AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

June 17, 2011

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

Re: USCIS Proposal for Comment: Proposed Changes to USCIS's Processing of EB-5 Cases

The American Immigration Lawyers Association (AILA) submits the following comments in response to the May 19, 2011, proposal to facilitate the speedy processing of regional center-affiliated project pre-approval applications and regional center-affiliated investor I-526 petitions.

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. AILA was founded in 1946 and is affiliated with the American Bar Association. 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, 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 processing rules and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The proposal articulated three "steps" that are intended to improve the EB-5 case adjudication process:

1. Provide for accelerated and premium processing of I-526 petitions and I-924 applications involving projects that are ready to get underway;
2. Create Specialized Intake Teams for the initial review of I-924 applications, with teams able to communicate directly with I-924 applicants in writing to address questions; and
3. Create an expert Decision Board for rendering decisions on I-924 applications, with the option of an in-person or telephonic interview to inform the Board's final decision where a notice of intent to deny has been issued.

USCIS's proposal is consistent with, and in furtherance of, President Obama's executive order of April 27, 2011, which calls upon each federal agency to streamline the delivery of services to its customers, as well as the President's initiative to encourage investment and entrepreneurship. While we wholeheartedly agree with the spirit and goals of USCIS's proposal, we respectfully recommend that the proposal be modified as explained below, in order to provide for greater clarity and efficiency.

Proposed Step 1

USCIS proposes to implement two types of priority processing, accelerated processing and premium processing, for "actual" I-924 applications and I-526 petitions. With regard to I-924 applications, USCIS states that there are two varieties: "actual" and "exemplar" applications. Actual I-924 applications are based on projects that are "shovel ready," whereas exemplar applications are based on projects that are not shovel ready but are presented in principle to USCIS for a preliminary determination of EB-5 compliance. Investor I-526 petitions are, by definition, based upon shovel ready projects.

Recommendation 1A: I-924 Applications Should be Separated Into "Actual" and "Hypothetical" Categories, and "Actual" Projects Should be Defined without Reference to the Term "Shovel Ready"

USCIS correctly distinguishes between projects that are ready to get underway using EB-5 investor funds and thus truly need the benefit of priority processing, versus projects that are in the concept stage and have no practical need for expeditious processing. However, the use of the term "shovel ready" to delineate between the two types of projects is problematic because there is no formal, technically precise definition of the term that would transparently indicate to all projects whether they would be deemed "actual" for purposes of priority processing. There are a number of factors that determine when a real estate development project is ready to place a shovel into the ground, which include but are not limited to obtaining permits, licenses, environmental clearances, execution of contracts, and preliminary fundraising. However, not all investment projects involve real estate development or construction, and for these projects, the term "shovel ready" would be both irrelevant and inaccurate. The term's ambiguity cuts against the aim of streamlining adjudications as it fails to give real, ready-to-go projects a certain means to expedite their applications and raise job-creating capital. Thus, while the term "shovel ready" may be sufficient in other situations, it is ill-suited for the EB-5 program.

In lieu of "shovel ready," we recommend that an "actual" project be defined as one that is ready to accept investors immediately under the EB-5 program, with its sole reason for delay being the pendency of USCIS adjudication. A project that is ready to accept investors immediately means one where the specifications and site location are finalized, a detailed business plan is completed, and specific offering documents are ready to be executed. This definition of "actual" is transparent, measurable, and easily understood by any project seeking to participate in the EB-5 program.

There are three types of USCIS adjudications that could delay an actual project:

1. The adjudication of an initial I-924 application for regional center designation that includes an actual project pre-approval request;
2. The adjudication of a subsequent I-924 application after the regional center's designation that includes an actual project pre-approval request (but does not seek to amend the regional center designation in any way); and
3. The adjudication of an actual investor's I-526 petition, with respect to which business realities require the use of investor funds to be contingent on approval of the I-526.

All three types of USCIS adjudications would be eligible for both accelerated and premium processing, since they all involve actual projects with identical urgency concerns.

