



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529-2240

Submitted via www.regulations.gov

OMB Control No.: 1615-0045

Docket ID: USCIS-2006-0009

Re: Revision of a Currently Approved Collection of Information: Petition by Entrepreneur To Remove Conditions on Permanent Resident Status

Dear Ms. Deshommes:

The American Immigration Lawyers Association (“AILA”) respectfully submits the following comments (collectively the “Comment”) in response to the above-referenced Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”) notice and request for comments regarding revisions to a currently approved information collection: Petition by Entrepreneur To Remove Conditions on Permanent Resident Status (USCIS OMB Control No. 1615-0045; Docket ID USCIS-2006-0009) (hereinafter “Proposed Form I-829”) published in the *Federal Register* on May 13, 2021.¹

Established in 1946, 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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws, including on the requirements of the EB-5 Immigrant Investor Visa program. Our members’ collective expertise and experience makes us particularly well-qualified to offer views on the Form I-829 that will benefit the public and the government.

As set forth in the comments provided below, AILA urges DHS to clarify several points in the Proposed Form I-829 and its Instructions, including: (1) the Instructions to Proposed Form I-829 should be clarified to outline when a dependent can “interfile” and join a pending Form I-829 petition as compared to when a dependent must file his or her own Form I-829; (2) the Instructions to Proposed Form I-829 should be modified to clarify the evidence required in the Form I-829

¹ 86 Fed. Reg. 26230 (May 13, 2021).

Petition by a dependent filing a stand-alone I-829 Petition where the Petitioner is alive; (3) the Instructions to Proposed Form I-829 should be modified to clarify the evidence required in the Form I-829 Petition by a dependent filing a stand-alone I-829 Petition where the Petitioner has passed away and the dependents seek the benefits of INA 204(1); (4) the Instructions to Proposed Form I-829 should clarify when Form I-829 can be filed by the dependent; and (5) DHS should reconsider the filing fee for Proposed Form I-829 when filed by a dependent separate from the Petitioner's Form I-829 Petition as the burden to the agency is not equivalent.

I. USCIS must clarify in the Proposed Form I-829 Instructions when dependents can and cannot be added to a Petitioner's Form I-829.

In the May 13, 2021 *Federal Register* notice announcing proposed revisions to Form I-829, the agency stated that DHS is clarifying language from the preamble of both the 2019 Notice of Proposed Rulemaking (“NPRM”)² and the Final Rule³ with this Form I-829 revision regarding who may file the form. DHS in its notice further states: “*The current DHS practice is for derivatives not included on the principal's Form I-829 to file a separate Form I-829.*” Specifically, through this proposed revision to Form I-829, DHS sought to clarify when a dependent of a Petitioner can file his or her own Form I-829 when the Petitioner refuses to file for or otherwise include the dependent on his or her Form I-829.

AILA notes that the Instructions to Proposed Form I-829 should be clear about when a dependent can “interfile” a biometrics fee and be “included” in a pending Form I-829 by the Petitioner, and when a dependent must file his or her own I-829 Petition. In the preamble to the Final Rule, USCIS stated the following:

“DHS did not propose to change the current process, under which derivatives may still request to be added to a principal's pending Form I-829 if they pay the biometric fee, and are otherwise eligible to be classified as the principal's derivatives. Such derivatives may be added to the pending Form I-829 even in case of divorce during the conditional residence period.”⁴

Thus, in the Final Rule's preamble, USCIS clearly recognized a procedure whereby a dependent can submit his or her biometrics fee and attach her or himself to the Petitioner's pending Form I-829.⁵ The Proposed Form I-829 and its Instructions do not contemplate the Interfile process. To the contrary, the Proposed Form I-829 suggests that dependents must file their own I-829 Petition and that no “Interfile” process is available.

² See Notice of Proposed Rulemaking (NPRM), EB-5 Immigrant Investor Program Modernization, 82 FR 4738 (Jan. 13, 2017).

³ See EB-5 Immigrant Investor Program Modernization, 84 FR 35750 (Jul. 24, 2019) (AILA notes that the Final Rule was recently invalidated by *Behring Regional Center LLC v. Wolf et al.*, No. 3:20-cv-09263 (N.D. Cal.). However, as this is a separate revision of DHS's form under a separate Notice and Comment procedure, AILA seeks to provide DHS with comments to improve the adjudication of Form I-829 Petitions by USCIS).

⁴ See 84 FR 35750, 35877 (Jul. 24, 2019).

⁵ This process will be referred to throughout this Comment as an “Interfile.”

In the *Federal Register* notice for the Proposed Form I-829, DHS sought to clarify that a dependent can file his or her own Form I-829 when the Petitioner refuses to add the dependent to the I-829 Petition, therefore clarifying that a dependent can only remain eligible for removal of conditions if the Petitioner also files Form I-829. Specifically, the notice to the Proposed Form I-829 states:

“DHS understands that the failure to include ‘for the derivative(s)’ may have caused confusion concerning whether the derivative of a principal immigrant investor can petition for and obtain the removal of conditions if the principal immigrant investor has not petitioned to remove his or her conditions. Through its regulation, DHS only intended to clarify existing practice for derivatives seeking to remove conditions on permanent residence. Currently, if the principal immigrant is unable to remove his or her conditions, the derivative immigrant is generally unable to remove his or her conditions, except where the principal has died, as statutorily required by INA 204(l).”⁶

Taken together, the preamble to the Final Rule and this Proposed Form I-829 describe two separate processes, which should be made clear in the Instructions to Proposed Form I-829:

1. Certain dependent spouses or children may “follow to join” the Petitioner at some later time, either through adjustment of status on Form I-485 or through consular processing of an immigrant visa. It is possible for a dependent to commence conditional permanent residence after the I-829 Petition must be filed for the Petitioner/investor (i.e., the dependent commences conditional residence after the Petitioner’s 90-day window to file Form I-829). As a result, the dependent in this situation could not be included in the I-829 Petition at the time of Petitioner’s I-829 Petition filing with USCIS. However, the Petitioner still may wish to include the dependent in his or her I-829 Petition, but for the timing of the commencement of conditional permanent residence for the following-to-join dependent. As stated in the preamble to the Final Rule, as outlined above, USCIS confirmed that it allows the “interfiling” of a dependent so that the dependent can be “attached” to the Petitioner’s pending Form I-829 in this circumstance. USCIS should make clear in the instructions to Proposed Form I-829 that the Interfile process is allowable by USCIS and should be used by those Petitioners who seek to attach a following-to-join dependent to their pending Form I-829 Petition. There is currently no instruction from DHS for the Interfile process nor does the USCIS Lockbox Facility in Texas (which receipts in such requests) consistently allow such a process. The only time USCIS has recognized the Interfile process is in the preamble to the Final Rule. Thus, USCIS should include instructions in the Proposed Form I-829 when a dependent may Interfile as opposed to filing his or her own Form I-829 Petition because USCIS previously clarified in the Final Rule that it did not intend to modify or disallow the Interfile process.
2. For those dependents where the Petitioner “refuses or is unwilling” to include the dependent in the Petitioner’s I-829, it should be made clear in the instructions to Form

⁶ 86 Fed. Reg. 26230, 26231 (May 13, 2021).

I-829 that the dependent in this situation must file his or her own I-829 Petition. The Proposed Form I-829 should make clear that a stand alone Form I-829 Petition should only be used where Petitioner refuses to include the dependent, otherwise the Interfile process should be used.

AILA believes that it is quite common for dependents to follow-to-join the EB-5 Petitioner later in the process. Therefore, the Proposed Form I-829 should include clear instruction when an Interfile should be used versus when a stand alone I-829 Petition should be filed. The current Proposed Form I-829 instructions at page 2 do not contemplate the Interfile process currently and should be revised accordingly, as the proposed language is contrary to the Interfile language that DHS said was allowable in the Final Rule.

Page 2 of the Proposed I-829 Instructions states the following:

“NOTE: If you were not included in the investor’s Form I-829, you should file your own Form I-829.”

This language is inconsistent with DHS’s prior statements in the preamble to the Final Rule regarding the Interfile process.

AILA recommends that DHS also consider updating the USCIS Policy Manual, Volume 6, Part G, Chapter 5 to include instructions on the Interfile process versus when a stand alone I-829 Petition should be filed by a dependent. Moreover, if DHS intends to allow the continued use of the Interfile process, USCIS should provide additional training to Lockbox staff regarding how to process such Interfile requests, as the Texas Lockbox facility does not consistently allow such filings and frequently rejects such requests. If DHS does not intend to allow the Interfile process moving forward, that should be made more clear in the Instructions to the Proposed Form I-829.

II. The Instructions to Proposed Form I-829 should clarify the supporting documents required for a stand alone I-829 Petition filed by a dependent where the Petitioner is alive but unwilling to add the dependent to Form I-829.

The Proposed Form I-829 Instructions state on page 2:

“NOTE: If you were not included in the investor’s Form I-829, you should file your own Form I-829. **If you are filing a separate petition from the investor, you should attach a copy of the investor’s Form I-797, Notice of Action, relating to his or her I-829 petition.** USCIS cannot approve your Form I-829 and may reject your petition if the immigrant investor has not submitted a petition to remove conditions unless the immigrant investor has died.” [Emphasis added].

AILA notes that the Proposed Form I-829 does not include instructions with respect to what supporting documents must be included in the I-829 Petition by a dependent where the Petitioner is unwilling to include the dependent in his or her own Form I-829 Petition.

Where the Petitioner is unwilling to include the dependent in his or her own Form I-829 Petition, it is unlikely that the dependent would have access to Petitioner's investment information or documentation, sustainment of investment documentation, or job creation documentation. Privacy laws may prevent a Regional Center or a New Commercial Enterprise from sharing Petitioner's financial or other information with a dependent. Moreover, the Petitioner may refuse to share Form I-797C or Form I-797A with the dependent.

In light of these considerations, AILA urges DHS to outline the supporting documents that may be required by a dependent. AILA also urges DHS to modify the Proposed Form I-829 to include a section for Petitioner's name, date of birth, and other identifying biographic information to help match a Petitioner to a dependent where the dependent may not have access to Petitioner's Forms I-797.

III. The Instructions to Proposed Form I-829 should clarify the supporting documents required for a stand alone I-829 Petition filed by a dependent where the Petitioner has passed away and benefits are sought under INA 204(I).

The Proposed Form I-829 states on page 2:

“NOTE: If you were not included in the investor's Form I-829, you should file your own Form I-829. If you are filing a separate petition from the investor, you should attach a copy of the investor's Form I-797, Notice of Action, relating to his or her I-829 petition. **USCIS cannot approve your Form I-829 and may reject your petition if the immigrant investor has not submitted a petition to remove conditions unless the immigrant investor has died.**” [Emphasis added].

Moreover, the Instructions to Proposed Form I-829 list the following evidence to be submitted on page 11 where INA 204(I) benefits are sought:

“Evidence for Petitioners Filing as a Former Spouse or as a Spouse or Child Whose Investor Spouse or Parent has Died.

Submit the following with your petition:

A. Your former spouse's, current spouse's, or parent's Permanent Resident Card (Green Card);

B. Your former spouse's, current spouse's, or parent's divorce decree or death certificate if applicable; and

C. Evidence listed above in “Evidence Related to the Investor's Commercial Enterprise, Investments, and Job Creation.”

AILA urges USCIS to clarify section “C” above regarding evidence of the Investor’s sustainment of his or her investment. Specifically, USCIS should clarify that the sustainment of investment evidence is required through the time of Petitioner’s death only.

IV. The Instructions to Proposed Form I-829 should clarify when Proposed Form I-829 should be filed by the dependent.

On the Proposed Form I-829 Instructions on page 2, USCIS states the following under “When should I file Form I-829?”

“You must file Form I-829 to remove the conditions on your permanent resident status during the 90-day period immediately before your conditional permanent residence expires. You may include your spouse (or former spouse) and children if they also have conditional permanent resident status.

If you are the spouse (or former spouse) or child of an immigrant investor and you were not included on the immigrant investor’s Form I-829, you must file your own Form I-829 to remove the conditions on your permanent resident status. For additional information, please visit www.uscis.gov, key word search “Form I-829.” [Emphasis added].

AILA urges USCIS to clarify when a dependent filing a stand-alone I-829 Petition must file Form I-829. Specifically, the regulation at 8 CFR 216.6(a) states, “The **investor** must file within the 90-day period preceding the second anniversary of the date on which the investor acquired conditional permanent residence.”⁷ The regulation contemplates that the 90-day filing window is tied to the investor’s conditional permanent residence period, not the dependent’s conditional residence period.

Where a dependent is not included in Petitioner’s Form I-829 because the Petitioner is unwilling to include the dependent, USCIS should clarify in the Instructions to Proposed Form I-829 that a dependent can file at any time during his or her conditional permanent residence following the filing of Petitioner’s Form I-829. In other words, dependents filing stand alone I-829 Petitions need not wait until the expiration of their own conditional permanent residence period if the Petitioner has reached the end of his or her conditional residence and filed Form I-829 with USCIS.

AILA notes that dependents currently attempting the Interfile process with USCIS or who attempt to file their own I-829 Petition *prior* to the 90-day window of expiration of conditional status are frequently rejected by USCIS for filing outside the dependent’s window of conditional permanent residence. Additional training should be provided to Lockbox staff so as to not reject I-829 Petitions filed by dependents where the Petitioner has already reached the end of conditional permanent residence and filed Form I-829 with USCIS.

⁷ Emphasis added.

V. The current fee for Form I-829 is not commensurate with the time required to adjudicate a dependent's Form I-829.

Finally, AILA notes that the current base fee of \$3,750 to be paid by a dependent seeking to file a stand alone I-829 Petition is not commensurate with the processing of a dependent's I-829 Petition. As mentioned in the notice to the Proposed Form I-829, USCIS appears to only require of the dependent evidence that the Petitioner has filed his or her Form I-829. Adjudication of the dependent's Form I-829 Petition should be limited to a review of whether Petitioner's Form I-829 was previously filed and approved, along with the relevant background checks conducted on the dependent. As such, the time spent to adjudicate a stand alone dependent's Form I-829 Petition cannot be the same time allocation spent to adjudicate the Petitioner's I-829 Petition. Evaluation of the I-829 Petition requirements and evidence in the Petitioner's I-829 Petition is much more extensive. Accordingly, DHS should re-examine the filing fee charged to dependents filing a stand alone I-829 Petition in this context and consider reducing the filing fee in light of these considerations.

Conclusion

We appreciate the opportunity to comment on the Proposed Form I-829 and its instructions and look forward to a continuing dialogue with DHS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION