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IMMIGRATION  
LAWYERS  
ASSOCIATION

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Ms. Samantha Deshombres, Chief  
Office of Policy and Strategy  
Regulatory Coordination Division  
U.S. Citizenship and Immigration Services  
20 Massachusetts Avenue NW.  
Washington, DC 20529-2140

**Re: 60-Day Notice of Revisions to Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status**

**OMB Control Number 1615-0045  
Docket ID USCIS-2006-0009**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) Notice of Information Collection Activities: Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, published in the Federal Register on October 4, 2016.

Founded in 1946, AILA is a voluntary bar association of more than 14,000 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, 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 changes to Form I-829 and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views on this matter.

### **Proposed Revisions to Form I-829 Instructions**

#### **Page 1 – What Is the Purpose of Form I-829?**

**The Proposed Instructions State:** “The petitioner must submit this petition within the 90-day period immediately preceding the second anniversary of obtaining conditional permanent resident status.”

#### **Page 1 – What Happens When I File or Fail to File Form I-829? Effect of Not Filing**

**AILA National Office**

1331 G Street NW, Suite 300, Washington, DC 20005

Phone: 202.507.7600 | Fax: 202.783.7853 | [www.aila.org](http://www.aila.org)

**The Proposed Instructions State:** “If you fail to file this petition within the 90-day period immediately preceding the second anniversary of obtaining your conditional permanent resident status [...]”

**AILA Comments:** It is unclear from this language whether the 90-day filing period ends on the day before the second anniversary of obtaining conditional permanent resident status or it includes the day of the second anniversary. To avoid confusion, we suggest that the term “immediately preceding” be replaced with the word “before” in conformity with the language in 8 CFR §216.6A(d)(2)(A).

## **Page 1 – What Happens When I File or Fail To File Form I-829: Effect of Filing**

**The Proposed Instructions State:** If U.S. Citizenship and Immigration Services (USCIS) accepts your petition before your conditional permanent resident status is terminated, your conditional permanent resident status will *automatically be extended for one year.*”

**AILA Comments:** This should clarify that the automatic extension of status is valid until a final decision is made on the petition. The receipt notice serves as documentary evidence of status for an initial period of 12 months from the date of expiration on the conditional permanent resident card. If a decision is not made within that time, the petitioner must go to a local USCIS office to obtain a Form I-551 stamp evidencing continued lawful status.

## **Page 1 – Who May File Form I-829?**

**The Proposed Instructions State:** “You may include your conditional permanent resident spouse or former spouse and children in your petition. If your spouse and children are not included on this Form I-829 petition, each dependent must file his or her own petition separately. Your spouse and children cannot be included together on a Form I-829 petition if they are not filing with you, the principal entrepreneur.”

**AILA Comments:**

- In the first sentence it is unclear whether the modifier “conditional permanent resident” applies to the spouse, the former spouse, and the children. It would be clearer to say “You may include your spouse or former spouse and children in your petition if they have been admitted as conditional permanent residents.”
- Investors and their counsel are often confused as to whether the above statement is true even when one of the dependents has “followed to join” the principal and may have only been a conditional resident for a very short time. We would strongly suggest clarifying this point by amending the first quoted sentence to read: “You may include your spouse or former spouse and children in your petition if they have been admitted as conditional permanent residents, even if their conditional residence period is different from yours.”
- In the third quoted sentence, the language “included together” is confusing. It seems the primary point is communicated by the second quoted sentence. We suggest deleting the

third sentence and revising the second sentence to say “If your spouse and/or children are not included in the principal entrepreneur’s petition, a separate Form I-829 must be filed by each dependent.”

- We note that there is no basis in the statute or regulations for requiring spouses, former spouses, or children to file separate I-829 petitions. In that vein, there are many situations in which it would be more appropriate for a former spouse and children to file together rather than separately or with the entrepreneur. For example, if the entrepreneur and spouse divorce but the former spouse retains custody of the minor child. In that instance, particularly if the divorce was not amicable, the former spouse may want to file separately from the entrepreneur but together with the minor child to (1) avoid contact with the entrepreneur but (2) ensure that the minor child will attend the same biometrics appointment as the former spouse.

**The Proposed instructions State:** “NOTE: If you are filing a separate petition from the entrepreneur, you should attach a copy of the entrepreneur’s Form I-797, Notice of Action, relating to his or her I-829 petition.”

**AILA Comments:**

- This should be mentioned in the evidence checklist elsewhere in the instructions (“What Evidence Must You Submit”).
- There are at least two common circumstances where this might not be possible: (1) a former spouse may not have access to the principal’s immigration documents or even have access to information about whether the principal has filed an I-829; and (2) I-829 filing receipts take time to issue and may not be readily available during the narrow window for timely filing a dependent’s I-829 petition.

**Page 3 – Specific Instructions, Part 1, Basis for Petition**

**“Item Number 1. Investment Type.** Indicate whether the entrepreneur’s investment is associated with a regional center that *was designated at the time the entrepreneur became a conditional permanent resident.*”

**AILA Comments:**

- An EB-5 investment is not associated with a regional center. Under EB-5 law and regulations, it is only the new commercial enterprise that is affiliated or associated with a regional center. This instruction would be more accurate if it stated “Indicate whether the entrepreneur’s investment is in a new commercial enterprise associated with a regional center ...”
- The relevance of the italicized language is unclear. There is no basis in the law or regulations for distinguishing among regional center-affiliated investments based on

whether the regional center designation date was before or after an investor's acquisition of conditional permanent residence.

**“Item Numbers 3.a. and 3.b. Name and Identification Number of the New Commercial Enterprise (NCE).** Provide the full legal name of the NCE in which the entrepreneur invested. **(NOTE: This is a required field. Do not leave it blank.)** Indicate the NCE Identification Number.”

**AILA Comments:**

- The form must describe what the NCE identification number looks like and where it can be found, especially if it is required.

**Page 4 – Specific Instructions, Part 2, Information About You**

In “Part 2, Item Number 9. Date of Admission as a Conditional Permanent Resident,” reference is made to “Form I-551, Legal Permanent Resident Card.”

**AILA Comments:**

- The correct name of the document is Form I-551, Permanent Resident Card

**“Item Number 11. Additional Form I-526 or I-829 Receipt Numbers.** Provide the receipt numbers for any additional Form I-526, Immigrant Petition by Alien Entrepreneur, or Form I-829, Petition by Entrepreneur to Remove Conditions to Permanent Resident Status, filed by the Entrepreneur.”

**AILA Comments:** This needs clarification. Does USCIS want case numbers for any and all I-526 or I-829 petitions ever filed by the entrepreneur? Or, only data on prior petitions related to the same investment or NCE?

**Page 4 – Specific Instructions, Part 2, Information About You**

**Part 2, Item Numbers 16.a. – 16.h. Physical Address** states, “Provide your physical addresses for the last five years. Provide your present address first. If you need extra space to complete this section, use the space provided in Part 12. Additional Information.”

**AILA Comments:** The form I-829 is for people who are granted 2 years of conditional LPR status. It's not reasonable to ask for past residences beyond the date they are granted conditional LPR status, especially because they already provided this information in the immigrant visa or adjustment of status application. It would be more relevant to ask for physical addresses since the date Petitioner has become a conditional permanent resident.

**Page 5 – Specific Instructions, Part 3, Information About Your Current or Former Conditional Permanent Resident Spouse**

**Part 3, Item Numbers 8.a – 8.h, Mailing Address** states, “Provide your current spouse or former conditional permanent resident spouses’ physical addresses for the last five years. Provide the present address first. If you need extra space to complete this section, use the space provided in Part 12. Additional Information.

**AILA Comments:** The instruction is contradictory. The title indicates Mailing Address, but the instruction asks for physical addresses for the last five years. It should ask for one mailing address as the title indicates, or change the title to PHYSICAL ADDRESS and ask for the physical addresses since the date spouse/former conditional LPR spouse has become a conditional LPR.

#### **Page 5 – Specific Instructions, Part 4, Information About Your Children**

The introductory sentence states “Provide information about ALL of your children including biological children, stepchildren, and adoptive children, regardless of age.”

**AILA Comments:** Petitioners are frequently confused about the distinction between children being *identified on* the petition and being *included in* the petition. We suggest being explicit by adding language to the end of the above sentence, as follows: “Provide information about ALL of your children including biological children, stepchildren, and adoptive children, regardless of age and regardless of whether they are filing with you.”

#### **Page 7 – Specific Instructions, Part 6, Additional Information About the Regional Center and the New Commercial Enterprise (NCE)**

**“Item Numbers 1. – 2. Additional Information About the Regional Center.** Provide the receipt number for the approved Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program, either for the initial designation of the regional center or a subsequent amendment, upon which the Form I-526, Immigrant Petition by Alien Entrepreneur, was based. In addition, indicate whether the regional center associated with the entrepreneur’s investment has been terminated.”