Recommendation 1B: Once an Actual Project Is Pre-approved in an I-924 Application, an Approval Notice Should be Generated for the Actual Project Documents that Represents a Binding Decision

USCIS's proposal states that "[b]usiness plans, economic analysis, and I-526 documentation approved in an 'actual' I-924 application, if unchanged, will be given deference in the filing of associated I-526 petitions, and such petitions will be eligible for accelerated target processing times and for [premium processing service]." USCIS does not elaborate on the procedure by which an I-924 applicant would be notified of actual project approval, or by which those project documents would be given deference in the adjudication of an actual I-526. We recommend the following procedure: approval of actual project documents in an actual I-924 application should be formalized in an approval notice generated by USCIS (separate from and in addition to a regional center designation letter) that is binding on all parties. Absent fraud, as long as subsequently filed I-526 petitions affiliated with the approved project include a copy of the approval notice, along with proof that no changes have been made to the approved documents, the project documents should not be reevaluated at the I-526 stage.

Treatment of actual project approval as binding will ensure efficiency and reinforce the importance of the agency's involvement in project review. Such treatment would be akin to USCIS's procedure for blanket L-1 petitions, as set forth in 8 CFR §214.2(l), approved I-140 petitions, or approved labor certification applications. This promotes efficiency by enabling the adjudicator of the I-526 petition to focus exclusively on lawful source of funds and path of funds. It prevents the anomalous situation of adjudicators second guessing Specialized Intake Teams and Decision Boards. Finally, and very significantly, it creates assurance that if members of the developer community follow this prescribed procedure, they will have some certainty that projects can proceed as planned (as opposed to the present procedure whereby many project pre-approvals are questioned in the I-526 adjudication process).

For hypothetical projects, an approval notice should be binding with respect to any job creation methodologies and formulas presented within the hypothetical project documents, although the project documents themselves would be expected to change to reflect actual project details in the future.

Recommendation 1C: The Term "Hypothetical" Should be Used to Refer to All Non-Actual Projects

In the proposed changes, USCIS uses the term "exemplar" to refer to all non-actual projects, meaning those projects that are at the concept stage and are not ready to accept investors. We recommend that in lieu of the term "exemplar," USCIS use the term "hypothetical" to refer to all non-actual projects for the sake of clarity. USCIS has previously used the term "exemplar" to refer to a model I-526 petition containing actual project documents that would be submitted with an actual I-526 but does not identify a specific investor. Per the December 11, 2009 memorandum issued by Donald Neufeld, Acting Associate Director, Domestic Operations, "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions," the submission and approval of an exemplar I-526 is meant to "facilitate the adjudication of an actual but identical Form I-526 petition."

Based on the understanding of an exemplar I-526 outlined in the December 11, 2009 memo, a number of regional centers have submitted and obtained approval of exemplar petitions. These regional centers have then used their exemplar approvals to file "actual but identical" I-526 petitions, resulting in streamlined I-526 adjudications because the exemplar project documents do not need to be readjudicated. To ensure that previously approved "exemplar" I-526 petitions will correctly be treated as approved "actual" projects, and not mistakenly treated as hypothetical projects that need to be reexamined at the I-526 adjudication stage, we recommend that the term "hypothetical" be used to refer to all non-actual projects going forward. Such nomenclature is precise and will avoid unnecessary confusion in light of prior term usage. All hypothetical projects would fall under regular processing.

Recommendation 1D: "Hybrid" I-924 Applications Should be Eligible for Accelerated and Premium Processing

Contrary to USCIS's proposal, we recommend that accelerated and priority processing be made available for what USCIS calls a "hybrid" I-924 application, meaning an application by a single regional center that presents both actual and hypothetical projects for pre-approval. To alleviate efficiency concerns, USCIS may wish to limit the number of hypothetical projects that can be included in a hybrid application, but the existence of a hypothetical project should not automatically push an I-924 application out of the priority channel if a regional center also presents an actual project with a legitimate need for expeditious processing. We believe that the proposed treatment of "hybrid" applications would lead to the unfair and inefficient consequence of forcing a regional center to file

two I-924 applications, at a fee of $6,230 per application, just to allow an actual project to receive priority treatment.

Recommendation 1E: I-526 Premium Processing Should be Made Available Not Only for Regional Center-Affiliated Projects, but Also for Stand-Alone (Non-Regional Center) Projects

Actual projects, whether or not affiliated with a regional center, face the same challenges with respect to timing and need for capital. Stand-alone (non-regional center) projects play an important role in the realization of the EB-5 program's job creation goals. In fact, almost 30 percent of all EB-5 visas issued in FY 2010 fall into the stand-alone/non-regional center category. A stand-alone project may involve an EB-5 investor investing in a troubled business, with the use of funds contingent on I-526 approval. The troubled business would face a struggle for survival until USCIS adjudicates the petition, and therefore the speedy adjudication of the stand-alone I-526 petition is of paramount importance both for the troubled business and the investor. USCIS's proposal is silent with regard to stand-alone I-526 projects, and therefore we recommend that stand-alone actual projects explicitly be included in the scope of the new accelerated and premium processing scheme, and not be prejudiced simply because they are not affiliated with a regional center.

Proposed Step 2

Recommendation 2A: USCIS Should Clarify the Possible Actions That May be Taken by the Proposed Specialized Intake Team

USCIS proposes the creation and implementation of "Specialized Intake Teams" that will handle initial review of I-924 applications, and may communicate directly with the I-924 applicant in writing to address identified questions or needs. We recommend that the function of the Specialized Intake Teams be clarified to state that they are empowered to take the following four possible actions:

1. Approve the I-924 application (and any project pre-approval application) as initially filed;
2. If supplemental information (and any project pre-approval application) is needed, make one request for information or documentation;
3. Approve the I-924 application based upon the supplemental information submitted; and
4. If unable to approve, forward the application to the Decision Board (Proposed Step 3), which will give the applicant written notice that sets forth issues to be resolved, schedule the applicant for a hearing in person or by phone to discuss the issues on the record, and then render a final decision.

Each one of these steps should occur within 15 days on premium processing cases. The first two steps should take place within the targeted processing times, and steps three and four (on non-premium processing cases) should take place within one month.

Recommendation 2B: The Specialized Intake Team Should be Comprised of One Immigration Service Officer and One Economist

Proposed Step 3

USCIS proposes to create an expert I-924 Decision Board that will be equipped to render final decisions on applications that present issues not resolved by the Specialized Intake Team. As part of its function, the Decision Board will have the authority to schedule an in-person or telephonic interview with an I-924 applicant before issuing a final decision. This interview procedure is limited to the circumstance in which the Decision Board has issued a Notice of Intent to Deny.

Recommendation 3A: The In-Person/Telephonic Interview Process Should Not be Limited to the Circumstance in Which a Notice of Intent to Deny Has Been Issued

To best facilitate the Decision Board's final decision, we recommend that the procedure be revised as follows: If the Specialized Intake Team is unable to approve the I-924 application, it will forward the application to the Decision Board. The Decision Board will give the I-924 applicant a notice in writing that sets forth issues to be resolved, schedule the applicant for a hearing in person or by phone to discuss the issues on the record, and then render a final decision. The scheduling should be within 15 days of receipt of the application on premium processing cases and within one month on accelerated processing cases. This would provide a more efficient use of resources and a more timely and streamlined procedure than the procedure set forth in the proposal.

Recommendation 3B: The Decision Board Should be Comprised of Four Individuals: (1) A Senior Immigration Service Officer Supported by (2) Legal Counsel, (3) an Economist, and (4) a Business Analyst or Economic Development Specialist

To clarify, an "Economic Development Specialist" refers to an individual who would assist the I-924 Decision Board by providing the following:

1. Analysis of local economic development initiatives throughout the U.S., and strategic direction on how EB-5 program policies can further the nation's overall economic development goals in a highly competitive global environment for international investments;
2. Direction on how EB-5 program outreach can effectively encourage participation from more geographic areas throughout the U.S. so that the economic benefit of the program can have a greater impact;

3. Focused proposals on how the EB-5 program can partner with local (e.g. city-wide) economic development programs to intensify the positive effect of EB-5 investments;
4. Reports on how EB-5 investments are achieving economic development, based on the analysis of data from specific projects that are funded with EB-5 investment capital; and
5. Consolidated guidelines to assist adjudicators with identifying and assessing feasibility factors and real-world economic development ramifications of regional center and I-526 business plans.

Recommendation 3C: It Should be Clarified That Any Final USCIS Adjudication on an I-924 Application, whether by the Specialized Intake Team or by the Decision Board, Carries the Same Weight

Conclusion

AILA appreciates the opportunity to comment on these proposed EB-5 operational changes and we look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION