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April 1, 2013

Office of Public Engagement
U.S. Citizenship and Immigration Services
20 Massachusetts Ave. NW
Washington, DC 20529
Via e-mail: opefeedback@uscis.dhs.gov

Re: AILA Comments on USCIS Draft Memorandum: EB-5 Adjudications Policy (PM-602-XXXX), posted Feb. 14, 2013

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the draft policy memorandum, "EB-5 Adjudications Policy," posted on the USCIS website for comment on February 14, 2013.

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed EB-5 memorandum and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

AILA applauds the efforts of USCIS to create a comprehensive memorandum that consolidates the agency's guidance to stakeholders in the EB-5 area. Although we believe that much of the Draft Memorandum contains an accurate recitation of the law and existing policy, and some of the areas of conflicting adjudication have been clarified, we appreciate the opportunity to comment on the following: (a) areas where the law has been incorrectly stated; (b) areas covered by the Draft Memorandum where further clarification would be beneficial; and (c) areas not covered by the Draft Memorandum.

We refer to our comments dated December 9, 2011 on the first draft of this Policy Memorandum which was posted on November 9, 2011. We thank USCIS for incorporating many of our comments into the second draft, posted on January 11, 2012, and the instant draft.

Our comments, with references to the pages of the current Draft Memorandum are as follows:

1. **Page 1, Second Paragraph**: The Draft Memorandum describes Congress's intent in creating the two-year conditional residency period as ensuring, among other things, that "U.S. jobs are created." However, the intent of Congress in creating the two-year conditional residency period was to deter fraud. Section 204 of the proposed 1989 immigration reform bill was entitled, "Deterring Immigration-Related Entrepreneur Fraud."[1] It required a two-year conditional permanent residence status, during which investors must have "sustained" the investment.[2] The fraud deterrent provision was adopted in the Immigration Act of 1990[3] as a foundation of EB-5 law, and as legacy INS observed in its rule-making process, investors are "admitted as conditional permanent residents as a means to deter immigration-related entrepreneurship fraud."[4] While job creation was indeed one of the goals in creating the EB-5 category,[5] assurance of job creation was not the goal of imposing conditions on residence. We urge USCIS to adopt an accurate statement of Congressional intent by omitting reference to job creation in describing the reason for the two-year conditional residency period.

2. **Page 5, Second Full Paragraph**: First, the term "transactional agreements" should be changed to "agreement between the new commercial enterprise and immigrant investor, such as a limited partnership agreement or operating agreement." The "at risk" evidentiary test to establish that an investor has made the required investment requires examining the agreement between the investor and the new commercial enterprise only. Recent requests for evidence (RFEs) erroneously apply the "at risk" test to agreements between the new commercial enterprise and the job creating enterprise in the regional center context. Clarifying that the relevant agreement for assessing whether the capital is "at risk" is only the agreement between the investor and the new commercial enterprise will reduce confusion on this point.

   Second, the following sentence requires clarification: "Nothing, however, precludes an investor from receiving a return on his or her capital during *or after* the conditional residency period, so long as the return was not previously *guaranteed* to the investor and so long as the funds are not a return of the investor's principal" (emphasis added). USCIS should clarify that "guaranteed" means a fixed rate of return promised by the new commercial enterprise in order to focus the relevant "at risk" transaction as the one between the new commercial enterprise and the investor. Also, the phrase "or after" should be deleted from the sentence, as *Matter of Izummi* clearly permits return of the investor's principal after removal of conditions.

[1] Immigration Act of 1989, S358 101st Cong. (1989).
[2] *See* S Rep No 55, 101st Cong., 1st Sess. 22 (1989).
[3] Pub. L. No. 101-649, 104 Stat. 4978.
[4] Commentary to Final Rule, 59 Fed. Reg. 26588 (May 23, 1994), *quoting* S. Rep. No. 101-55, 101st Cong., 1st Sess. 22 (1989).
[5] *See* 136 Cong. Rec. S7622, 7626 (daily ed. July 11, 1989); S. Rep. No. 101-55, at 21 (1989).

3. **Page 8, Fourth Full Paragraph**: Please explain the significance of the newly added language indicating that USCIS defers to state determinations of "the appropriate *physical* boundaries of a geographic or political subdivision that constitutes the targeted employment area" (emphasis in original). The regulation at 8 CFR §204.6(i) provides that a state may designate "a particular geographic or political subdivision" as a targeted employment area (TEA), and only mentions boundaries as a part of the TEA designation evidence that may be provided to investors for Form I-526 submission.

4. **Page 14**: The Draft Memorandum correctly notes that it is the new commercial enterprise that will create the jobs. To settle concerns among stakeholders about the acceptability of using EB-5 funds to replace prior bridge financing, the Draft Memorandum should explicitly state its policy on bridge financing along the lines provided in our December 2011 comments. USCIS indicated its acceptance of bridge financing at the May 1, 2012 EB-5 Quarterly Stakeholder Engagement (page 14)[6] and has elsewhere articulated a "nexus" requirement to claim job creation credit. Given its prevalence and necessity in the face of lengthy processing times, the Draft Memorandum should consolidate and express its policy on bridge financing.

5. **Page 15, Second Full Paragraph**: The Draft Memorandum should clearly state, consistent with the USCIS December 2009 Memo,[7] that only *direct* jobs are required to be full-time, not *indirect* jobs modeled by reasonable methodologies in the regional center context. The December 2009 Memo states on page 14, revising AFM 22.4(c)(4)(D)(iii): "determinations regarding whether jobs qualify as 'full-time' are only relevant to the analysis of *direct jobs* created by a commercial enterprise claiming the creation of *direct jobs* as a result of the EB-5 capital investment" (emphasis in original).

   The Draft Memorandum should also adopt the December 2009 Memo's clarification of the terms "direct jobs" and "indirect jobs." The December 2009 Memo states that the term "direct jobs" only refers to jobs establishing an employer-employee relationship with the new commercial enterprise (*see, e.g.*, pages 8, 14-15). However, we continue to see RFEs in regional center-based cases requesting evidence of "qualifying employees" and "full-time" employment when all the jobs are indirect—that is, not held by employees of the new commercial enterprise. The terms "direct jobs" or "direct employees" appearing in job creation impact reports do not usually refer to employees of the new commercial enterprise, but instead are jobs serving as inputs in an input-output model, or a category of jobs output (direct, indirect, and induced). Accordingly, it is essential that the Draft Memorandum make the distinction unequivocally clear,

[6] "EB-5 Immigrant Investor Program Quarterly Stakeholder Engagement, May 1, 2012." AILA Doc. No. 12041241. (http://www.aila.org/content/default.aspx?bc=1016|6715|12053|26284|42734|39235).
[7] "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)." December 11, 2009. AILA Doc. No. 09121561. (http://www.aila.org/content/default.aspx?docid=30795).

and confirm that the concepts "qualifying employees" and "full-time" apply only in instances where there are employees of the new commercial enterprise – i.e. direct employees.

The Draft Memorandum should also make clear that the terms "direct jobs" or "direct employees" appearing in job creation impact reports do not usually refer to employees of the new commercial enterprise, but instead are jobs either created outside an input-output model to serve as an input, or a category of jobs output (direct, indirect, and induced). In all instances, the jobs labeled "direct" are not jobs held by new commercial enterprise employees. Please refer to number 16, in our December 2011 comments for additional information.

6. **Page 16, Last Paragraph**: The December 2010 letter from USCIS Director Mayorkas to Senator Leahy states that "a regional center may rely on jobs indirectly created outside its geographic boundaries."[8] While USCIS reaffirms this policy here in the Draft Memorandum, examiners have recently issued RFEs suggesting that a job creation model that includes counties outside the regional center's geographic jurisdiction may require a regional center amendment to add those counties. To avoid more RFEs contradicting USCIS policy, we recommend that USCIS express even clearer guidance indicating that a regional center may count indirect jobs created outside its geographic bounds.

7. **Page 17, *Matter of Ho***: Recent RFEs reflect the need for fuller guidance in applying *Matter of Ho*. For example, some RFEs have interpreted *Matter of Ho* to require, in checklist fashion, most of the items listed in the paragraph describing the contents of a comprehensive business plan. In doing so, USCIS applies a formalistic test without evaluating the overall credibility of the business plan, which is the "most important" factor according to the AAO. The Draft Memorandum should clarify that *Matter of Ho* emphasizes a totality of the facts presented as established by a preponderance of the evidence in assessing the core issue of feasibility.

   As another example, a template I-924 RFE states: "the business plan must show that the job creating entity is at the stage where work is immediately ready to begin." There is no such requirement in the statute, regulations, or *Matter of Ho*. If USCIS requires the business plan to show that work is immediately ready to begin as a requirement for approval of an actual project, the Draft Memorandum should make this clear.

   In this connection, we note that the December 2009 Memo introduced the terms "hypothetical investment project," "exemplar investment project," "actual investment project" and "exemplar Form I-526." These terms have not been clearly or consistently used in the instructions to the Form I-924, published USCIS material, designation approvals, or RFEs. The Draft Memorandum should

[8] Letter from USCIS Director Mayorkas to Senator Patrick Leahy (Dec. 3, 2010). AILA Doc. No. 10122135. (http://www.aila.org/content/default.aspx?docid=33953).

therefore include clearly defined terms relating to the different types of projects, the evidentiary standard applicable to each, and the effects of approval.

Finally, we again remark that *Matter of Ho* applies to stand alone EB-5 petitions and does not apply to regional centers or regional center projects. The regulation at 8 CFR §204.6(j)(4) requires a business plan to meet the two-year job-creation requirement in the context of (i) a stand-alone EB-5 project; and (ii) a troubled business. Neither the business plan nor the two-year job creation is referenced in subsection (iii) relating to the Immigrant Investor Pilot Program. Rather, for regional centers, the regulation requires "reasonable methodologies" to demonstrate employment creation rather than a business plan.

Therefore, it is an incorrect legal analysis to treat *Matter of Ho*—which relates to stand-alone EB-5 petitions—as applying to regional center-based EB-5 cases. (Please see our December 2011 comment, number 17).

8. **Page 18, Section V**: We observe that this draft contains new language italicized as follows: "The EB-5 Program further provides that if, two years after obtaining conditional permanent resident status, the immigrant investor has *sustained the investment and is conforming to the EB-5 Program's requirements*, the conditions will be removed." Both the statute and *Chang vs. United States,* 327 F.3d 911 (9th Cir. 2003) make it clear that the appropriate coupling point between I-829 and I-526 adjudication is the examination of whether the investor sustained the investment during the conditional period. The *Chang* court held that legacy INS raised "serious retroactivity concerns" when it sought to "refashion" I-829 standards to include a fresh assessment of whether the petitioner satisfied the I-526 standards.[9] Accordingly, the new language in the Draft Memorandum should not be used to support re-adjudication of I-526 eligibility during I-829 adjudication.

9. **Page 19, Second Bullet Point**: Consistent with comment number 5 above, the full-time requirement applies to direct jobs only. Accordingly, the Draft Memorandum should strike the language following "indirectly."

10. **Page 20, "Within a Reasonable Time"**: The Draft Memorandum sets forth a standard for job creation "within a reasonable time" as within a year of the two year anniversary of the approved Form I-526. This formulation is based on the premise that "the law contemplates two years as the baseline expected period in which job creation will take place." This is an incorrect statement of the law and drives a rigid approach to job creation evidence in adjudicating both the I-526 and I-829, particularly with respect to job creation timing. In fact, INA §216A is silent on job creation and merely requires that the investment was made and sustained.

[9] *See Chang*, 327 F.3d at 927.

Congress narrowly crafted the statutory language for petition adjudication conditions. Specifically, Congress indicated that conditions on residence should be removed if there is evidence that the petitioner invested (or is "in the process of investing") the required capital, and has sustained the investment in the new commercial enterprise.[10] Rejecting more rigid approaches, Congress required nothing else of the investor.[11]

While legacy INS later promulgated a regulation that requires evidence that the petitioner "created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees,"[12] it did not go so far as to mandate that the ten jobs be in place within two years or within any other specific timeframe. Indeed, Congress rejected existing legislative alternatives that would have imposed more rigid time requirements on job creation.[13] Notwithstanding the clear mandate from Congress that removal of conditions not be hindered by a "completed job creation" standard, USCIS more recently sought in an earlier Memorandum to impose such a standard as a petition adjudication condition by way of re-framing the purposes of the conditional residence period.[14]

Accepting for discussion's sake that job creation "within a reasonable period of time" is a petition adjudication condition, and that consistent with the intent of Congress, the regulation is to be flexibly interpreted, the petition adjudication conditions reflect the narrow legislative objective of imposing a conditional period on the investor so as to deter fraud while allowing broad latitude to the investor to carry out business objectives.[15] Accordingly, the investor is not required to do more than prove he or she (i) has invested or is in the process of investing the required capital; (ii) has sustained the investment; and (iii) has created, or will create within a reasonable period of time, the required jobs, with the term "reasonable" given as much flexibility as possible to render the

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[10] *Id.*

[11] An amendment to the statute in 2002 added the general provision of INA 216A(d)(1)(B) -- requiring the petitioner generally to be "conforming to the requirements of section 203(b)(5)."

[12] 8 CFR §216.6(c)(1)(iv).

[13] Congress rejected an earlier proposal that would have required all jobs to be created within a two-year period of making the investment, *see* 134 Cong. Rec. S2119 (1988), as well as another proposal that would have required all job creation to occur within a reasonable time but no later than six months after the investor's admission to the United States. *See* S. Rep. No. 101-55, at 21 (1989).

[14] "USCIS Memorandum, EB-5 Alien Entrepreneurs – Job Creation and Full-Time Positions." June 17, 2009. AILA Doc. No. 09061964. http://www.aila.org/content/default.aspx?docid=29306 ("June 2009 Memo"), adding new language to the Adjudicators Field Manual ("AFM") and stating that the primary purpose of I-829 adjudication is to determine whether the petitioner "has invested the requisite capital *and created the requisite jobs* through investment" (italics added). The June 2009 Memo amended the AFM to require that all I-526 petitions include a business plan providing for job creation within two years. The amendment cites to 8 CFR §204.6(j)(4)(i)(B), stating that the time requirement "is intended to ensure that aliens seeking to enter the United States on EB-5 visas have a legitimate and feasible plan to create jobs *as required by the statute* within that period of conditional residence." *See* June 2009 Memo, page 3 (italics added). But, to what statute does this refer? There is no statute that requires job creation within two years or within the period of conditional permanent residence.

[15] Members of Congress repeatedly observed they did not intend to hamstring the fluid business process with onerous, excessive and/or arbitrary standards. *See, e.g.*, 136 Cong. Rec. S17106, S17112 (1990)(Immigration Act of 1990 – Conference Report); Letters from U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs, to Gene McNary, INS Commissioner (April 12, 1991, and Aug. 2 1991).

regulation more harmonious with the law. With that evidence in hand, the law requires USCIS to approve the petition for removal of conditions.

With the statutory backdrop in place, it becomes clear that any bright line test, such as a one-year rule of thumb proposed by the Draft Memorandum, is inconsistent with the law. In lieu of any test proposing a fixed period of time as "reasonable," we instead urge that the Draft Memorandum set forth a "totality of the circumstances" test to assess whether jobs will be created "within a reasonable time," giving due weight to evidence of business commitment, concrete activity undertaken, and the variety of factors that may reasonably cause delay without limiting examples to just *force majeure*.

11. **Page 20, Regional Center Amendments**: While the Draft Memorandum observes that the Form I-924 provides a list of "acceptable amendments," the Memorandum should instead set forth when amendments to the regional center designation are *required*, thus resolving ambiguities in the Form I-924 instructions, designation approvals, and USCIS stakeholder materials.

    In that connection, a regional center amendment should not be required merely because details later become available that were not discussed in the original regional center application, nor should it be required if internal business structures or operations change, consistent with the customary evolution of a business, that have no direct bearing on basic EB-5 statutory requirements. Rather, an amendment should be required only if those details pertain to an issue that is clearly outside the scope of the approved regional center parameters – namely, approved industry clusters and geography. We note that there is no clear guidance on whether an amendment is required for changes in approved job creation methodology, and what USCIS deems an approved methodology. For example, if a regional center was approved under a hypothetical impacts analysis using the IMPLAN input-output model, would an amendment be required to use RIMS II or REDYN? The Memorandum should set forth clear answers to apprise stakeholders of the effects on associated Forms I-526.

12. **Page 20, Regional Center Amendments**: The Draft Memorandum does not discuss Form I-924 regional center project pre-approval amendments. The Memorandum should elevate pre-approval amendments as a key adjudication tool in ensuring predictability in Form I-526 adjudication, while preserving USCIS's interest in adjudicating project eligibility on a case-by-case basis.

    Expedited processing of Form I-924 pre-approval amendments is essential. Deference afforded to I-526 petitions associated with pre-approval amendments is likewise essential. (We discuss the Draft Memorandum's treatment of deference in greater detail below). Expedited processing will reduce the likelihood of major changes between I-924 pre-approval amendment and I-526 filing. Speed in deciding project eligibility is important to promoters, developers, and investors in providing a "green light" for associated I-526 petitions. Most regional centers

place investor funds in escrow until I-526 approval, per current market expectations. The 12+ month processing time for I-924 pre-approval amendments plus the 12-month processing time for I-526s before escrow release, present unworkable delays to shovel-ready projects.

Consistent and clear vocabulary, per comment number 7 above is also needed. The May 2011 USCIS proposal entitled *Proposed Changes to USCIS's Processing of EB-5 Cases*[16] promising clarity to the terminology, evidentiary standards, and effects is a good starting place for final treatment in the Memorandum. Please see our June 17, 2011 comments to that proposal.[17]

13. **Page 21, Deference**: To give effect to the Draft Memorandum's stated goal of "ensuring predictability" and "conserv[ing] scarce agency resources," USCIS's deference policy should define clear, narrow exceptions.

    The exception "legal deficiency" is undefined in the Draft Memorandum. We recommend that USCIS adopt the "material error" standard articulated in the USCIS Memorandum dated April 23, 2004 ("April 2004 Memo")[18] which addresses the adjudication of nonimmigrant petition extensions. USCIS examiners are directed to accord deference to prior favorable determinations in the absence of "misapplication of an objective statutory or regulatory requirement to the facts at hand." Prior determinations involving subjective evaluations are to be accorded deference. A definition of legal deficiency adopting the same standard would clearly advance the stated policy goals of deference in the EB-5 context.

    The exception "material change" is given a new definition in the Draft Memorandum: "A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision." This definition is unhelpful in the context of defining "material change" because of its circularity. USCIS's decision regarding whether or not a change is material would depend upon its definition of "material change." The definition offered in the Draft Memorandum only makes sense in connection with assessing the relevance of a fact with reference to a substantive standard, such as the relevance of birthplace with reference to qualifications for citizenship, the facts present in the cited decision *Kungys v. United States*. It does not make sense where the substantive standard is not yet defined as is still the case with material change.

    The Memorandum should adopt a material change standard based on the "substantial change" standard in the April 2004 Memo. Substantial change is set

[16] "Proposed Changes to USCIS's Processing of EB-5 Cases." May 19, 2011. AILA Doc. No. 11051963. http://www.aila.org/content/default.aspx?docid=35456
[17] "AILA Comments on USCIS Proposed Changes to EB-5 Processing." June 17, 2011. AILA Doc. No. 11061830. http://www.aila.org/content/default.aspx?docid=35945
[18] USCIS Memorandum, W. Yates, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity" (Apr. 23, 2004) ("April 2004 Memo") AILA Doc. No. 04050510. http://www.aila.org/content/default.aspx?docid=10654.

forth there as a major change involving cornerstones of eligibility, not merely change itself or some minor change. A definition of material change adopting the same standard would clearly advance the stated policy goals of deference in the EB-5 context.

Finally, the Draft Memorandum limits deference to prior favorable determinations of reasonableness in assessing economic methodology only if the related later adjudication is "directly linked to the specific project for which the economic methodology was previously approved." Given that many regional centers use identical methodology project after project, limiting the scope of deference accorded to prior favorable determinations of reasonable methodology to a single project lacks rationale. USCIS may conduct a fresh review of the facts feeding into a previously approved methodology and question feasibility under the preponderance of the evidence standard. However, previously approved methodologies and other approved business plan models and investment structures should continue to be accorded deference, absent clear objective legal error, until USCIS promulgates prospective policies giving notice to stakeholders of changed interpretations.

Due to the importance of project pre-approval amendments in ensuring predictability, the Memorandum should also explicitly clarify that an approved exemplar I-526 petition is binding upon USCIS prospective adjudications of I-526 petitions if they are materially similar to exemplar I-526 petition as set forth on the Form I-924 amendment. The only issue that USCIS should address in the associated I-526 petitions, therefore, is the investors' source of funds.

14. **Page 22, *Katigbak* and *Izummi***: We continue to be troubled by the Draft Memorandum's misinterpretation of *Matter of Katigbak* and *Matter of Izummi* with respect to post-filing changes. As other commentators have noted, *Matter of Katigbak* stands for the simple proposition that if a petitioner is ineligible at the time of filing, the defect may not be cured post-filing. *Matter of Izummi* stands for the same proposition. Neither case provides any support to invalidate an I-526 petition, if it in fact established eligibility at the time of filing, simply because "after the filing the petitioner becomes eligible under a new set of facts or circumstances." *Izummi* states at page 175:

> A petition must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.

The facts in *Izummi* were analogous to *Katigbak* where ineligibility *ab initio* was sought to be cured after filing. It is in this context that the AAO set forth the

language quoted in the Draft Memorandum. The context of the quote makes it clear that *Izummi* only concerned a fact pattern where there was ineligibility *ab initio*:

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

Contrary to the Draft Memorandum, it is not consistent with *Matter of Izummi* to hold that "if there are material changes to a Form I-526 at any time after filing, the petition cannot be approved." Again, if the petitioner was eligible at the time of filing *and continues to be eligible though under changed facts, neither Matter of Katigbak nor Matter of Izummi governs*.

The Draft Memorandum may correctly apply these authorities in the third paragraph in this section where it states, "A deficient Form I-526 petition may not be cured by subsequent changes to the business plan or factual changes made to address any other deficiency" to the extent that by "deficient" it means ineligible at the time of filing. In such instances, we agree that post-filing changes do not cure ineligibility and that a new Form I-526 petition is warranted. For clarity, the Memorandum should use the language in the precedent decisions rather than "deficient" to refer to petitions that are ineligible at the time of filing.

The fourth paragraph in this section expresses a new concept that would permit USCIS to revoke an approved I-526 petition if there is a "material change" that occurred after approval and before admission in conditional permanent residency status. Again, *Katigbak* and *Izummi* do not provide relevant authority for this position, as an approval indicates that the petition established eligibility at the time of filing. As we have advanced in our earlier comments, the law and existing regulations are not hostile to business changes attending EB-5 enterprises, though USCIS's reading of *Katigbak* and *Izummi* appear to have animated a rigid approach to real world businesses.

Summarizing prior USCIS pronouncements, including most notably the USCIS Memorandum dated December 11, 2009, USCIS would require continuity of at least five separate factors to avoid a finding of "material change":

- Capital investment structure
- Capital investment project
- Business plan

- Job creation methodologies; and
- Eligibility requirements already approved in the I-526 petition.

The material change concept, as articulated by USCIS, would find material change in every business when one considers the breadth of activities in the life of the commercial enterprise that could potentially fall within the scope of at least one of the five factors. A static business plan, and for that matter, a static business, does not exist. Participation by a new funding source to ensure project completion might constitute prohibited changes in the "capital investment structure"; adding an unplanned location to a chain of restaurant franchises might amount to a prohibited change in the "capital investment project"; using a different construction company not identified in the plan to construct a building could be a material "business plan" change; actual expenditures or actual "direct" jobs could be different (and are likely to be different) from what was estimated, raising the question of whether "job creation methodologies" have been materially changed; and the investor's management role in the commercial enterprise may have been slightly modified during the conditional residence period, leaving some doubt as to whether previously approved "eligibility requirements" have materially changed. The job-creating business that was the basis for the business plan may be struck by environmental factors beyond its control, such as hurricanes, floods, fire, or other unforeseen events. The economy may take an unprecedented and unanticipated turn as in the Great Recession of 2008-2009. An officer of the job-creating business may have an unexpected grave illness or accident. Examples are abound of ordinary and routine changes in business that could result in changes after the approval of a Form I-526 petition but before admission, especially when visa backlogs result in delayed admission for an indeterminate period of time.

Business survival that preserves investment capital requires change. In the months following Form I-526 petition approval and conditional residency admission, a business may reasonably be compelled to adapt. Accordingly, we urge USCIS to adopt a material change definition and policy that resonates with commercial realities without concern that *Katigbak* and *Izummi* compel rigidity in dealing with post-filing changes, as they do not where eligibility is initially established. (Please also see our December 2011 comment number 18 for additional information).

15. **Page 23, Second Full Paragraph**: In describing expectations in I-829 adjudication, the Draft Memorandum in clause (2) states that the petitioner must demonstrate "that the required amount of capital was *transferred* to the business or businesses most closely responsible for creating the employment" (emphasis added). Rather than using the term "transferred" which does not precisely track the language in *Matter of Izummi* on this point, the Memorandum should state: "that the required amount of capital was *made available* to the business or businesses most closely responsible for creating the employment *upon which the petition is based*."

We appreciate the opportunity to comment on the Draft Memorandum and look forward to a continuing dialogue with USCIS on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Attachments: December 2011 comments w/attachments

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December 9, 2011

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Re: AILA Comments on USCIS Draft Memorandum: EB-5 Adjudications Policy (PM-602-XXXX), Posted November 9, 2011

The American Immigration Lawyer's Association (AILA) submits the following comments in response to the draft policy memorandum, "EB-5 Adjudications Policy," posted on the USCIS website for comment on November 9, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed EB-5 memo and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The AILA EB-5 Committee applauds the efforts of USCIS to create a comprehensive memorandum that consolidates the agency's guidance to stakeholders in the EB-5 area. Although we believe that much of the Draft Memorandum contains an accurate recitation of the law and existing policy, and some of the areas of conflicting adjudication have been clarified, we appreciate the opportunity to comment on issues that require further clarification. Our comments include (a) areas where the law has been incorrectly stated; (b) areas covered by the Draft Memorandum where further clarification would be beneficial; and (c) areas not covered by the Draft Memorandum where we ask for the opportunity to provide suggested language.

Our comments, with reference to the pages of the Draft Memorandum, are as follows:

1. To the extent that the Draft Memorandum establishes new guidance in areas where there have been conflicting adjudication policies (such as deference to state geographical TEA designations and job creation by the new commercial enterprise and not the EB-5 investors in cases of bridge financing), we respectfully request that USCIS make this guidance immediately available to the field pending the finalization of the Draft Memorandum.

2. Page 1, Paragraph 3: Change "directly manage job-creating commercial enterprises" to "engage in the management of the job-creating commercial enterprise." 8 CFR §204.6(j)(5).

3. Page 3, Third Bullet Point: The Memorandum should explain the distinction between capital acquired "by unlawful means such as criminal activities" and capital acquired through lawful means by aliens who may have had immigration status violations during the time the capital was lawfully acquired. 8 CFR §204.6(e). Also, the Memorandum should clarify that the requirement to prove that capital was acquired by lawful means only applies to capital invested in the new commercial enterprise and not to other capital acquired by the investor or capital used to pay regional center expenses, overhead, etc. above and beyond the $500,000 or $1,000,000 that is invested in the new commercial enterprise. We note that some requests for evidence (RFE) are requesting this extraneous documentation.

4. Page 6, First Full Paragraph: The statement that the investment "must create the jobs in the targeted employment area" does not apply to indirect jobs in the regional center context as confirmed in the letter from USCIS Director Mayorkas to Senator Leahy (see attached). There is no statutory or regulatory limit to the geographic location of indirect jobs.

   The Adjudicator's Field Manual (AFM) does not state that all qualified indirect job creation must occur within a regional center, and Congress has never mandated such a requirement. This makes good sense. An EB-5 project may create employment outside of a regional center at the same time as it increases productivity within the regional center. Indirect employment creation outside regional center boundaries may be necessary to the function of the regional center project where, for example, materials or services provided from outside the region are necessary to implement the project. In such a case, without extra-regional employment creation there would be no increased employment within the regional center. It is also clear that small regional centers may not be able to confine all indirect employment within their boundaries or that projects situated close to the boundaries of a regional center may create employment outside the regional center perimeter.

   Regional center productivity supports the primary objective of the EB-5 program, codified at INA §203(b)(5)(A)(iii), which provides for EB-5 classification if the new commercial enterprise "*will benefit the United States economy* and create

full-time employment for not fewer than 10" qualified persons. Therefore, the primary purpose of the EB-5 program is to aid the entire U.S. economy. Thus, 8 CFR §204.6(m)(3)(iv) refers to "the manner in which the regional center will have a positive impact on the regional or *national* economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and *without* the regional center."[1]

5. Page 7, First Paragraph: Change "is to give deference to" to "shall not question or challenge" to conform to the language of AFM §22.4(c)(4)(F).

6. The Memorandum should specify that a census tract or combination of census tracts can constitute a "geographical subdivision" under the regulations. While "political subdivision" has a general defined meaning (such as a state, county, city),[2] there is no general definition of "geographic subdivision," Also, because the definitions set apart the qualifying areas in the alternative as "geographic *or* political subdivision," the *geographic subdivision* must have a meaning apart from *political subdivision*. It is evident, then, that "a" geographic subdivision may encompass any single area deemed rational by the delegated state authority, vested with the full authority under the regulations, to designate high unemployment areas. This single area may encompass unincorporated areas, for example, or multiple political subdivisions, or parts of political subdivisions or statistical subdivisions such as a single census tract or multiple census tracts.

   The purpose of the state designation letter is precisely to permit an authorized state body to designate *irregular* areas not readily encompassed by a political subdivision or subdivisions as high unemployment TEAs.

7. Page 8: The following clarification should be added: In order to determine whether an investment is in a "new commercial enterprise," the initial inquiry is whether the investment is in a commercial enterprise that was established after November 29, 1990.[3] If the investment is in a commercial enterprise that was established after November 29, 1990, the requirement is met and no further inquiry is appropriate. If the investment is made in a commercial enterprise established on or before November 29, 1990, the investor must meet one of two tests. In a pre-November 29, 1990 commercial enterprise, the investor must restructure or reorganize an existing business or expand the business in such a

[1] Emphasis added. NB: *Matter of Izumii* (in relevant part) states only that all the *business activity* of an EB-5 project must be conducted inside a regional center. This holding is entirely unrelated and irrelevant to the lawfully unsupportable conclusion that indirect employment generated outside a regional center by business activity inside a regional center may not be counted in support of an investor's petition.
[2] *See, e.g.*, http://www.financeglossary.net/definition/2694-Political_Subdivision (a county, city, town, or other municipal corporation, a public authority, and generally any publicly owned entity that is an instrumentality of a state or of a municipal corporation.)
[3] 8 CFR 204.6(c), Definition of "new."

way as to accomplish a 40 percent increase either in the net worth or the number of employees of the business.

We note that 8 CFR §204.6(h)(1), with respect to commercial enterprises established after November 29, 1990, requires that the investor "create an original business." This regulation is obsolete since it refers to the requirement in the law prior to November 2, 2002 that the investor must "establish a commercial enterprise." With the removal of that requirement in the 21st Century Department of Justice Appropriations Authorization Act, the alien need no longer create an original business; it is sufficient if he invests in and is engaged in a new commercial enterprise.[4]

8. Page 8: The Memorandum should clarify that a new commercial enterprise established after November 29, 1990 does not lose its status as a new commercial enterprise because it purchases assets from an independent enterprise which it does not acquire and with respect to which it is not a successor in interest (assuming it does not acquire all of the rights and liabilities of the independent company whose assets have been purchased).

   The date that the company from which assets were purchased was established is completely irrelevant as to whether the purchasing company is a new commercial enterprise. USCIS has without legal basis required the demonstration of a successor-in-interest relationship (i.e. assumption of rights and obligations of the seller) between the entity from which the EB-5 enterprise has purchased assets and the EB-5 enterprise. However, if USCIS considers the purchase of assets to be relevant to the determination of new commercial enterprise, it should use the same standard for successor in interest that it has employed in adjudicating other immigration petitions.

   USCIS defines successor in interest for non-EB-5 benefits as when "one company assumes all the rights and obligations of another company."[5] However, USCIS imposes a different standard in EB-5 adjudications. Currently, when an investor forms a new company, purchases assets from an existent business, and opens in the same location, the new company must prove that the prior company was established after November 29, 1990, which it cannot do since it is not a successor in interest and has no access to the company's records. Likewise, if the investor is not a successor in interest, he or she does not have access to documents required to prove an increase in net worth or number of employees or restructuring, as the investor has no ownership relationship with the seller.

[4] *See* Memorandum, William Yates, Acting Associate Director of Operations, "Amendments Affecting the Adjudication of Petitions for Alien Entrepreneur" (HQ 40/6.1.3) (June 10, 2003).
[5] *See* Letter from Efren Hernandez, 77 Interpreter Releases 591 (May 1, 2000). *See also* Letter, Hernandez, Director, Business and Trade Services, INS HQ 70/6.1.3 (Oct. 17, 2001); Memorandum, Puleo, Acting Exec. Assoc. Comm. HQ 204.24-P, HQ 204.25-P (Dec. 10, 1993). *Cf* 8 CFR §274a.2(b)(1)(viii)(A)(7).

It is unreasonable to expect a business to disclose confidential tax information to a company that merely purchases some of its assets. Although USCIS should not confuse the EB-5 enterprise's use of EB-5 proceeds to purchase assets with a successor-in-interest scenario, if it does, it should adhere to the successor-in-interest standard that it has followed for decades and should not vary from this determination in the EB-5 realm.

9. Page 8, Section 2a: The Memorandum should clarify what constitutes sufficient restructuring or reorganization for purposes of creating a new commercial enterprise. This is critical because these terms have not been defined in any AAO decision or in any stakeholders meeting. The only precedent decision to discuss corporate restructuring and reorganization required by 8 CFR §204.6 (h)(2) is *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998). In *Soffici*, an investor purchased a Howard Johnson's Motor Lodge and continued to run it as such. The AAO held that this did not constitute a qualifying "reorganization," stating that the petitioner had not shown the degree of restructuring and reorganization required by the regulations. The AAO noted that the hotel had always been a Howard Johnson and continued to be so. Though *Soffici* addressed a situation where restructuring and reorganization had clearly not occurred, it failed to provide any type of guidance on when it would occur.

   In a July 11, 2001 non-precedent decision, the AAO found that sufficient restructuring and reorganization had occurred where an investor purchased a farm that bred and trained a few horses and provided a business plan to show he would be constructing a substantial breeding and training program and selling well trained dressage and show jumping horses. The AAO noted that the proposed business reflected a clear change in mission and dramatically expanded the services of the farm. In addition, the investor not only obtained land use rights but also purchased additional farm land.

   At the very least, a change in the mission or focus of a business should also result in sufficient reorganization or restructuring. Some examples are:

   - A restaurant becomes a nightclub
   - A dairy farm also becomes a crop producing farm
   - A hotel becomes an adult congregate living facility.

10. Page 11, C: While USCIS must focus on the number of full-time qualifying employment positions created by the new commercial enterprise, it should not deem relevant prior employment positions in unrelated entities. For example, a Subway restaurant in a strip mall closes. Shortly thereafter, a Taco Bell leases the same space and hires ten full-time workers. USCIS should not request evidence of the number of employees employed at the Subway restaurant. There would be no way for the Taco Bell investor to know this information and there is no legal basis to require an investor to prove employment numbers in an unrelated company.

USCIS currently requires this by way of requesting evidence of "relocated" jobs and discounting them.

11. Page 12, Top: The Draft Memorandum properly indicates that 8 CFR§204.6(j)(4)(i) states that it is the new commercial enterprise, not the EB-5 investor, which must create the requisite employment positions. However, the Draft Memorandum should make note of the very common practice of real estate developers utilizing interim, temporary, or bridge financing—in the form of either debt or equity—prior to receipt of EB-5 capital. Language such as the following should be added: "Since the job creation requirement applies to the 'new commercial enterprise' rather than the specific EB-5 investor's capital, the commencement of job creation based upon bridge or interim financing subsequently replaced by EB-5 capital does not detract from the creation of jobs by the new commercial enterprise."[6]

12. Page 13, Third paragraph: The distinction between part-time positions and job sharing arrangements should be clarified by noting that job sharing arrangements apply to two or more qualifying employees "in the same job" whereas part-time positions apply to two or more employees "in different jobs."

13. Page 13, 2(a): Examples should be provided to clarify areas of confusion:

    - An investor in a troubled business with six qualifying employees can qualify by saving the six jobs and adding four qualifying employees.
    - Three investors who invest concurrently on the same day in a troubled business with 20 existing qualifying employees can all qualify by saving the 20 jobs and adding 10 new qualifying employees.
    - Ten investors in a regional center troubled business with 20 existing qualifying employees can qualify by saving all 20 employee positions which are direct jobs and adding 80 additional direct and/or indirect jobs as calculated by a reasonable economic methodology.

14. Page 14 (c): The last sentence should clarify that the indirect jobs can be outside of the regional center.

15. Page 14, 3: The Memorandum should clarify that a new commercial enterprise is not required to violate 8 CFR §274a in order to meet the requirements of EB-5. Our position paper on this subject, with the warning to employers from the Department of Justice Office of Special Counsel is attached.

16. Page 14: We suggest that page 14(c) be changed to read as follows:

[6] *See* AILA EB-5 Committee position paper on interim financing, attached.

(c) New Commercial Enterprise Located Within and Associated With a Regional Center

For a new commercial enterprise that is not a troubled business and is located within a regional center, the EB-5 program provides that the full-time positions can be created either directly or indirectly by the new commercial enterprise. 8 CFR §204.6((j)(4)(iii). These terms are generally defined as follows:

- ***Direct jobs*** are those jobs that establish an employer-employee relationship between the *new* commercial enterprise and the persons that they *directly* employ *(as manifested by payroll records, I-9 employment eligibility verification records, and W-2 tax wage statements).*

- ***Indirect jobs*** are the jobs held by persons who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise, such as steel producers or outside firms that provide accounting services. There is a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. Induced jobs are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

Regional centers use various economic models to determine the number of indirect jobs that will be created through investments in the regional center's investment projects.

Many economic models used to demonstrate indirect job creation rely on certain assumptions or variables to show the requisite job creation including, but not limited to, direct-effects, construction expenditures, gross annual revenues, square footage or loan amount.

Economists sometimes use the term "direct" workers or jobs when calculating the total indirect job creation impacts from construction activities. As noted above, however, USCIS deems "direct" jobs as only those workers directly employed by the new commercial enterprise. This has created some confusion among stakeholders. Thus, USCIS should clarify that unless the new commercial enterprise is, in fact, a construction company, the job creation impacts resulting from construction expenditures are recognized as "indirect" jobs.

17. Page 15, Top: The Memorandum should explain that *Matter of Ho* applies to "general" and "troubled business" EB-5 petitions and not to regional centers or regional center projects. 8 CFR §204.6(j)(4) requires a business plan to meet the two-year job-creation requirement in the context of (i) a "general" EB-5 project;

and (ii) a troubled business. Neither the business plan nor the two-year job creation is referenced in subsection (iii) relating to the Immigrant Investor Pilot Program. Rather, for regional centers, the regulation requires "reasonable methodologies" to demonstrate employment creation rather than a business plan. Therefore, it is incorrect to treat *Matter of Ho* as applying to regional center-based EB-5 cases.

18. Page 17, B: The first paragraph is very helpful in explaining the realities of the business world. We commend USCIS's intention to modify its prior position regarding approvability of Form I-829 notwithstanding changes in the business plan contained in the I-526 petition. For the reasons set forth in AILA's January 21, 2011 comments, we believe that requiring an unchanged business plan at the I-829 phase is flawed as a matter of law and accordingly welcome this change.

    However, the Memorandum should make clear that *Matter of Izummi* and *Matter of Katigbak* do not relate in any way to material changes subsequent to the approval of an I-526 petition and prior to the filing of the separate I-829. The Draft Memorandum incorrectly references *Katigbak,* a decision adopted in the EB-5 context in *Izummi*. USCIS's construction of *Katigbak* and *Izummi* laid the flawed groundwork to its material change policy in the December 2009 Memorandum. We are troubled to see that the Draft Memorandum expresses an even further departure from the actual holdings in these cases when it reformulates *Katigbak* and *Izummi* as supporting the position that "a petition cannot be approved if, after filing, the petitioner becomes eligible under a new set of facts or circumstances." Under this formulation, even if eligibility is met at the time of filing and the petitioner demonstrates *continued* eligibility under different facts, USCIS will find *Katigbak* and *Izummi* violations. *Katigbak* and *Izummi* do not support this conclusion. Accordingly, we offer an analysis of these cases in the hope that USCIS will properly apply these authorities in EB-5 policy and adjudication.

    In *Katigbak*, the beneficiary did not qualify for the EB-3 preference category at the time of filing a petition on December 6, 1970. She lacked the required academic preparation to qualify as an accountant, a "member of the professions," when the petition was filed, having only 19 2/3 semester units toward an accounting degree rather than the generally required 24. The petitioner claimed that in 1971, after the petition was filed and denied, the petitioner fulfilled the unit requirements. Rejecting these post-filing attempts to qualify, *Katigbak* held:

    > A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. A beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

    In *Katigbak*, therefore, there was ineligibility *ab initio* as a matter of fact.

In *Izummi*, after the I-526 was filed, the petitioner amended, among other documents, the limited partnership agreement in two stages. The second stage amendments, the petitioner contended, would make the I-526 approvable. Citing *Katigbak*, the AAO refused to recognize the second stage amendments, stating, "the Service cannot consider facts that come into being only subsequent to the filing of a petition." *Izummi* states:

> A petition must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.

The facts in *Izummi* were analogous to *Katigbak* where there was ineligibility *ab initio* sought to be cured after filing. A "material change" therefore is a change made post-filing to cure an ineligibility defect. If the petitioner demonstrates eligibility at the time of filing, *Katigbak* and *Izummi* are improper authorities to disallow post-filing change, as such changes do not attempt to cure an *ab initio* ineligibility defect.

Similarly, contrary to the Draft Memorandum, *Katigbak* and *Izummi* do not concern cases where "the petitioner becomes eligible under a new set of facts or circumstances." USCIS's new articulation of *Katigbak* and *Izummi* in the Draft Memorandum is particularly concerning because, if adopted, USCIS would now find a *Katigbak* and *Izummi* problem where (1) a petitioner establishes eligibility *ab initio*; and (2) continues to establish eligibility, though under changed facts. Under these authorities properly understood, either fact actually renders *Katigbak* or *Izummi* inapposite.

USCIS's surface interpretation of *Katigbak* and *Izummi* has resulted in, or at least supported, policies distrustful of inevitable business changes. As we have advanced in our earlier comments, the law and existing regulations are not hostile to business changes attending EB-5 enterprises, but rather encourage adjudication flexibility to accommodate such changes. USCIS should not use *Katigbak* and *Izummi* to uphold rigidity in dealing with post-filing changes, particularly where petitioners demonstrate continued eligibility.

19. Page 18, 1: The entire section on regional center applications (I-924) should be removed from the section dealing with material change and dealt with separately. The issue of when an amended I-924 is required is not dealt with in the Draft Memorandum and is not a material change issue. We will separately submit suggested language for the Memorandum relating to I-924s and amended I-924s.

A regional center application is not an application by an alien for an immigration benefit based on specifically enumerated statutory eligibility criteria. Rather, a regional center application describes the parameters and anticipated impact of the proposed regional center's activities.[7] The application sets forth in broad terms, the geographic and industry scope of the regional center's planned activities; the types of investment structures to be used; the predicted economic impacts; the reasonable methodologies to be used to calculate such impacts; and the regional center's future oversight and administration plan.

The approval of a regional center application confirms that the activities outlined in the regional center's approval and designation letter are permissible. Approval and designation letters are broadly construed to be in accord with the nature and purpose of the regional center designation. It is only the later-filed individual I-526 and I-829 petitions affiliated with an approved regional center that must specifically comply with statutory eligibility requirements for employment-based fifth preference classification. The concept of "material change," as understood in the context of individual applications and petitions for immigration benefits, does not apply to regional center applications. Regional centers may anticipate and incorporate change as businesses grow and evolve. For example, a regional center may anticipate opening a restaurant and later franchising and creating a restaurant chain. While operating a business may be different from managing a restaurant franchise operation, this type of anticipated material change is permissible within the framework of a regional center.

If a regional center wishes to expand its scope beyond that described in the regional center proposal materials approved by USCIS, it must request and obtain approval of an amendment to the regional center's designation. The regulations anticipate that USCIS be informed of, and evaluate, the proposed expansion of scope. USCIS should facilitate and not hinder job-creating investment activity through the operation of regional centers. Accordingly, a regional center amendment should not be required merely because details later become available that were not discussed in the regional center application, nor should an amendment be required if details of internal business structures and operations change consistent with the customary evolution of businesses having no direct bearing on basic EB-5 statutory requirements. Rather, an amendment should be required only if those details pertain to an issue that is clearly outside the scope of the approved regional center parameters.

20. Page 18, 1: This section should also clarify that an approved exemplar I-526 petition is binding upon USCIS prospective adjudications of I-526 petitions if they are identical regarding the regional center project. The only issue that USCIS should address is the investor's source of funds.

[7] *See* Section 610 of Public Law 102-395; 8 CFR 204.6(m)(3).

21. Page 18, 2: The Memorandum should confirm that, regardless of filing an amended I-924, an investor can, at the prescribed time, proceed to file form I-829 to remove conditions and present evidence demonstrating that the requirements for the removal of conditions have been satisfied based on sustaining the investment and creating the requisite jobs (or proving that jobs will be created within a reasonable time) notwithstanding a change in the business plan.

22. Page 18: USCIS's policy of denying I-829s if there has been a material change in a project has resulted in denials for bona fide investors whose money has already been used in building projects that have created jobs for U.S. workers. Given that almost all development projects have gone through changes caused by the severe economic recession, adverse weather conditions, unavailability of financing and other reasons, investors are left with a serious dilemma. They can file the I-829 and hope that USCIS does not consider changes to be material, which is a pure guessing game since there is no standard for material change. If they guess wrong, they end up in removal proceedings. If they fear USCIS might consider a change to be material, they have to start all over again, leaving conditional permanent resident children subject to removal from the United States if they have turned 21. USCIS must develop an alternative procedure for dealing with changes in projects where jobs have been created or will be created within a reasonable time.

    The problem is exacerbated in regional center projects with many investors. Let's postulate a regional center project with 50 investors who have to file I-829 petitions. Nothing in the I-829 relates to the investor; everything relates to the regional center project. Therefore, all of the I-829 petitions will be the same other than the allocation of jobs to each individual investor.

    Presently, all 50 investors have to file I-829 petitions and hope that USCIS does not find that there has been a material change when the petitions are adjudicated 7 or 8 months later. These 50 petitions may go to 50 different examiners who may make inconsistent findings, with some investors getting their conditions removed and others finding themselves in removal proceedings. This is a highly inefficient procedure for USCIS and a highly unsatisfactory procedure for good faith investors who have invested money in job-creating enterprises.

    Instead, USCIS should create a completely optional procedure for the regional center to file an exemplar I-829, similar to the procedure already established for the exemplar I-526. If USCIS believes there has been a material change from the original business plan, but there has been no fraud and the requisite number of jobs has been created, it can adjudicate compliance with the statutory provisions in the context of the exemplar I-829. If necessary, at the option of the regional center or at the insistence of USCIS when reviewing the exemplar I-829, the regional center could file an amended I-924 or amended exemplar I-526 to enable the Service to approve the changes and make a finding that all statutory and regulatory criteria have been met.

Individual investors would still timely file their individual I-829s. If the exemplar I-829 is still pending, the petitions would be filed with a receipt showing the pendency of the exemplar I-829. An RFE would be issued for the approval of the exemplar I-829 and/or amended I-924. Upon approval, the approval notices would be sent in response to the RFE to enable the examiner to approve each individual's I-829. This procedure would be similar to the procedure that USCIS has adopted for dealing with the I-751 conditional removal process where the I-751 is submitted after a divorce petition is filed but before the divorce is finalized. An RFE is issued for the divorce order. When the divorce is finalized, the divorce order is submitted to USCIS, and the I-751 petition is adjudicated.

The procedure requiring a new I-526 when there is a material change was created before the existence of the I-924 and before the Service had any experience with the exemplar I-526, which is used increasingly by regional centers. The procedure suggested above is a logical extension of those new procedures. The new I-526 option would be reserved for only the direst of cases where jobs would not be created within a reasonable time but investors have invested in good faith.

We emphasize that this suggested procedure should be completely optional and should only apply in the case of good faith investors and absent any fraud. We believe it enhances the integrity of the EB-5 program, drastically reduces adjudication time, promotes family reunification, prevents multiple petitions, and enables the Service to adjudicate the statutory and regulatory compliance prior to removing the conditions for any investor.

23. Page 18: The section on condition removal should set out the procedure to be followed when an investor opts to file an amended I-526 petition. This procedure should provide for holding the I-829 in abeyance and for concurrent adjudication of the application for adjustment of status or immigrant visa (and work/travel authorization if adjustment is filed) and the application for abandonment of conditional residence, so that there is no interruption in the investor's status, work authorization or travel permission.

24. The Memorandum should clarify that following to join dependents who acquire conditional permanent resident status after the principal acquires such status based on the same I-526 approval, up until the filing of the I-829 by the principal, should be able to remove conditions at the same time as the principal. Nowhere in 8 CFR §216.6(a)(l) is there language prohibiting the spouse and children who obtained conditional status after the principal's acquisition of conditional status from being included in the same I-829. When this language is compared to 8 CFR §216.4(a)(2) governing I-751 condition removal, there can be no doubt that the Service intended to treat the spouse and children differently in terms of I-829 benefits. In the I-829 context, the regulatory language limiting dependents who acquired conditional status within 90 days after the principal's acquisition of conditional status to be joined in the same I-829 has intentionally been left out.

> This differential treatment of dependents is due to the fact that in the I-751 context, a principal applicant and a dependent child must be petitioned separately by the same USCIS petitioner-spouse, whereas in the I-829 context, spouse and children are included in the I-526 immigrant petition. Therefore, as long as the spouse and children obtained conditional status at any time after the principal acquired his status, there is no legal reason why such dependents should not be allowed to file and be accorded condition removal via the principal's I-829. This conclusion is supported by the practicality that there is no separate issue to be adjudicated in a stand-alone I-829 petition by a family member.

In addition to these comments on the specific provisions of the Draft Memorandum, we suggest that the following important areas of EB-5 practice be included in the expanded and final Memorandum:

- Project preapprovals
- TEA longevity
- Congressional intent relating to removal of conditions
- Regional center amendments
- Indirect construction jobs
- 2.5 year job creation rule
- Length of time for substantiating I-829
- Clarification of the timeframe/methodology to calculate the 150%.

We will provide suggested language for the Memorandum in these important areas. We appreciate the opportunity to comment on the Draft Memorandum and look forward to a continuing dialogue with USCIS on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529

U.S. Citizenship and Immigration Services

DEC – 3 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Thank you for your September 27, 2010 letter regarding the EB-5 Regional Center Program administered by U.S. Citizenship and Immigration Services (USCIS). You expressed your view that, contrary to USCIS's existing interpretation, a proposed regional center business plan may encompass job creation outside the center's geographic boundaries. Upon review of the applicable EB-5 law and regulations, we agree that a regional center may rely on jobs indirectly created outside its geographic boundaries.

USCIS's interpretation derived from the geographic requirements identified in *Matter of Izummi*, 22 I&N 158 (Comm'r. 1998), and other sources. *Matter of Izummi* holds that if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, those job-creating businesses must all be located within the regional center's geographic limits. Similarly, Section 610(a) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, as amended, provides that "[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." Likewise, USCIS's regulation at 8 CFR 204.6(m)(3)(i) requires each regional center to provide a proposal that "clearly describes how the regional center focuses on a geographic region of the United States."

Based on those sources, USCIS interprets the law to require that a regional center focus its EB-5 capital investment activities on a single, contiguous area within the defined geographic jurisdiction requested by the regional center. Nevertheless, we agree that the law does not further mandate that all indirect job creation attributable to a regional center take place within that jurisdiction. I will, therefore, ensure that USCIS policy reflects this understanding of the law.

Thank you again for your letter. I assure you that USCIS maintains its commitment to the success of the EB-5 Regional Center Program. I look forward to our continued collaboration on important issues of mutual interest.

Sincerely,

Alejandro N Mayorkas

Alejandro N. Mayorkas
Director

To: Director Mayorkis (for July meeting)

From: AILA EB-5 Committe

USE OF EB-5 CAPITAL TO PAY BACK BRIDGE FINANCING

As a result of the great American recession that began in the fourth quarter of 2007, EB-5 investment has become a highly attractive and sometimes singular option for many businesses facing the loss of cash flow and domestic debt and equity financing sources. The number of EB-5 program stakeholders has grown exponentially and has come to represent an increasing diversity of business needs, including and especially nascent projects that urgently need foreign investment capital to continue viably and successfully reach completion. Such projects must make use of bridge financing to stay viable while anticipating the deployment of EB-5 capital, and they look to prospective EB-5 investment to repay the short-term financing as an integral part of the job creation plan. USCIS has previously accepted the repayment of bridge loans as a permissible use of EB-5 investment capital, and we ask that the agency adopt this position officially in order to encourage the ultimate goal of the EB-5 program: strong, ongoing commercial activities that sustain lasting jobs for U.S. workers.

Due to the nature of investor recruitment and processing under the EB-5 program, EB-5 capital as a practical matter is never immediately available. Rather, it is contingent upon the success of marketing activities as well as USCIS processing times, both for I-924 regional center applications (whether for initial approval, amendment, or project preapproval) and I-526 immigrant investor petitions. As a practical matter, many projects are ready to commence, and need to commence before the EB-5 money is available to the project. For example, real estate development projects often run on tight deadlines and cannot afford delay in the permitting and entitlement processes. In order to commence the project, the project principal is often required to either "front" the initial costs or obtain financing in the form of a bridge loan with the expectation that the EB-5 money will come in shortly to either pay back the developer or the bridge loan. Short-term bridge financing becomes a significant part of a project's business plan, with the end goal being completion of the business plan resulting in the creation of permanent jobs.

The fact that EB-5 capital is injected into a project to pay back short-term bridge financing, so that the project can proceed to completion, does not undermine the direct connection between the EB-5 funds and ultimate job creation. The analysis of a business' progress, operations and success leading to permanent job creation is not focused on capital contributions made at certain points across a linear timeline but rather studies the convergence of numerous factors all of which are necessary to sustaining the business as a whole. The EB-5 statute recognizes that the investment of an individual will strengthen the new commercial enterprise as a whole, thereby allowing the enterprise to create the requisite jobs, and also that it would be an impossible task to trace a particular investor's funds to subsequent job creation. Section 203(b)(5) of the Immigration & Nationality Act, ("the Act") provides for visas to be made available to qualified immigrants seeking to enter the U.S. to engage in a "new commercial enterprise...which will benefit the United States economy and create full-time employment for not

fewer than 10" qualifying employees. (Emphasis added.) The Act is clear that the new commercial enterprise will create the jobs; there is no statutory requirement that a particular investor's investment at a given point in time be traced to subsequent job creation.

The EB-5 regulations also provide that in analyzing job creation, it is the new commercial enterprise and not the individual investor that must create the jobs. 8 CFR 204.6(j) states, "A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the U.S. which will create full--time positions for not fewer than 10 qualifying employees." (Emphasis added.) 8 CFR 204.6 (j) (4)(i) also provides that "the new commercial enterprise will create not fewer than ten (10) full-time positions..." (Emphasis added).

Moreover, requiring that an individual investor's funds be traced to the jobs that are created as a result of the investment is incompatible with business reality. If an investor's funds are used to pay down debt of the new commercial enterprise, the new commercial enterprise will no longer have to use working capital to pay debt, allowing the capital to be used to pay salaries, or expand the business in a manner that will support additional employment opportunities. Clearly, making capital more available to a business will result in more job opportunities. Similarly, if a company owes $10 million in debt and opts to use the invested funds to pay off the debt, the company is free to use new capital to pay additional employees, purchase new equipment or improve physical facilities. Whether the invested funds are directly used to pay salaries or to pay off the debt should make no difference as long as the funds are benefitting the new commercial enterprise, the new commercial enterprise can create the requisite jobs.

If repayment of debt were removed as a potential use of EB-5 investor funds, irreparable damage would result to projects that have no other long term financing options in the current capital market. Regional Centers in particular would be unable to manage financial operations in a manner most beneficial to the projects and the U.S. economy. It is the availability of EB-5 funding that enables projects to proceed using short term bridge financing and avoid the fate of stalling and failing. The practice of a business obtaining bridge financing or a developer fronting costs with the expectation of being paid back by investors in the near future is a normal business practice, which should be recognized and embraced in EB-5 adjudications so that the EB-5 program can realize its intended purposes.

In conclusion, the EB-5 program, and especially the regional center program, was created to facilitate business and job creation in the U.S. economy through the strategic application of foreign investor capital. Because of the protracted processing times for Regional Center designation and I-526 approval, funds are not always available to a new commercial enterprise at the onset of the investment, and enterprises are required to obtain bridge loans to meet initial financial obligations until the funds invested in the EB-5 enterprise are available. This is a business reality and necessity. We ask that USCIS continue in the vein of shaping the EB-5 program into one that best suits business realities and optimizes the benefits to U.S. enterprises, U.S. workers, and the U.S. economy.

Service Requests for Documentation Relating to Employees

In recent adjudication of I-829 petitions, USCIS has demanded documentation of status of employees that far exceeds the standard requirements imposed on U.S. employers. In requiring EB5 investors to prove the immigration status of the employees of the commercial enterprise, CIS is requiring employers to violate the anti-discrimination provisions of Section 274A and subjecting them to liability in order to obtain the immigration benefit of condition removal.

Pursuant to statute,[1] an employer is obligated to use the Form I-9 to verify the employment authorization of its workforce. An employee, regardless of citizenship or immigration status, must provide for the employer's review a List A document (establishing both identity and employment authorization) such as a U.S. passport, or the combination of a List B document (establishing identity) such as a driver license and a List C document (establishing employment authorization) such as a Social Security card. An employer is obligated to accept a document that reasonably appears to be genuine on its face. Under federal anti-discrimination laws an employer may be heavily penalized for prescribing which documents an employee must provide in the I-9 process.[2]

Nevertheless, in the adjudication of I-829 petitions, and even though the investor often is not the employer, USCIS has insisted that the investor provide substantial evidence of the immigration status of the employer's workforce.

For investors who require specific guidance on how to proceed – between the rock of USCIS which demands specific documentation of immigrant or citizenship status and the hard place of federal anti-discrimination laws – USCIS offers little. In one I-829 case, the RFE indicated that the I-9 information was compared with the "Service database" and USCIS had determined that a certain percentage of the employees' information "did not match" and therefore those employees could not be "verified" as qualifying employees. The USCIS did not specify which of the employees could not be verified, and consequently, the employer was required to treat all employees as unverified.

The upshot of this trend in I-829 adjudication is that USCIS is not merely requiring the investor to present properly completed and documented I-9s for the commercial enterprise's workforce. Instead, as a condition of I-829 approval, USCIS is requiring the investor to go beyond the I-9 employment verification process and present compelling documentation of the immigration status of each employee.

An I-829 Petitioner should never be required to violate the law in order to obtain a benefit and should only be required to submit properly completed I-9 forms and payroll records to demonstrate the full-time employment of U.S. workers. CIS should not look behind these documents to determine whether the employees were in fact U.S. workers, as the Petitioner cannot request new or different documents than the law permits in determining an employee's employment eligibility. Certainly, CIS does not want to encourage an I-829 Petitioner to violate the anti-discrimination provisions.

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[1] INA §274A(b)(1).

[2] INA §274B(a)(6).

If the Service is not going to accept I-9s to satisfy the job creation requirement, and is going to perform its own independent verification of the immigration status of the employees for whom I-9s are submitted, the proper adjudication is not to deny the I-829 if one or more employees is not in proper immigration status according to the Service's records. Rather, in order to enable an employer to comply with the anti-discrimination provisions, the Service should issue an RFE advising of the specific employees whose status is being questioned. This presumably would give the employer actual or constructive notice sufficient to justify requesting the employee to provide further documentation of citizenship or permanent resident status. If the employee is unable to do so, the employer would be able to replace the employee with another citizen or permanent resident worker. In order to provide the employer sufficient time to both give the existing employee an opportunity to prove legal status and, if not, to terminate the existing employee and replace him with a new employee, the RFE should provide a minimum 120 day response time.

Immigration Status and National Origin Discrimination in Employment

The U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) works to ensure that employers do not discriminate against individuals who are permitted to work in the U.S. based on their immigration status or national origin.

Employers discriminate on these unlawful bases when they fail to give equal treatment to workers in the hiring and firing process on the basis of where the workers are from or appear to be from, or whether the workers are U.S. citizens or not. Employers may also discriminate when they treat workers differently on these bases in the Form I-9 and E-Verify employment eligibility verification processes.

OSC vigorously investigates and prosecutes such claims of discrimination. Employers found to be engaging in discriminatory activity may be required to pay civil penalties and any appropriate back pay to injured parties.

AN EMPLOYER MAY BE DISCRIMINATING ON THE BASIS OF IMMIGRATION STATUS OR NATIONAL ORIGIN IN EMPLOYMENT IF AN EMPLOYER:

- **Demands specific documents from a worker**
  Example: In May 2011, OSC reached a settlement that provided for $45,760 in civil penalties from an employer that had a policy of requiring newly-hired non-U.S. citizen workers to produce specific government-issued documentation before they were permitted to begin work, while U.S. citizen new hires were permitted to present their choice of documents to satisfy the Form I-9 process and to begin employment. For example, lawful permanent residents were not permitted to begin work unless they presented "green" cards, even if they had presented valid driver's licenses and unrestricted social security cards.

- **Asks certain workers for more documents than needed to complete the Form I-9**
  Example: In October 2010, OSC reached a settlement with an employer that provided for $257,000 in civil penalties after finding the employer engaged in a pattern and practice of requiring naturalized U.S. citizen workers and non-U.S. citizen workers to produce more documents than required by law for the Form I-9 process. Specifically, the employer demanded that non-U.S. citizens produce a List A document after having already presented List B and List C documents, while permitting native born U.S. citizens to choose which documents to present.

- **Rejects valid work authorization documents from non-U.S. citizens but accepts the same documents from U.S. citizens**
  Example: In June 2010, OSC reached a settlement providing for $8,586 in back pay to two non-U.S. citizen workers and $2,200 in civil penalties after finding the employer rejected their

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unrestricted Social Security cards and demanded to see additional documents to prove their work eligibility, but routinely accepted Social Security cards presented by U.S. citizen workers.

- **Demands that lawful permanent residents present new "green cards" when theirs expire but does not ask U.S. citizens to produce new documents when theirs expire**

  Example: In November 2010, OSC reached a settlement including $10,200 in civil penalties against an employer that had a pattern and practice of requiring all lawful permanent resident workers who presented green cards for the Form I-9 to present renewed green cards when their cards expired, but did not require U.S. citizen workers to present renewed documents when their documents expired. Both lawful permanent residents and U.S. citizens are always work authorized, regardless of the expiration of their documentation.

- **Refuses to hire workers who sound or appear foreign**

  Example: In April 2011, OSC reached a settlement providing for $18,550 in back pay to a non-U.S. citizen job applicant and $3,200 in civil penalties after finding the employer instituted a policy of not hiring any immigrants, leading the employer's human resources personnel to reject all applicants who sounded or appeared foreign.

- **Only hires U.S. citizens (unless that policy is specifically required by law)**

  Example: In May 2010, OSC reached a settlement providing for $7,100 in back pay to a non-U.S. citizen job applicant who was denied a job because he was not a U.S. citizen and who was then retaliated against for reporting the employer's refusal to hire him.

- **Hires workers on non-immigrant visas, such as H-2B or H-2A workers, but rejects U.S. citizens and other work-authorized individuals who apply for work**

  Example: In May 2010, OSC reached a settlement providing for $11,173 in back pay to a U.S. citizen after finding the employer discriminated against him by preferring H-2B temporary visa holders.

- **Hires undocumented workers instead of work-authorized individuals**

  Example: In November 2010, OSC issued a letter of resolution providing for $2,000 in back pay to a lawful permanent resident who was discriminated against in favor of an undocumented worker.

- **Fires work-authorized workers for lying about their prior undocumented status, but does not fire other workers for lying about different aspects of their background.**

  Example: In May 2010, OSC issued letters of resolution after an employer agreed to provide a total of $13,167 in back pay to several workers, resolving a case where the employer terminated the workers for having misrepresented their authorization to work when they were hired, despite the fact that they had since legalized their status and corrected their information

with the company. OSC found that the company had not terminated other workers that corrected false information regarding other aspects of their background.

AN EMPLOYER'S USE OF E-VERIFY MAY ALSO BE DISCRIMINATORY ON THE BASIS OF IMMIGRATION STATUS OR NATIONAL ORIGIN. DISCRIMINATION MAY OCCUR IF AN EMPLOYER:

- **Terminates or suspends employees for whom it receives TNCs on a selective basis**
  Example: A non-U.S. citizen worker who receives a Tentative Nonconfirmation (TNC) is terminated or suspended during the resolution period while native-born U.S. citizen workers who receive TNCs are allowed to work while they resolve their TNCs.

- **Pre-screens using E-Verify on a selective basis**
  Example: A non-U.S. citizen job applicant is run through E-Verify before he or she is hired and is denied a job when E-Verify generates a TNC, but native-born U.S. citizen job applicants are not run through E-Verify before hire.

- **Pre-screens all applicants using E-Verify but does not hire applicants for whom it receives TNCs on a selective basis.**
  Example: A non-U.S. citizen applicant who receives a TNC is not hired and/or not told that E-Verify generated a TNC, while U.S. citizen applicants who receive TNCs are hired and given an opportunity to resolve their TNCs.

- **Selectively requires employees who receive TNCs to provide additional documentation establishing their work authorization.**
  Example: Instead of, or in addition to, following the E-Verify instructions, the employer requests additional documentation establishing work eligibility from a non-U.S. citizen worker for whom it receives a TNC but does not request additional information when native-born U.S. citizen workers receive TNCs.

- **Re-runs employees through E-Verify when reverifying Employment Authorization Documents, and then terminates or suspends employees who receive TNCs on a selective basis**
  Example: Despite the instruction not to re-run employees through E-Verify at reverification, the employer does so and then terminates or suspends a non-U.S. citizen worker for whom it receives a TNC.

If a worker you know has suffered immigration status or national origin discrimination, call the OSC **Worker Hotline at 1-800-255-7688,** 9am-5pm, E.S.T. (TDD for the hearing impaired is at 1-800-237-2515). Telephone interpreters are available in many languages as needed. ***It is unlawful to intimidate, threaten, or retaliate against anyone for contacting the Hotline, assisting in any way in an investigation, or filing a charge of discrimination with OSC.***

Employers can call the **Employer Hotline at 1-800-255-8155** for guidance on how to avoid immigration status and national origin discrimination. For more information or to obtain outreach materials, call the Hotline or visit http://www.justice.gov/crt/about/osc.