: Assuming that I-924 adjudication times were 60 days or less, great efficiencies would be realized. Investors would confidently subscribe to exemplar approved projects, assured that the USCIS deference policy would allow predictability in their I-526 approval, resulting in more efficient decision-making to invest. This greater efficiency in investment decision-making means quicker, less costly capital raises for U.S. projects.

Investors will benefit by considering only exemplar projects which have already been vetted by USCIS. The detailed documentation requirements of an exemplar petition would also have the tendency of culling more mature projects capable of supporting more comprehensive due diligence analysis. These benefits could not only help reduce immigration risk, but also reduce risk of investment fraud. Moreover, JCEs will benefit from the rule because they will perceive a reduced investment risk and have reasons to reasonably rely on financial commitments made by an NCE. This reduced investment risk also flows indirectly to the general contractor, banks and financial institution, future tenants, and all other downstream parties.

These are all exceptionally important benefits to these particular stakeholders. However, the proposed rule is not likely to significantly impact (decrease or increase) the EB-5 capital portion of a project's total finance; the jobs creation requirements are perhaps the largest factor in the sizing of the EB-5 funding. Likewise, the proposed rule is not likely to significantly impact the overall financing costs and rates of return for investors, regional centers, and developers.

18. **How could USCIS define the term "material change" to account for the exemplar process, consistent with applicable regulations and case law, including regulations requiring petitioners to be eligible for the requested benefit at the time of filing and to remain eligible until the benefit is granted? [FN 5] Please discuss how a new material change definition would impact pending EB-5 immigrant petitions.**

RESPONSE: These are extremely important questions. Please see our full discussion of "material change," offering a clarifying definition, analysis of source authority, proposed process for reporting and adjudicating changes, and impacts of changes in response to question 11, above.

B. Safeguards for Monitoring and Oversight

1. What would be the most effective and efficient way to add monitoring and oversight requirements? Should such requirements be incorporated into the initial designation stage, the exemplar stage, or throughout the period of the regional center's designation?

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

We observe that to adopt successful regulations in this regard, USCIS must first define with precision the ultimate end or purpose of "effective oversight." For this reason, we applaud DHS's acknowledgement that the statutory standard of promoting economic growth "is subject to varying interpretations" as well as DHS's intention expressed in the ANPRM to "consider[] certain changes to the regulations governing continued regional center designations, including changes that would require existing and newly designated regional centers to demonstrate that they continue to meet applicable and regulatory requirements."[11] We believe more specific standards for continued participation is the necessary prior step to developing effective oversight and monitoring standards as such standards should track compliance requirements.

While the ANPRM states that USCIS seeks to "ensure only regional centers with effective oversight could operate within the program," the picture of what a regional center with effective oversight looks like is not clear. The statutory mandate for regional centers is broad and provides little guidance for when a regional center fails in the "promotion of economic growth" or "increased domestic capital investment." USCIS should flesh out the factors for more specific activities furthering those statutory ends. Effective oversight, then, would be measured by providing reasonable assurance to USCIS and investors of compliance with the specifics of promoting economic growth.

In general, the oversight regime contemplated in recently proposed EB-5 legislation requiring certifications, attestations, disclosures, and agreements among other measures, presents a workable framework, but only to the extent that oversight responsibilities are reasonable. For example, imposing strict liability upon regional centers for the conduct of third parties is unreasonable. "Due diligence after reasonable investigation" should be the standard for regional center certifications of third party representation or conduct.

We also recommend that USCIS assume an adaptive posture on oversight regulations. Whether any oversight regulations USCIS implements prove effective or not, only time and experience will tell. We recommend that USCIS provide a reasonable time frame to test the efficacy of any new regulations and revise the regulations as deemed necessary. We caution, however, that

---

[11] 82 Fed. Reg. at 3216.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

USCIS should in all instances provide notice of any policy change and apply any policy change only prospectively.
Finally, we further observe that there are many successful approved regional centers creating jobs for diverse enterprises across America. They do their best to comply with USCIS rules and take their responsibilities both to USCIS and investors seriously. Most of these regional centers have already instituted measures responsible for their success. We recommend that DHS give due weight to any comments it may receive from such established regional centers, as they will offer important insights on proper administration as equated with compliance and investor protection.

2. **What forms of monitoring and oversight of NCEs, JCEs, and investor funds are regional centers currently utilizing as part of their best practices?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

3. **Do other entities associated with regional centers engage in monitoring and oversight?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

4. **What benefits, if any, would additional monitoring and oversight offer to regional centers and immigrant investors?**

RESPONSE: Consistent with our response to question number 1, effective monitoring and oversight consistent with defined goals from USCIS would offer great benefits. We emphasize that the goal should be "effective," not merely "additional" oversight. Moreover, the oversight measures should be reasonable and workable. The benefits of effective oversight to regional centers include:

- Transparency in compliance standards;
- Improved program image and public support; and
- Uniform operational standards for all.

The benefits of such oversight to immigrant investors include greater confidence in regional center integrity, regardless of choice of regional center.

5. **What types of documentation would be appropriate for regional centers to submit to establish that they will have an adequate monitoring and oversight process in place upon designation?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

6. **What measures, if any, have regional centers put in place to identify conflicts of interest by regional center participants? What requirements for identification and disclosure of conflicts of interest would be appropriate in the regional center context?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

We observe that material disclosures, including material conflicts, are required to be made in offering documents. We defer to the above parties and their securities counsel in this respect.

7. **What investment and other economic impacts could be expected from the establishment of new monitoring and oversight requirements?**

RESPONSE: We do not have relevant information or authority to respond to this question.

8. **What data and information should USCIS consider affirmatively disclosing to increase transparency in the EB-5 program?**

RESPONSE: There are a number of items that USCIS should consider affirmatively disclosing to increase transparency in the EB-5 program. The list of terminated regional centers USCIS began posting is helpful in increasing transparency in the EB-5 program. In addition, we recommend affirmatively disclosing:

- Regional center termination decisions, with the reasoning for termination unredacted;
- Confirmation of timely filed Form I-924A for the prior fiscal year;
- Compliance audit standards after stakeholder dialogue; and
- Investor Program Office training materials.

9. **What additional costs would stakeholders incur in setting up and maintaining a monitoring and oversight process?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

10. **Would an additional filing fee or additional costs to regional centers in preparing documentation for separate filings be too burdensome to support or justify the suggested initial filing framework?**

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 I Fax: 202.783.7853 I www.aila.org

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

11. **Would any of the potential changes described above either deter or incentivize participation in the program, or directly affect the viability of certain types of investment projects? If so, how could USCIS best measure the likely effects?**

RESPONSE: We refer DHS to comments submitted by regional centers, regional center member associations, and investor fund administrators of regional centers. They are the most competent sources of this requested information.

12. **Would any of the potential changes described above impact small entities? If so, how? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.**

RESPONSE: We do not have relevant information or authority to respond to this question.

C. Continued Participation

1. **How would regional centers or immigrant investors benefit, if at all, from an explicit requirement that the regional center actively participate in the Regional Center Program?**

RESPONSE: The response to this question depends on how USCIS defines "active participation." If an ideal balance is struck, all stakeholders benefit from having only bona fide regional centers with good compliance systems operate in the EB-5 regional center program.

2. **What activities demonstrate active participation in the Regional Center Program? What evidence should regional centers be required to provide to demonstrate active participation?**

RESPONSE: The purpose of the regional center program is promoting economic growth. Any proposed standard of "active participation" should therefore be tested for its ability to determine whether a regional center is promoting economic growth. As we propose that USCIS adopt a totality of the circumstances balancing test to determine failure to promote economic growth in the termination context, we propose that USCIS adopt the same balancing test in the converse context of determining whether a regional center is "actively participating" in promoting economic growth. No single factor should be dispositive. Factors may include:

- Whether an exemplar was filed or approved within a reasonable past timeframe. A prior 18 to 24 month timeframe may be appropriate, but we advise against adopting a bright line test. Instead, an assessment of the timeframe for the activity should be based on the particular facts of the regional center;

- Whether the regional center is sponsoring I-526 petitions within the same time period. We caution against setting a bright line minimum number. Depending on the context, a small number of petitions may merely signal the start of capital raise, a conservative start for a new regional center, or simply a small scale but no less legitimate and worthy EB-5 project;
- Whether EB-5 capital from investors is in escrow ready for deployment or already deployed to job creating activities;
- Whether any actual job creation, direct or indirect, has occurred as a result of deployment of EB-5 capital;
- Whether the regional center has undertaken due diligence on prospective project(s) for EB-5 suitability, including whether the regional center has a process and standards for such due diligence;
- Whether the regional center is in the process of negotiating deal terms with prospective job creating entities or developers;
- Whether the regional center is prosecuting or overseeing promotional activities for a project; and
- Whether the regional center has adequate staffing and systems for its operations, again avoiding any bright line test but rather assessing operational capacity for the particular business needs.

This list is not exhaustive, but merely illustrative of the kinds of factors that may be relevant, on a case-by-case basis, in evaluating whether a regional center is actively participating in the Regional Center Program.

3. **If DHS conditions a finding of active participation on evidence that the regional center is associated with an approved and valid exemplar, a pending exemplar application, or a pending Form I-526 or I-829 petition associated with the regional center, how long should the regional center be able to retain its designation in the absence of such approved or pending exemplar or pending petition? Why is such a timeframe appropriate?**

RESPONSE: First, we recommend that DHS avoid conditioning a finding of active participation on evidence of any one factor such as association with an approved exemplar or pending petition. Rather, consistent with our comments throughout, we recommend that DHS adopt a case-by-case totality of the circumstances test to condition a finding of active participation. Regional centers vary widely in terms of experience, access to deals, pipeline of projects, jurisdictional requirements for land development or improvement, and many other dimensions. It makes little sense, therefore, to rigidly impose a set of criteria for "active participation" and even less sense to condition "active participation" on any single evidentiary factor. For the same reason, we recommend avoiding any bright line test for a timeframe of active participation.

4. **How would a continual monitoring and oversight requirement impact currently designated regional centers?**

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

RESPONSE: It is unclear what DHS means by a "continual" monitoring and oversight requirement. As constant monitoring is not feasible and an annual form I-924A is already required, we assume DHS means an interim role for DHS in monitoring and oversight sometime during the fiscal year. Even thus narrowed, we cannot comment without more specificity in the kind of continual monitoring and oversight requirement DHS is contemplating.

5. **How would a monitoring and oversight requirement impact small entities? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.**

RESPONSE: We do not have relevant information or authority to respond to this question.

6. **In what circumstances should a regional center be required to amend a regional center designation during an out-of-cycle filing?**

RESPONSE: It is unclear what DHS means by "out-of-cycle filing." Accordingly, we cannot respond to this question.

7. **What additional changes to the regional center amendment process would assist stakeholders in complying with the process?**

RESPONSE: We recommend considering two different workflows for regional center amendments. The first workflow would consist of adjudicating regional center amendments relating to significant changes in its designation, such as changes to the regional center's ownership, organizational structure affecting control, administration affecting its oversight and reporting responsibilities, adding or removing regional center principals, and/or geographic scope of the regional center. These amendments may be deemed regional center structural amendments. We recommend that insignificant changes, such as name changes or minor changes to organizational structure not affecting control, be simply made by e-mail notice to USCIS, as has been the practice.

The second workflow would consist solely of adjudicating exemplars requiring satisfaction of completely different and self-contained standards. These amendments may be deemed exemplar amendments.

Division of workflow in this manner should be accompanied by revisions to the Form I-924, or perhaps entirely separate forms, perhaps a Form I-924B for structural amendments and Form I-924C for exemplar amendments. Separating the amendment workflow in this manner will provide greater predictability in standards applicable to each, greater efficiency in adjudications, and hopefully ultimately reduced processing times for both.

8. **Should DHS reconsider the current filing structure for notifying USCIS of the suggested changes – i.e., filing an amended Form I-924 with a fee? If so, what would be appropriate alternatives, and why?**

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

RESPONSE: First, DHS should provide absolute clarity by reasonable notice regarding whether petitions may continue to be filed while any amendment is pending. We were disturbed by USCIS's announcement during the March 3, 2017 stakeholders meeting that petitions filed after December 23, 2016 in association with pending geographic scope amendments will be denied, reversing prior written policy. We further report that we do not know from the Form I-924 instructions dated December 23, 2016 whether regional center organizational changes are required to be filed by Form I-924 amendment with fee, and whether such an amendment must be approved before associated investor petitions may be filed. Clearly, there has been failure to be clear and to provide reasonable notice of amendment requirements or process. Again, we urge USCIS to clearly state any reversals or changes to prior policy in public and written form with a prospective effective date.

Second, insignificant changes to regional center designation, per our response to question number 7, above, should not require a Form I-924 amendment with fee, but rather notice to USCIS via e-mail per prior and perhaps still-current process.

Third, given that regional center structural amendments involve significantly less complex adjudication than regional center exemplar amendments, USCIS should assign a lower filing fee for structural amendments than exemplar amendments.

D. Termination

1. **What should DHS do to more effectively regulate the regional centers participating in this program?**

RESPONSE: We make the following recommendations for DHS to more effectively regulate regional center participants:

- Ensure that the Form I-924A and instructions clearly set out required data and any support documentation also required;
- Ensure the bona fides of regional center principals;
- Regularly publish guidance on improving filings, preparing for compliance audits, and guidance for active participation;
- Hold regular stakeholder meetings with regional centers and advisors dedicated to regional center governance issues; and
- Liaise with regional center program associations such as IIUSA and EB5IC as well as bar associations such as AILA to disseminate recommendations on how such organizations may assist DHS to effectively regulate regional centers

2. **Should the failure to maintain approved exemplar filings result in termination?**

RESPONSE: Termination of a regional center impacts not only the regional center but all of the good faith innocent investors associated with it. Wrongful termination may be reversed by the AAO or the courts. Accordingly, USCIS should hold itself to a high standard when considering whether to terminate a regional center.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

AILA Doc. No. 17041235. (Posted 4/12/17)

Rather than using single factor tests such as whether a regional center is "maintaining an approved exemplar," we recommend a termination standard consistent with the recent non-precedent AAO decision dated March 15, 2017, *Matter of [redacted]*, Certification of Immigrant Investor Program Office Decision; Benefit: Regional Center Designation (the "AAO decision"). In that decision, the AAO rejected adopting "inactivity" as the test for failure to promote economic growth and found that USCIS is not limited to "mere inactivity" as grounds for regional center termination. The AAO remanded the case to the IPO to instead apply a balancing test on a case-by-case basis:

> In sum, we must balance all the equities on a case-by-case basis to determine whether a regional center is continuing to promote economic growth. Where both positive and negative indications of the promotion of economic growth exist, we look at all relevant documentation to reach a conclusion regarding whether, on balance, the regional center is continuing to promote economic growth. Positive factors include job creation, capital investment, and other signs of positive economic impact. Negative factors include mismanagement, theft, or fraud by the regional center or related entities. Each case will therefore be assessed on its own merits. In doing so, we consider the factors' relative weight as determined by surrounding circumstances. *See Matter of Sotelo-Sotelo,* 23 I&N Dec. 201, 203 (BIA 2001) ("In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case.").

This test requires USCIS to carefully evaluate all of the facts and assign weight based on a totality of the circumstances. Given the vast diversity of regional center history, operations, and activities and the gravity of termination consequences, we can recommend no alternative standard.

3. What activities should be considered a failure to promote economic growth and result in termination of the regional center?

RESPONSE: Please see our discussion of the proposed termination standard in response to question 2, above. The current regulations authorize USCIS to issue notices of intent to terminate in two instances: (1) where a regional center fails to submit required information such as the Form I-924A; and (2) where USCIS determines that the regional center no longer serves the purpose of promoting economic growth.

We support the position taken by the AAO in the March 15, 2017 decision discussed above, that USCIS should consider the totality of the circumstances to determine whether a regional center has failed to promote economic growth. The AAO decision lists possible factors USCIS may consider including:

- Inactivity (the most prevalent factor USCIS invokes);
- Mismanagement;
- Theft; or
- Fraud.

Consistent with our prior discussion, no single factor, such as failure to maintain an exemplar, should determine inactivity. Rather, inactivity itself requires a totality of the circumstances evaluation. For example, if a long-standing and active regional center has no new project for 18 months, inactivity may be less concerning than a newly designated regional center having no project for the same time period. That said, even a new regional center may have been diligently pursuing new project opportunities during those 18 months, in which case inactivity may not be of concern. A single factor in isolation, therefore, cannot settle the issue of whether a regional center is inactive, just as inactivity itself in isolation cannot settle the issue of whether a regional center is failing to promote economic growth.

“Mismanagement” is similarly contextual. Factors establishing mismanagement may include:

- Failure to track job creation of any projects under sponsorship;
- Failure to ensure project documentation for investor filings and/or in response to USCIS requests; and/or
- Insufficient staffing and/or systems for continued participation.

The ANPRM lists a number of activities that could result in regional center termination, including failure to meet continued participation, obtaining designation by fraud or misrepresentation, using unlawfully sourced funds for regional center operations, or misusing investor funds. For the reasons amply explored, we do not endorse a single factor test for regional center termination, but rather urge the use of a totality of the circumstances test, consistent with AAO findings. Accordingly, all of the listed activities in the ANPRM may be factors for consideration under “mismanagement,” “theft,” or “fraud” but any single factor should not lead to termination.

4. **What impact, positive or negative, would changes to clarify the termination grounds and process have on regional centers and/or investors? What impact would the changes have on small entities? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.**

RESPONSE: We take this opportunity to address the impact of regional center terminations on associated investors, a critical matter upon which DHS does not seek comment. In recent termination cases, USCIS appears to take the position that termination is a material change as well as perhaps also the underlying reason for termination. Following therefrom, USCIS has proceeded to deny associated investor petitions and revoke approved petitions.

We urge USCIS to adopt a different position. A termination should not be viewed as affecting eligibility for EB-5 classification. Therefore, termination itself should not be viewed as a material change. The facts giving rise to termination may, but may not always, affect eligibility for EB-5 classification. Even significant changes may not be material, as discussed in depth in response to Part A, question 11. When and only when the underlying facts giving rise to termination makes a petition no longer approvable should USCIS find material change.

Termination Should Not Itself Be Categorical "Material Change"

To summarize our prior discussion, according to the USCIS Policy Manual, a material change in circumstances renders a pending I-526 petition ineligible for approval.[12] The USCIS Policy Manual considers "materiality" to be a question of whether changed circumstances "would have a natural tendency to influence or are predictably capable of affecting the decision."[13]

USCIS should promulgate a regulation providing that termination of a regional center is not a sufficient change in circumstances, without more, to deny a pending I-526 petition or revoke an approved I-526 petition. As the Supreme Court reasoned in *Kungys*, the date and place of birth of a naturalization applicant are not relevant to the qualifications for naturalization and therefore the misrepresentation of such facts is not material. Materiality, thus, is determined by the elements of eligibility for the immigration benefit, and the central question is whether new facts make the petitioner ineligible for the desired benefit. Unlike, for example, in the case of a family-based first preference petition, where a subsequent marriage would render the beneficiary ineligible for the visa classification, termination does not render the I-526 petitioner categorically ineligible for the EB-5 investor classification because eligibility for EB-5 classification does not turn on regional center association.

The core elements of the I-526 petition are described in 8 CFR §204.6(j) – petitioner invested or is investing; in a specific new commercial enterprise (NCE); investment capital from a lawful source; jobs have been or will be created via the NCE; investor is engaged in management; and the NCE primarily does business within a particular location (if the petition is based on a TEA). Regulations require the EB-5 investor using indirect job creation methodology to present evidence that the "investment is within a regional center" and of the jobs methodology used. But there is no requirement that the EB-5 investor have any legal relationship with the regional center, own or invest in the regional center, oversee the regional center, or have any responsibility for management or monitoring responsibility in connection with eligibility for petition approval.

On the other hand, the obligations of a regional center are defined and limited to include promotion of the regional center geographic area for investment, oversight of NCEs connected to the regional center, and reporting data to USCIS. In practice, USCIS allows regional centers to operate with a highly peripheral and passive role in the case of the "affiliation only" model which may not involve the regional center in any promotional activity, NCE management, or JCE oversight, but instead by design is a user-friendly platform for NCEs/JCEs to link to the benefits of the regional center program. USCIS policy and practice allow regional centers to exist in a manner that is substantially detached from investors as well as coordinated economic development of a region of the U.S., and the immigration eligibility of investors.

---

[12] Citing *Matter of Izummi*, 22 I&N Dec. 169, 176 (1998) and 8 CFR §103.2(b)(1).
[13] Citing *Kungys v. United States*, 485 U.S. 759, 770 (1988) (holding that misrepresentation of circumstances of birth were not material to adjudication of naturalization application).

Considering the elements of eligibility for the investor petition approval and the obligations of regional centers, there is no overlap or commonality between the regional center obligations and the investor's *prima facie* requirements for EB-5 eligibility under INA §203(b)(5) and 8 CFR §204.6. The legal relationship between the typical immigrant investor and regional center is not required and is non-existent unless the regional center is also the NCE manager. The investor has no control, leverage or power to affect the actions of the regional center. In cases of termination, investors typically have "clean hands" and are victims of the actions or inaction of the regional center and its principals.

Regional center termination does not impair, threaten or compromise any of the salutary outcomes of investor actions – a substantial investment is made in the U.S. economy and specifically into the NCE, expenditures of capital by the NCE create economic benefits throughout the U.S. economy, and thus create jobs for U.S. workers. It is manifestly unjust as well as out of line with the *Kungys* material change doctrine to deny and revoke investor petitions based on regional center termination.

Proposed Regulations

Given that the typical circumstances that form the basis for termination are not related to or caused by EB-5 investor action or inaction and are beyond the EB-5 investor's control, current regulations should be amended, in the interests of justice, to state that termination is not sufficient for denial of a pending I-526 petition or for revocation of an approved I-526 petition. Specifically, the regulations should provide:

- If the I-526 petition is approvable when filed, a new I-526 petition should not be required solely as a consequence of termination;
- A replacement regional center affiliating with the NCE neutralizes any adverse effect of termination for purposes of the I-526 petition if the replacement regional center undertakes the oversight and reporting requirements for the NCE;
- If a replacement regional center with an approved geographic scope circumscribing the area of the NCE is not available, another regional center with remote geographic scope may be used if the remote regional center undertakes the oversight and reporting requirements for the NCE, and a substantial part of the required job creation already has occurred;
- USCIS shall provide the affected investors with notice of intent to terminate the regional center and allow for the full period of time to present additional evidence (12 weeks); and
- In order to neutralize any adverse effect of termination, the investor shall provide evidence within the prescribed timeframe that (i) the NCE entered into an agreement with a replacement regional center or as necessary a remote regional center for provision of oversight and reporting services; and (ii) the investor acknowledges and approves the assignment of regional center reporting and oversight with respect to the investor's project by the replacement regional center or remote regional center.

Of note, this proposed regulatory change does not offend existing law. The province of the oft-cited *Matter of Izummi* is best limited to cases where USCIS determines the EB-5 petitioner was not eligible for the benefit at the time of filing the I-526 petition. Similarly, 8 CFR §103.2(b)(1)

requires the petitioner to be eligible at the time of filing. It also admonishes that the petitioner must continue to be eligible for the benefit throughout adjudication. Current 8 CFR §204.6(m)(9) also does not disallow our proposal. This regulation provides that in the event of termination, the investor's conditional permanent residence should be terminated unless the investor can show "continued eligibility" for permanent residence. Our proposed regulatory change adds much-needed context to what "continued eligibility" should now mean for a regulatory provision promulgated 23 years ago when there were zero regional centers in operation and no investor conditional permanent residents.

The urgency for the proposed regulation is proven by recent events and terminations. The grounds for termination are likely to expand as a consequence of new regional center obligations imposed by statutory or regulatory change, and the number of terminations is likely to increase. In most, if not all cases, the immigrant investor's actions or inaction are irrelevant and the investor will have clean hands. The interests of justice point to a fairly crafted solution as is presented by this regulatory proposal.

5. **What other factors impacting the regional center and/or investors should DHS consider when terminating a regional center?**

RESPONSE: Please see our responses to questions number 3 and 4, above.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

AILA Doc. No. 17041235. (Posted 4/12/17)