**AILA Comments:**

- Because not every I-526 petition involves an affiliated regional center, we suggest including “(if applicable)” in the heading [i.e. “Additional Information About the Regional Center (if applicable)].”
- Now that regional center terminations are occurring with more frequency, and given that it is reasonably probable that NCEs impacted by regional center terminations will seek to protect their investors by affiliating with different regional centers, it seems that this question does not allow for the possibility that the regional center that was affiliated with the NCE at the time of I-526 filing might be a different regional center from the one that is affiliated at the time of I-829 petition filing. We suggest modifying the questions and instructions on this point accordingly.

In **Item Numbers 11.a. – 11.c. Subsequent Investments in the NCE**, the list of examples of “types of investments” includes “qualifying indebtedness as described in 8 Code of Federal Regulations (CFR) section 204.6(e).”

**AILA Comments:** “Indebtedness” is not “invested” unless the investment is a secured promissory note. USCIS’s interpretation of “indebtedness” in the regulations now appears to include borrowed funds, but as borrowed funds are still “cash” when they are invested, it would still be accurate to answer the question “cash,” so it is unclear how investors should answer these questions. A suggested revision is provided below regarding the related question on the proposed Form I-829.

In **Item Number 13. Changes in Assets of the NCE**, the proposed new language helpfully references “other *capital* distributions or withdrawals” (emphasis added).

**AILA Comments:** USCIS not infrequently issues RFEs where IRS Forms K-1 indicate distributions to investors, notwithstanding the fact that the distributions are characterized on the tax returns and the K-1 as distributions of profit rather than distributions of capital. We suggest making this distinction explicit by adding a new sentence in this instruction: “Do not include distributions of profit.”

In **Item Number 14. Total Amount of Capital Invested by EB-5 Investors**, the proposed revision includes new language stating in part “by all EB-5 investor at the time of filing”

**AILA Comments:** The word “investor” should be amended to “investors.”

## **Page 8 – Specific Instructions, Part 6, Additional Information About the Regional Center and the New Commercial Enterprise (NCE)**

In **Item Number 16. Changes to NCE**, the proposed instruction includes the following language that also appears in previous versions: “or had any changes in its business organization or ownership since the date of the entrepreneur’s initial investment.”

**AILA Comments:** We respectfully suggest that in the context of pooled investments of EB-5 capital from multiple EB-5 investors, the answer to this question is always going to be yes, because each of the EB-5 investors (including the petitioner) becomes a new owner and changes the ownership of the NCE after the date of the initial investment. It is also true that many or most investors’ counsel construe this question as intended to speak to other types of ownership changes not related to the rolling admissions of EB-5 investors as contemplated by the offering, and consequently many investors’ counsel recommend responding “no.” We suggest this form revision presents an opportunity to clear up the confusion inherent in this question by explicitly stating an exception or including the EB-5 investors’ acquisition of ownership as “changes in ownership.”

## **Page 8 – Specific Instructions, Part 8, Information About Job Creation**

In **Item Numbers 1.a. – 1.d. Direct Job Creation**, the proposed revision makes reference throughout to “in the NCE,” “the NCE employed,” “for the NCE,” and “from the NCE.”

**AILA Comments:**

- Under current USCIS policy, direct jobs include employees of the NCE *or the NCE’s wholly-owned subsidiary*. This should be clarified by including a parenthetical reference “(or its wholly owned subsidiary)” after each mention of the NCE.
- The second paragraph includes more information about the individuals who may be counted as “qualifying employees.” We recommend similar information be provided with respect to the regulatory requirements for establishing “full-time employment.”

In **Item Numbers 2.a. – 2.c. Indirect Job Creation**, the proposed revision includes reference to “full-time economically direct jobs.” The same section states “it is necessary to indicate the reasonable methodology used to calculate job creation.”

**AILA Comments:**

- Economic modeling does not distinguish between part-time and full-time employment, but instead utilizes the concept of economic impact that is equivalent to a specified level of employment (in terms of the number of man-hours or full-time workers that would be required to accommodate a specified change in demand). The term “economically direct” has no meaning in the law or the economic literature, and there is no meaningful distinction to be made between a “full-time economically direct job” and a “part-time economically direct job.” We suggest that USCIS avoid creating additional confusion by adding meaningless terminology to the instructions.
- We submit that when “direct jobs” are derived from a reasonable economic model, the FTE concept is statistically already built into the model. Adding the additional qualifier of “full-time” suggests the additional requirement of statistical evidence that is above and beyond standard economic modeling and may be impossible to provide. We suggest the reference to “full-time” in connection with indirect job creation be omitted.
- We submit that while “economically direct” is not meaningfully descriptive, it would be accurate, plain English usage to describe the economist-projected “direct jobs” as “model-derived direct jobs” or “economic model-derived direct jobs.”
- The EB-5 stakeholder community differs in its understanding of the meaning of “reasonable methodology.” Some interpret it as “RIMS II” or “Implan,” etc.; others might conclude it refers to the inputs and multipliers identified and demonstrated in a specific, dated economic analysis of a given project. This vague instruction would benefit from clarification.

**Page 9 – Specific Instructions, Part 8, Information About Job Creation**

In **Item Number 6. Changes to Business Plan**, the proposed revision states: “Indicate whether the entrepreneur made an investment and created jobs in the United States according to the business plan presented with the Form I-526. If you answered “No” to Item Number 6., use the space provided in Part 12. Additional Information to provide an explanation of the changes made to the original business plan submitted with the approved Form I-526.”

**AILA Comments:**

- The language “created jobs ... according to the business plan” is vague. Given the lengthy time frames between I-526 filing and I-829 filing resulting from extended USCIS processing times and visa backlogs for China, it is inconceivable that any project will proceed to completion without any change. USCIS should provide additional guidance here.
- In many cases, there are updates to a business plan that are submitted with an interfiling while the I-526 remains pending. In these cases, the record of adjudication of the I-526 would include the updated business plan, and yet by virtue of having been updated it is necessarily not the same as the “original business plan.” We suggest that the word “original” be deleted, as USCIS would have already reviewed an updated business plan during I-526 adjudication to determine whether it reflected changes that should be deemed material, so as to require the filing of a new I-526 petition.

**Page 10 – What Evidence Must You Submit?**

In **3. Evidence for Petitioners Filing as a Former Spouse or as a Spouse or Child Whose Entrepreneur Spouse or Parent has Died**, the proposed instructions require submission of , among other things, “A. Your former spouse’s, current spouse’s, or parent’s Permanent Resident Card (Green Card).”

**AILA Comments:**

- This implies that the original permanent resident card of the former or deceased principal must be submitted as required initial evidence. In the case of a deceased principal, this may be possible and USCIS would want it returned, but there will be many circumstances where the decedent’s Permanent Resident Card (or even a copy thereof) will be unavailable or inaccessible to the dependents. It is not reasonable for USCIS to assume that the surviving spouse and/or a surviving child would have the legal right to possession of the decedent’s Permanent Resident Card. With respect to a former spouse, it is even more unreasonable to require that the Permanent Resident Card, or even a copy thereof, be produced by a former spouse. In many cases when marriages dissolve the parties are antagonistic, and a divorced spouse may not only be unable to get a copy of a card; he or she may not even have access to information about whether the principal entrepreneur has filed or will file an I-829 petition. This is the kind of evidentiary requirement that has the potential to contribute to a dynamic of abuse. We strongly recommend that if USCIS desires the return of the original Permanent Resident Card of a deceased principal, the

requirement be qualified by “, if available” and limited to spouses/children of deceased principals. In all cases, we suggest that copies of these documents are unnecessary and the names and file identifiers necessary to identify the deceased or former spouse principal should be readily available to USCIS in the petitioners’ A-files.

- As noted earlier in these comments, the instructions at the bottom of page 1 include a NOTE suggesting submission of the principal entrepreneur’s I-829 petition if dependents are filing separately. We reiterate our comment that this should be required only “if available,” and that if this is required, it should be stated as a requirement in this section. We suggest, since this evidence would not necessarily be applicable to former spouses or spouses/children of deceased principals, it would warrant a new or separate category of evidence.

### **Page 11 – What Is the Filing Fee?**

**The Proposed Instruction State:** “A biometrics services fee of \$85 is also required for the petitioners, as well as any current spouse. Former conditional permanent resident spouse, [...]. That means you must submit a separate biometric services fee of \$85 for each conditional permanent resident who is applying with you to remove the conditions on their permanent resident status.”

#### **AILA Comments:**

- The word “petitioners” should be amended to “petitioner”.
- In the second quoted sentence, we suggest adding “between 14 and 79 years of age” after “each conditional permanent resident” to make it clear that only conditional permanent residents of certain ages are required to submit a biometric services fee.

### **Page 14 – Paperwork Reduction Act**

**The Proposed Instructions State:** The public reporting burden, “including the time for reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition,” is estimated at 3 hours per response.

**AILA Comments:** Three hours is a gross underestimation of the time required to prepare and submit an I-829 petition.

## **Proposed Revisions to Form I-829**

### **Part 1, Basis for Petition, Question 1: “Is the investment associated with a Regional Center?”**

**AILA Comments:** Investments are not associated with regional centers; only new commercial enterprises are associated/affiliated with regional centers. The question would accurately reflect the law if modified to read: “Is the investment in an NCE associated with a Regional Center?” or “Is the New Commercial Enterprise (NCE) associated with a Regional

Center?”

**Part 2, Information About You, Question 11:** “Any Additional Form I-526 or Form I-829 Receipt Numbers for Other Petitions Filed by Entrepreneur”

**AILA Comments:** The wording of the question is unclear. It would be better to state “Receipt Numbers for Prior Form I-526 or Form I-829 Petitions Filed by Entrepreneur Based on Investment in Enterprise(s) Other Than the One Provided in This Form”

**Part 2, Information About You, Question 15:** Is your Mailing address the same as your physical address?

The proposed instructions state: If you answered “No” to Item Number 15., you MUST provide your current physical address in the Item Numbers 16.a. – 16.h. If you need extra space to complete this section, use the space provided in Part 12. Additional Information.

**AILA Comments:** Since the revised form asks for physical addresses for the last five years, it would be better to say “Is your Mailing address the same as your PRESENT physical address?”

**Part 5, Biographic Information:** This section is comprised of Questions 1-6 requesting personal identifying characteristics (ethnicity, race, height, weight, eye color, hair color) of the Petitioner.

**AILA Comments:** These questions appear to relate exclusively to the Petitioner, yet the heading “Biographic Information” does not specify “About You.” Confusion could be eliminated by incorporating the questions into “Part 2. Information About You” or moving the placement of this Part to immediately follow Part 2.

**Part 6, Additional Information About the Regional Center and the New Commercial Enterprise (NCE)**

**AILA Comments:** Not every case involves a regional center. We suggest the heading for Part 6 should insert “(if applicable)” following the words “Regional Center.”

**Part 6, Question 1:** “Receipt Number for the Approved Form I-924, Application For Regional Center Designation Under the Immigrant Investor Program, Upon Which the Related Form I-526, Immigrant Petition by Alien Entrepreneur Was Based.”

**AILA Comments:**

- Please see previous comments relating to the Form I-829 Instructions in connection with this question.
- The instructions suggest one can answer this question by providing the I-924 receipt number for the initial regional center designation application or for a subsequent

amendment application. However:

- Many regional centers were designated prior to the introduction of Form I-924
- The Regional Center ID number is requested in Part 1, Question 2, so the question may be duplicative, and USCIS should have this information in its records.
- This question appears to presume that a project-specific Form I-924 will have been both filed and approved prior to the filing of Form I-526, whereas such filings (and approvals) are not required by law or regulation. It is quite common for there to be no Form I-924 relating to the new commercial enterprise into which an entrepreneur has invested, and when there is a related Form I-924, it is decidedly uncommon for it to have been approved prior to the filing of the entrepreneur's I-526 petition, so it would be unusual for an I-526 petition to have been "based on" an approved Form I-924.
- If USCIS wants petitioners to specify the receipt number of any approved Form I-924 relating to the NCE, it could so request more directly: "If a Form I-924 relating to the New Commercial Enterprise has been approved, provide the Receipt Number."

**Part 6, Question 2:** "Was the Regional Center associated with the entrepreneur terminated?"

**AILA Comments:**

- Regional centers are not associated with entrepreneurs; they are associated with NCEs. Please see above comments relating to the proposed Form I-829 Instructions.
- As previously noted, now that regional center terminations are occurring with more frequency, and given that it is reasonably probable that NCEs impacted by regional center terminations will seek to protect their investors by affiliating with different regional centers, it seems that this question does not allow for the possibility that the regional center that was affiliated with the NCE at the time of I-526 filing might be a different regional center from the one that is affiliated at the time of I-829 petition filing. We suggest modifying the questions and instructions on this point accordingly.

**Part 6, Questions 9 & 10:** Date and amount of "Entrepreneur's Initial Investment"

**AILA Comments:** USCIS has given mixed signals over the years as to whether the "investment" is the entire subscription amount (including administrative fees) or only the portion that is capital invested in the NCE. The proposed instructions refer to "capital investment." We suggest eliminating confusion and ambiguity by amending the questions to refer to "Entrepreneur's Initial Capital Investment"

**Part 6, Question 11.c.:** "Type of Subsequent Investment (for example, cash, equipment, inventory, other tangible property, cash equivalents, or qualifying indebtedness as described in 8

CFR 204.6(e)). \_\_\_\_\_ NOTE: If multiple investments have been made since the entrepreneur's initial investment in the commercial enterprise, use the space provided in Part 12 ....”

**AILA Comments:**

- Please see above comments relating to the Form I-829 Instructions for this question. We suggest this question could avoid the interpretive problems associated with characterizing investments as cash vs. indebtedness (and also provide more useful data) by providing a “check all that apply” list such as the one below. In addition, a line could be added next to each item allowing submission of the dollar amount claimed for each specific class:
  - Cash
  - Equipment
  - Inventory
  - Other tangible property
  - Cash equivalents
  - Qualifying Loan Proceeds
  - Qualifying Promissory Note
  - Other
- The “NOTE” is overbroad, as it would seem to require the entrepreneur to provide detail and source of funds information for investments made by other investors as well as his own, if they occurred after the date of the initial investment. The question should be clarified to read “If the Entrepreneur has made additional investments subsequent to the initial investment ....”

**Part 6, Question 12:** “Amount of Capital Investment Sustained in the NCE”

**AILA Comments:** The wording of this question is ambiguous and overbroad, as it could be construed to ask for the total amount of capital investment in the NCE, as opposed to the amount of the entrepreneur's capital investment sustained in the NCE. There is no basis in applicable law or regulations to require an I-829 petitioner to address any investment other than his own. To clarify and narrow the question the words “Entrepreneur” or “Your” should be inserted prior to “Capital Investment”

**Part 6, Questions 12 and 16:** Questions about capital distributions and changes in ownership

**AILA Comments:** Please see above comments regarding the proposed Form I-829 Instructions that relate to these questions for important issues requiring clarification

**Part 7, Information About the Job Creating Entity**

**AILA Comments:** Not every I-829 petition will have a JCE distinct from the NCE. The heading should include the words “(if applicable),” and begin with an instruction: “If there is no JCE associated with the NCE, move on to Part 8.”

**Part 7, Question 7:** “Has any of the JCEs filed for bankruptcy, ceased business operations, materially changed the nature of the business, or made any changes in its organization or ownership since the date of your initial investment, or have any criminal or civil proceedings been filed against any of the JCEs or any of their owners, officers, directors, general partners, managers or other persons with a similar interest or in a similar position of authority for any of the JCEs involving fraud or other unlawful activity? Yes/No”

**AILA Comments:** There is no basis in law or regulation to require individual investors to make this kind of representation about an entity over which they have no control. There is similarly no requirement in law or regulation for JCE entities utilizing EB-5 financing to make these disclosures or certifications to investors on a rolling basis, covering investor-specific time periods. This question imposes a grossly unreasonable burden on immigrant investors and threatens to hold them responsible for the misdeeds of others. It would be more appropriate to address questions like this in the context of regional center compliance requirements, not in individual I-829 petitions.

**Part 8, Questions 1.a. – 1.d.:** “Information about direct job creation at the NCE”

**AILA Comments:** Qualifying direct job creation includes direct jobs in a wholly-owned subsidiary of the NCE. We suggest adding “(or its wholly-owned subsidiary).”

**Part 8, Question 2 Heading:** Information about indirect job creation outside of the NCE (if applicable)

**AILA Comments:** The words “outside of the NCE” are not meaningful in this context; it would be sufficient to say “indirect job creation (if applicable)”

**Part 8, Question 2.a.:** “Number of Full-Time Economically Direct, Indirect and Induced Jobs Created as a Result of EB-5 Investment”

**AILA Comments:** Please see above comments relating to the proposed Form I-829 Instructions. For the reasons stated previously, we suggest deleting the words “Full-Time Economically Direct” from the question and substituting the words “Model-Derived Direct” or “Economic Model-Derived Direct.”

**Part 8, Question 2.b.:** “Amount of Capital From EB-5 Investors That Was Transferred to the JCE”

**AILA Comments:** This question is ambiguous and overbroad. It is not uncommon to have multiple NCEs contribute capital to a JCE. An I-829 petitioner should not be required to provide information regarding the business transactions conducted by NCEs other than the one in which the entrepreneur has invested. The words “From the NCE” should be inserted

after the word “Transferred” for clarification if USCIS wants to know how much EB-5 funding was actually transferred by the NCE. If the question is intended instead to speak more broadly to the composition of the capital stack (i.e. EB-5 funding vs. non-EB-5 funding), the question needs to be clarified and should not ask specifically about “transfers.”

**Part 8, Question 2.c.:** “Amount of Capital Invested in the JCE That Was Not Funded by Investors Who Received or are Seeking Classification as Alien Entrepreneurs”

**AILA Comments:** This question suffers from the same kind of ambiguity that affects the previous Question 2.b.: Is it seeking general information about the non-EB-5 funding in the capital stack? By using the word “invested,” is it looking only for aggregate equity investment, not including debt financing? To the extent there are multiple NCEs, clarification is required as to whether EB-5 funding from other NCEs should be included here or in Question 2.b.

**Part 8, Question 5.:** “If ten full-time jobs for qualifying employees have not yet been created, please indicate the number of jobs expected to be created within a reasonable time.”

**AILA Comments:** This question appears to require petitioners to concede that job creation has been insufficient for their own petition in order to include information about jobs that will be created within a reasonable time. This is unfair and unnecessary. No such qualification or concession can be supported by the law or regulations. Furthermore, when there are multiple investors filing I-829 petitions to claim credit for a limited number of jobs, it is often impossible to determine at the time of filing which jobs will be allocated to a specific petitioner and whether USCIS will deem the job creation to be sufficient and/or qualifying. As a practical matter, where a pooled investment has created at least 10 total jobs, every investor would likely leave this question blank but would also provide documentary evidence that additional job creation within a reasonable time is expected. So it seems the wording of the question would frustrate the intention of USCIS to use the form to yield more useful data. We suggest the question be rewritten as follows: “How many additional jobs are expected to be created within a reasonable time after filing this petition?”

**Part 8, Question 6.:** “Changes to Business Plan. Have you made an investment and created jobs in the United States according to the plan presented in the Form I-526? Yes/No”

**AILA Comments:** Please see above comments relating to the proposed Form I-829 Instructions. It is unclear what is meant by “created jobs in the United States according to the plan.” More guidance is needed.

**Part 9, Petitioner’s Statement:** “NOTE: [...] You must file Form I-829 while in the United States.”

**AILA Comments:** EB-5 regulations do not require the petitioner to be in the United States to file Form I-829; indeed, 8 CFR §216.6(a)(3) contradicts such a requirement. This requirement has no foundation in applicable law, serves no reasonable purpose, and should be stricken from the proposed Form I-829.

**Part 9, Petitioner's Declaration and Certification:** "I provided or authorized all of the information contained in, and submitted with, my petition; I reviewed and understood all of the information in, and submitted with, my petition; and all of this information was complete, true, and correct at the time of filing."

**AILA Comments:** The required attestations are overbroad and unreasonable as applied to individual investors participating in the Immigrant Investor Program. The Immigrant Investor Program is structured in a way that makes most EB-5 investors, as limited partners (or equivalent) in a funding entity, highly reliant and dependent on information and business activities conducted by NCE managers and other business entities (developers, borrowers, JCEs) over which they have no control. It is not reasonable to require a good faith investor to attest to the accuracy and completeness of other businesses' representations as if they were their own. It would be more reasonable to require the investors to provide a certification signed by the entities that provided the information to the investor for use with the petition. It is also unreasonable to require EB-5 investors to attest to their understanding of all information submitted with the petition. Indirect job creation, for example, is based on economic modeling which is complex and very difficult for persons without professional-level training in economics to understand; the complexity of the task is intensified when there are language barriers. With the exception of a copy of the Permanent Resident Card, biographical data, and investment evidence, all of the information submitted with an I-829 petition is prepared and provided to the petitioner by third parties. The Petitioner's Declaration and Certification should be revised to reflect only certification as to those facts and circumstances about which an individual petitioner/investor can reasonably be expected to have personal knowledge.

## **Conclusion**

We appreciate the opportunity comment on the proposed changes and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION