



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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

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

Re: USCIS Policy Manual, Volume 6: Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements - Tenant-Occupancy Methodology

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the new USCIS policy guidance relating to the rescission of guidance regarding tenant-occupancy methodology, found in Volume 6: Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements of the USCIS Policy Manual (“Policy Manual”).¹

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

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

A. Comments to USCIS Policy Manual

These comments relate to the May 15, 2018 Policy Alert (“Policy Alert”) announcing that “USCIS no longer considers tenant occupancy to be a reasonable methodology to support economically or statistically valid forecasting tools.”² Our comments advance the following points:

¹ Available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter2.html>

² <https://www.uscis.gov/policymanual/Updates/20180515-EB5TenantOccupancyMethodology.pdf> (“Policy Alert”).

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- (1) The Policy Alert is ambiguous as to whether projects pending on May 15, 2018 will be adjudicated under prior guidance. Therefore, it is ambiguous on the critical question of which petitions will receive deference, failing to provide sufficient public notice;
- (2) USCIS overgeneralizes its rationale for rescinding the 2012 Operational Guidance and so states insufficient grounds for its revised policy; and
- (3) USCIS's policy of categorically banning so-called "tenant-occupancy methodology" as a "reasonable methodology" is a legislative rule requiring formal notice and comment rulemaking under the Administrative Procedure Act ("APA").

We discuss these points more fully below.

- (1) The Policy Alert is ambiguous as to whether projects pending on May 15, 2018 will be adjudicated under prior guidance. Therefore, it is ambiguous on the critical question of which petitions will receive deference, failing to provide sufficient public notice.**

The body of the Policy Alert states that "USCIS will continue to give deference to Form I-526 and Form I-829 petitions directly related to previously approved projects"³ (emphasis added). However, in the footnote at the end of the same sentence, USCIS refers to deference for petitions "related to pending or approved applications or petitions"⁴ (emphasis added). Given the internal contradiction, it is unclear whether deference will be afforded if a project with tenant-occupancy methodology is pending, or whether deference will be limited to petitions related to only approved projects. If deference is accorded to pending projects, presumably such pending projects would be adjudicated under prior guidance. However, the Policy Alert is silent on these questions.

Despite this unsettling ambiguity, the new policy has been effective as of May 15, 2018. Without resolution, it is unclear which guidance applies to: (1) pending projects; (2) pending petitions associated with pending projects; and (3) newly-filed petitions associated with pending projects.

The Policy Alert illustrates the inherent problem in USCIS's deference policy, itself, when coupled with new policy applied to pending projects. USCIS's general deference policy attaches only to prior approvals.⁵ However, USCIS currently takes between 25 to 32.5 months to adjudicate Form I-526 petitions⁶ and 17 to 22.5 months to adjudicate Form I-924 applications. Even discounting the months or years of preparation before an EB-5 project is first filed on a Form I-924 or I-526, processing delays at USCIS mean a project may have been pending for nearly three (3) years when a policy change affecting the project is announced. Applying new policy to such long-pending projects, potentially rendering them unapprovable, poses serious problems for projects and

³ *Id.*

⁴ Policy Alert, footnote 1, *supra* note 2.

⁵ 6 USCIS-PM G.6 ("Where USCIS has previously evaluated and approved certain aspects of an investment, USCIS generally defers to that favorable determination at a later stage in the process.") (Emphasis added.)

⁶ See <https://egov.uscis.gov/processing-times/> (last visited 5/27/2018).

investors placing significant reliance on guidance in place at the time of filing. When prior policy has engendered serious reliance interests, ignoring such matters is arbitrary and capricious.⁷

We trust that the ambiguity in the Policy Manual now brought to USCIS's attention, USCIS will issue clarifying guidance to the effect that projects pending on May 15, 2018 will continue to be adjudicated under the guidance in place at the time of their filing. The clarification should further confirm that USCIS will defer to such project approval even if occurring after May 15, 2018 in subsequent adjudication of Form I-526 and Form I-829 petitions directly related to the project, consistent with USCIS's deference policy.

(2) USCIS overgeneralizes its rationale for rescinding the 2012 Operational Guidance and so states insufficient grounds for its revised policy.

The Policy Alert rescinds prior December 20, 2012 Operational Guidance for EB-5 Cases Involving Tenant-Occupancy ("2012 Operational Guidance").⁸ To quote the revised Policy Manual, the prior guidance "provided that investors could (1) map a specific amount of direct, imputed, or subsidized investment to new jobs, or (2) use a facilitation-based approach to demonstrate the project would remove a significant market-based constraint."⁹

With respect to the first method, by way of stating the reason for rejecting this approach, the revised Policy Manual states:

The first method requires mapping a specific amount of direct, imputed, or subsidized investment to new jobs such that there is an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. In practice, however, the construction of standard office or retail space alone does not lead to a sufficient connection for this type of mapping such that tenant jobs can be credited to the new commercial enterprise. The existence of numerous other factors, such as the identity of future tenants and demand for that type of business, makes it difficult to relate individual jobs to a specific space. (Emphasis added.)

However, there have been EB-5 projects using the first method where the identity of the future tenant was known and demand for that type of business demonstrated by a credible, third-party market study. The example the revised Policy Manual invokes of "standard office or retail space" may be problematic, but there are more favorable tenant characteristics. For example, if the tenant is a known, existing entity and affiliate of the developer receiving EB-5 capital, it should not be difficult for USCIS to relate tenant jobs to the new commercial enterprise. USCIS has, in fact, successfully related such tenant jobs and approved such projects. USCIS's stated difficulties with the first method are premised on factual characteristics that may recur or even be prevalent, but

⁷ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

⁸ See <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Interim%20EB-5%20Tenant-Occupancy%20GM.pdf> ("2012 Operational Guidance").

⁹ 6 USCIS-PM G.2(D)6.

they are not necessary characteristics of tenant-occupancy methodology. Accordingly, clearer guidance rather than abandonment of tenant-occupancy methodology is the better response.

With respect to the second method, the revised Policy Manual states:

The second method looks at whether the investment removes a significant market-based constraint, referred to in the 2012 guidance as the “facilitation based approach.” In providing this approach as an option, USCIS explicitly allowed applicants and petitioners to avoid having to establish an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. As of May 15, 2018, however, USCIS determined that that allowance was ill-advised, because a direct financial connection between the EB-5 capital investment and the job creation is necessary to determine a sufficient nexus between the two. Reliance on a showing of constraint on supply or excess of demand by itself does not establish a causal link between specific space and a net new labor demand such that it would overcome the lack of a sufficient nexus. (Emphasis added.)

It is indeed unclear what was ever meant by “facilitation-based approach,” or how applicants can “demonstrate that the economic benefits provided by a specific space project will remove a significant market-based constraint.”¹⁰ However, one understanding was that if the project demonstrated that there was a need for a specialized or specific use of the tenant space, tenant jobs from such use may count. Built-to-suit tenant spaces such as schools, wet labs, and retail stores specifically designed for a particular customer base¹¹ presumably would each have created a sufficient nexus under the 2012 Operational Guidance, whereas chain coffee bars, copy centers, and salons may not have.

As in the first method, clearer guidance would achieve the objective shared by USCIS and filers of demonstrating sufficient nexus to EB-5 capital. For example, if a space is built-to-suit with EB-5 capital, USCIS guidance could deem in that instance to exist a “direct financial connection” between the EB-5 capital and the tenant space.

USCIS’s rationale for rescinding the 2012 Operational Guidance appears to be based on USCIS difficulties applying its prior guidance to open-ended fact patterns. Banning tenant-occupancy methodology, however, is neither compelled by USCIS’s stated rationale nor is permitted under the APA, as discussed below. To ban the tenant-occupancy methodology altogether, USCIS is required to undertake formal rulemaking under the APA.

¹⁰ *Id.*

¹¹ An approved example is a mall within an assisted living campus containing stores specifically designed for elderly residents.

(3) USCIS’s new policy banning “tenant-occupancy methodology” is a legislative rule requiring formal notice and comment rulemaking under the APA.

USCIS states in its revised Policy Manual that the tenant-occupancy methodologies described in the 2012 Operational Guidance “result in a connection or nexus . . . that is too tenuous and thus are no longer considered reasonable methodologies or valid forecasting tools under the regulations.” However, a rule that excludes a particular job creation methodology from “reasonable methodologies” as set forth in statute¹² and regulations¹³ is a legislative rule requiring notice and comment rulemaking under the APA. Accordingly, the section of the revised Policy Manual concluding that tenant-occupancy is no longer considered “reasonable methodology” is procedurally invalid.

In banning tenant-occupancy as a disqualified “reasonable methodology,” USCIS is amending a prior legislative rule, namely 8 CFR sections 204.6(j)(4)(iii) and (m)(iii), referenced in the revised portion of the Policy Manual. These regulations, implementing Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 102-395 as amended, allow evidence of required job creation to be “demonstrated by reasonable methodologies including those set forth in paragraph (m)(3).” The language in 8 CFR sections 204.6(j)(4)(iii) is permissive and expansive. For example, reasonable methodologies include, but are not limited to, those expressed in paragraph (m)(3). The term “reasonable methodologies,” itself, is intrinsically context driven, incompatible with any exclusion of a particular methodology. A construct is “reasonable” or not based on all relevant considerations. Therefore, plucking one methodology out of the fact-sensitive standard and finding it *per se* unreasonable is contrary to the plain language of current regulations and therefore cannot be given effect in the current form of revised policy.¹⁴

Indeed, the 2012 Operational Guidance, though wanting clarity, correctly captured the legal standard as one involving contextual inquiry: “Whether an applicant or petitioner has demonstrated that an EB-5 enterprise caused the creation of indirect tenant jobs will require determinations on a case-by-case basis and will generally require an evaluation of the verifiable detail provided and the overall reasonableness of the methodology as presented”¹⁵ (emphasis added). The case-by-case determination of overall reasonableness required under current regulations prohibits or at minimum is irreconcilable with a USCIS rule essentially banning a particular methodology outright. Accordingly, preclusion of tenant-occupancy methodology, or any other methodology, requires formal notice and comment rulemaking to amend existing regulations.

By way of further analysis, regulations at 8 CFR section 204.6(m)(3) do not contain methodologies that are categorically “reasonable” or “unreasonable.” Rather, they reference standards for

¹² See Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 102-395, as amended.

¹³ See 8 CFR sections 204.6(j)(4)(iii) and (m)(iii).

¹⁴ See *Christensen v. Harris County*, 529 U.S. 576 (2000) (“The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.”)

¹⁵ 2012 Operational Guidance, p.2, *supra* note 8.

determining whether a methodology is reasonable along with illustrative examples. The standard includes “verifiable detail,” “detailed prediction,” and “economically or statistically valid forecasting tools, including but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.”¹⁶ In specifically excluding a particular methodology, USCIS’s new rule effectively amends a prior legislative rule – i.e., regulations at 8 CFR sections 204.6(j)(4)(iii) and (m)(iii) to create an express exception to “reasonable methodologies.” When a rule effectively amends a prior legislative rule, it is itself a legislative rule.¹⁷ Legislative rules must be promulgated under the APA with notice and comment.¹⁸

Moreover, USCIS must use the same process used to adopt the initial rule, in this instance regulations at 8 CFR sections 204.6(j)(4)(iii) and (m)(iii), which requires notice and comment rulemaking.¹⁹

We make the distinction here between permissible USCIS action with respect to interpretive rules and legislative rules. Agencies are accorded broad discretion, though not unlimited, in amending and repealing its own interpretive rules.²⁰ However, in banning tenant-occupancy methodology, USCIS goes beyond amending or rescinding its own prior interpretive rule or policy to amending the underlying legislative rules, that is, the regulations themselves. USCIS may do so only pursuant to notice-and-comment rulemaking under section 4 of the APA.

Finally, insofar as the revised Policy Manual is thus inconsistent with the cited regulations, the agency’s action is arbitrary and capricious in violation of section 10 of the APA. Indeed, the history of the use of tenant-occupancy methodology, including USCIS’s issuance of the 2012 Operational Guidance and numerous USCIS approvals thereunder, demonstrates that the methodology can constitute a reasonable methodology for job creation. Consistent with the core of the 2012 Operational Guidance, the touchstone is nexus between the jobs projected to be created using such methodology and EB-5 capital. USCIS has both the opportunity and authority to issue amended policy guidance to provide clearer guidance to the public and USCIS examiners. We encourage USCIS to do so, as the benefits are manifest to both the agency and the public.

B. Conclusion

While we commend USCIS’s gestures to limit retroactive application of changed policy, the Policy Alert and the revised Policy Manual skirt the requirements of the APA. While USCIS may revise, amend, and/or rescind its prior policy, in this instance, the 2012 Operational Guidance, USCIS

¹⁶ 8 CFR section 204.6(m)(iii).

¹⁷ See *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993); see also *Health Insurance Ass’n of America v. Shalala*, 23 F.3d 412 (D.C. Cir. 1994); see also Richard J. Pierce, Jr., *Administrative Law Review*, Vol. 52, No. 2 (Spring 2000), pp. 547-574.

¹⁸ See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015).

¹⁹ See *id.* at 1206, (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (“[T]he D.C. Circuit correctly read §1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”))

²⁰ See, generally, *Perez*, *supra* note 18.

must engage in notice-and-comment rulemaking before categorically excluding tenant-occupancy methodology from “reasonable methodologies” as provided in statute and regulations.

We also note that 14 days is insufficient for the public to reasonably provide comments to changed policy. Agency action, particularly in the complex area of EB-5 adjudications, requires reasonable time for analysis and comment. We respectfully request at least 60 days in the future for comment. Finally, any policy change should be made only after public comment and consideration of such comments. Making policy change contemporaneous with announcement creates no opportunity to resolve critical questions of validity and scope raised here.

In closing, we thank you for providing this opportunity to comment on the newly published section of the USCIS Policy Manual. We look forward to a continuing dialogue on this and related matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION