

Questions for EB-5 Stakeholders Meeting co-hosted by the American Immigration Lawyers Association EB-5 Committee and Invest In the USA (IIUSA)

September 14, 2009

QUESTIONS SUBMITTED BY IIUSA AND AILA BEFORE THE MEETING:

Statistical/Informational Questions

1. Please provide statistics for I-526 and I-829 filings, approvals and denials for FY 2009 so far, broken down by individual and regional center cases.

USCIS Answer: The requested statistic is unavailable as it is not currently tracked electronically.

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2. What are the current processing times for I-526 and I-829 petitions?

USCIS Answer: The current processing times for I-526 and I-829 petitions are from 4 to 6 months.

3. Please provide the latest list of all approved EB-5 regional centers.

USCIS Answer: The list is posted on our website at:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3df2b199cb011210VgnVCM1000004718190aRCRD&vgnnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>

The list posted on the website is updated within days of the approval of a regional center proposal.

4. How many EB-5 regional center applications are pending at the CSC?

USCIS Answer: We presently have less than 50 pending.

Operational/Policy Questions

5. (a) Are regional center and individual cases being adjudicated by the same adjudicators with the same processing times, or are they on separate tracks?

USCIS Answer: All cases are on the same track with the same general processing time.

(b) Are applications for new regional centers adjudicated by the same examiners who adjudicate individual petitions? Do they receive special training? Are they consulted by adjudicators who review individual petitions before such adjudicators issue RFEs on issues relating to the qualification of the regional center or a particular regional center project?

USCIS Answer: All applications/petitions are adjudicated by trained and qualified officers, who may be assigned to adjudicate regional center proposals or individual petitions, or both, as EB-5 work priorities dictate. A Request for Evidence or a Notice of Intent to Deny will generally be issued in cases where the record does not contain sufficient evidence to establish eligibility, or where there is evidence of ineligibility in the record.

6. What is the status of the idea of instituting premium processing for I-526s?

USCIS Answer: USCIS will not consider instituting premium processing for I-526 petitions until a full year has passed since the consolidation of all EB-5 case processing at the CSC. EB-5 related premium processing will only be instituted if it

is determined that sufficient resources are available to adjudicate EB-5 petitions accompanied by premium processing requests in the manner required by the premium processing program.

7. (a) In the summer of 2007 USCIS asked then-existing regional centers to supply certain information to USCIS HQ. Did USCIS ever summarize that information? If so, may we obtain a copy?

USCIS Answer: USCIS is in the process of determining the appropriate format to use for the summarization of this information, and cannot release it at this time.

- (b) Does USCIS plan to start asking or requiring EB-5 regional centers to submit data on a regular basis to USCIS, per the June 2007 letter to the Milwaukee regional center? If so, when will that start? How often will the data be requested?

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- ~~(c) What is the purpose of the information collection? Who reviews it? What use is made of it? Is it used to determine regional center decertification or revocation? If so, what standards are used?~~

USCIS Answer: USCIS is in the process of developing a regional center proposal form, and is examining this issue within the form development process.

- (d) Does USCIS void the designation of a regional center if the regional center is not active or has failed to create projects within any certain period of time or under any other timeline or parameters?

USCIS Answer: If there is evidence that a regional center no longer serves the purpose of promoting economic growth, improved regional productivity, job creation, and increased domestic capital investment, then USCIS may issue a Notice of Intent to Terminate (NIT) a regional center's designation. Prolonged EB-5

inactivity in a regional center is a valid ground for the termination of the regional center's designation. However, USCIS does not use a specific timeframe as a trigger for initiating termination proceedings against a regional center. Rather, such a decision is based on the totality of the facts in the case.

8. Will USCIS consider allowing regional centers to submit documents relating to a new project in an already approved regional center to the EB-5 headquarters staff or the California Service Center for a "pre-approval" review? Allowing regional centers and USCIS to discuss and resolve key issues in a new project, such as economic methodology, timetables, etc., will smooth I-526 processing and provide more certainty for regional centers, USCIS, and investors. For example, if a regional center has 100 limited partners in the same project, wouldn't the Service, the regional center and the investor benefit if there were not 100 different reviews and adjudications of the project, with potentially inconsistent approvals, RFEs and denials? Is there a procedure whereby one adjudication of the issue of whether the regional center investment meets the regulatory requirements is communicated to other examiners?

USCIS Answer: As indicated at our June 2009 meeting, USCIS is aware of EB-5 Stakeholder concerns regarding the issues raised in this question and hopes to resolve the issues in conjunction with the publication of the EB-5 memo and regional center proposal form. USCIS believes that the resolution of these issues should be within the adjudicative process and in a manner that avoids ex parte or off the record discussions. USCIS will not engage in ex parte or off the record discussions with respect to a regional center proposal or other EB-5 petition that is pending.

9. It appears that different CSC examiners answer email inquiries to the USCIS.ImmigrantInvestorProgram@dhs.gov email address from time to time. Depending on the examiner in charge, sometimes inquiries regarding status on I-526 and I-829 cases pending for over 1 year are not even answered. Also, inquiries regarding delays in production of permanent green cards that were supposed to be issued by TSC

are not answered. We were under the impression that this email address was the official email address to answer any EB-5-related questions. USCIS HQ should establish a workable means to provide responses to EB-5 cases that have been pending over regular processing times, because the National Customer Service Center just relays questions to CSC; and CSC does not provide specific reasons why the cases have been pending for longer than the regular processing time.

USCIS Answer: Inquiries on public law cases pending past processing times and cases adjudicated at the TSC should be made through the National Customer Service Center (NCSC) at 800-375-5283. Please be mindful that an adverse decision cannot be rendered in the public law cases until the regulations are published. Inquiries on most non-PL cases past processing time can be submitted to the EB5 program e-mail address, maintained by the CSC, at USCIS.ImmigrantInvestorProgram@dhs.gov.

The CSC attempts to provide a response to all inquiries within five days, although ~~under certain circumstances the response time may be longer.~~ In addition, CSC is in the process of developing additional standardized responses to ensure consistency in the answers provided by the EB-5 mailbox. If there has been no response to an inquiry to the EB-5 e-mail address within 10 business days, then a follow-up email may be sent. Note that case-specific information may only be shared with the affected party in the proceeding and the representative of the affected party, if any, who is identified on a properly executed Form G-28.

10. AILA members report that their clients have continuing problems with tracking and obtaining receipts on I-829 petitions. What system has been or is being implemented to enable investors to track or monitor the status and processing times of I-829 petitions? What procedure should investors follow if no receipt notice was issued or if a duplicate receipt notice is required? With ADIT stamps no longer being issued by many offices, and without such a receipt notice, these investors have no evidence of status.

USCIS Answer: Unlike other application types, investors cannot use the Form I-829 receipt number to track their cases in the USCIS Case Online System directly.

Instead, investors must use the receipt number on the ASC appointment notice (a CR-I89 number) to track an I-829.

Processing times for Forms I-526 and I-829 petitions are updated monthly on the USCIS website at <https://egov.uscis.gov/cris/processTimesDisplay.do>.

Investors can write to the EB5 mailbox if no receipt notice has been received.

11. What EB-5 memos are being drafted? When are they expected to be issued?

USCIS Answer: One EB-5 memo is currently being vetted through USCIS's concurrence process, and will be issued soon.

12. During the last stakeholders call, the Service agreed to consider providing - - without a formal Freedom of Information Act request - - all agency officer training material for adjudication of EB-5 immigrant investor cases. According to the Adjudicator's Field Manual, "all USCIS offices must ensure that only officers who have been specially trained and certified by USCIS Headquarters EB-5 program management adjudicate EB-5 immigrant investor case work." It would benefit the Service, investors, regional centers and counsel to have access to the training material. Petitioners and their counsel, having access to such information, would be better able to avoid filings that are likely to result in RFEs or denials and possibly even structure investments in a manner that is likely to result in a smoother petitioning process. CIS has provided training material in other adjudication areas, which has resulted in a win-win situation for all concerned, especially since such training materials contained Service interpretation of which the public and the bar were not aware.

USCIS Answer: A substantial portion of the training materials have already been released to the public in the form of policy memos and AFM updates. At this time,

USCIS is not prepared to release other training materials that contain internal processing instructions and privileged information.

Note: USCIS is in the process of updating the EB-5 material on its website at www.uscis.gov, to include the posting of an FAQ specifically intended to address questions regarding the Immigrant Investor Pilot Program. We expect to have this updated information posted on the website soon.

13. In regional center EB-5 cases, the I-526 petition is the vehicle by which the Service adjudicates the qualification of the regional center project in which the individual investor has invested. However, since the regional center is not a party to the petition, the regional center does not get notice of any RFE or denial questioning the regional center project. In order to rectify this problem and provide the regional center notice of an RFE or denial, please confirm that the regional center's counsel can provide a G-28 and receive notice of any RFEs or denials.

USCIS Answer: USCIS communications such as those described in this question can only take place with the affected party in the proceeding and the representative of the affected party, if any, who is identified on a properly executed Form G-28. If the regional center's counsel is also the counsel of record in the individual petition proceeding, then the information will be shared with the regional center's counsel. However, USCIS will only provide notice to a single G-28 representative in petition proceedings. Note that nothing precludes the affected party in Forms I-526 and I-829, or the attorney of record in those proceedings from sharing information, such as copies of RFEs or NOIDs with the regional center's counsel, if they so chose.

Case Adjudication/Legal Issue Questions

14. The USCIS regulation, 8 C.F.R. § 245.2 (a)(2)(i)(B), which provides for concurrent filing of adjustment of status applications for employment-based first, second and third preference (but not for fourth and fifth preference), was held invalid by the

district court in Ruiz-Diaz v. United States, CO7-1881RSL (W.D. Wash. June 11, 2009). In that case, the challenge was based on an EB-4 I-360 petition. The court ordered that the Service could not distinguish between employment-based categories in its concurrent processing regulations. The Service subsequently decided to implement the district court's order on a nationwide basis for EB-4 cases by Memorandum dated June 25, 2009 from Donald Neufeld.

The analysis of the court applies equally to EB-5 petitions. Will the Service implement concurrent filing of adjustment of status applications for EB-5 cases, which is now the only class of cases excluded? If so, when and how will that be implemented? If not, what are the relevant criteria distinguishing EB-5 from EB-1, 2, 3 and 4 as the basis for disallowing concurrent filing for EB-5?

The AILA EB-5 Committee believes there are no criteria to merit this distinction. We urge the Service to correct this disparity. In fact, because of the special need for expedition in matters involving large investments, construction projects, job creation, etc., there would seem to be even more reason to allow concurrent processing of EB-5 petitions than other categories.

USCIS Answer: At this time, USCIS does not plan to implement concurrent filing of adjustment of status applications for EB-5 cases. USCIS has issued appropriate directives in order to comply with the Ruiz Diaz court's order pending a determination on whether to pursue further review of this case. These directives do not reflect USCIS acquiescence to the Court's ruling with respect to EB-5 filings.

15. The June 17 EB-5 memo states that all I-526 petitions should include a business plan, even for petitions filed through regional centers. What does that mean exactly? The standards in Matter of Ho, 22 I. & N. Dec. 206 (Assoc. Comm'r, Examinations 1998), obviously applied to individual (i.e., non-regional center) EB-5 cases and did not apply to petitions filed through regional centers (i.e., information on competing businesses, direct employee job description and hiring timetable, etc.). Does the Service have separate

criteria for regional center business plans? Would the Service be interested in reviewing suggested criteria?

USCIS Answer: An important facet to evaluating the job-creating efficacy of an economic analysis involving indirect job creation requires USCIS to carefully evaluate the project's prospective business plan and other supporting documentation in the proposal. The proposal must demonstrate in verifiable detail that the business plan and associated economic analysis can be relied upon as a viable business model. It must be well-grounded in reasonable and credible estimates and assumptions for market conditions, project costs, and activity timelines. The business plan and associated economic analysis must persuasively show that the project's activities will generate sufficient economic activity in order to create the requisite jobs within the two year conditional residency time period. Matter of Ho did not specifically address the required attributes of business plans submitted in support of regional center proposals, as the case in Matter of Ho was an individual EB-5 petition. However, information on competing businesses, direct employee job descriptions and hiring timetables may still be relevant information to consider when evaluating whether a business plan can be relied upon as a viable business model within the regional center proposal context.

16. In all contexts other than EB-5, an employer is considered to be in full compliance with the law if it reviews documents required under section 274 that reasonably appear to be genuine and if the employee completes an I-9 indicating that he is a U.S. citizen or permanent resident. In fact, an employer is in violation of section 274A if the employer requests any more information or documentation.

Does the Service believe that an employer has different or additional requirements with respect to proving the U.S. citizenship or permanent residence of employees under section 203(b)(5)? Is an employer protected against a discrimination charge if it requests further documentation in connection with meeting its burden of proof on EB-5 petitions? Will the Service accept completed I-9 forms as presumptive evidence of meeting the

employment requirement of section 203(b)(5) absent any proof that the employer is in violation of section 274?

USCIS response: 8 C.F.R. § 216.6(a)(4)(iv) specifically provides that Forms I-9 are acceptable evidence to prove job creation. Like other forms of evidence, USCIS will evaluate Forms I-9 to determine their credibility and probative value in each individual case. Generally, Forms I-9 that were fully executed at the time of the hiring of the employee are competent and probative evidence that the individual employed by the commercial enterprise is a qualifying employee for EB-5 purposes. However, incomplete and/or unsigned Forms I-9 that appear to have simply been created for the purposes of supplementing the record in an EB-5 petition are less persuasive. USCIS does not specifically evaluate whether the employer is in violation of section 274 within the context of the adjudication of EB-5 petitions.

17. (a) USCIS has issued RFEs to EB-5 investors from Iran, stating that they need a license from the Treasury Department's Office of Foreign Asset Control (OFAC). What is the status of that issue? Have licenses been issued? Have petitions been revoked after being approved because they lack an OFAC license? What is the status of such cases?

USCIS Answer: USCIS is consulting with OFAC to gain a better understanding regarding when an OFAC license may be required in EB-5 matters. USCIS may only communicate case-specific information to the affected party in the proceeding and the representative of the affected party, if any, who is identified on a properly executed Form G-28. As a result, case specific information cannot be provided in response to this question.

- (b) If a petitioner receives an RFE requesting an OFAC license, and if the license is not issued within the time given for the RFE response, what is the proper procedure for the petitioner to follow? Please confirm that the

Service will provide whatever time is necessary for the government to issue the appropriate license to the investor.

USCIS Answer: Petitioners should provide a timely response to the issues raised in the RFE, to include providing a response to any other issues raised in the RFE that are unrelated to the OFAC licensure issue. USCIS will carefully evaluate how to handle each of these cases individually, based on the facts presented.

18. AILA believes that the following issues should be adjudicated at the stages indicated:

- I. I-526 PETITION
 - Lawful source of capital
 - Targeted Employment Area
 - Alien “has invested or is actively in the process of investing” requisite capital
 - Prospective job creation

- II. ADJUSTMENT OF STATUS (I-485) / IMMIGRANT VISA APPLICATION
 - Eligibility for Adjustment of Status under INA §245 (for I-485 only)
 - Inadmissibility under INA §212(a)
 - Credibility issues
- III. BEFORE SECOND ANNIVERSARY OF OBTAINING PERMANENT RESIDENCE
 - Termination of investor’s status prior to filing of I-829 pursuant to INA §216A(b)
- IV. I-829 PETITION
 - Alien “invested or was actively in the process of investing” requisite capital

- Alien sustained investment throughout conditional residence period
- Alien “created or can be expected to create within a reasonable time” requisite jobs

(a) Does the Service agree that this is a correct recitation of issues that should be adjudicated at each stage?

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(b) Does the Service concur that, once one of these issues is adjudicated, it should not be readjudicated at a subsequent stage (absent, of course, evidence of fraud?)

USCIS Answer: USCIS will be addressing this issue in the forthcoming EB-5 memo, and will wait until the memo is published before commenting on the above.

19. Do the new requirements set forth in the June 17 memo apply to existing projects? For example, if I-526 petitions have been approved for a project in a regional center but no I-829 petitions have been filed yet, will the June 17 memo apply to those projects/investors?

USCIS Answer: Yes. However, USCIS is not aware of any previously approved cases in which the June 17th memo might affect the adjudication of an investor’s Form I-829. If USCIS becomes aware of cases in which the June 17th memo might affect the decision, USCIS will carefully consider the facts and circumstances of each case, including the job creation plan contained in the Form I-526, in evaluating whether the Form I-829 can be approved.

20. (a) Most states update census tracts and population/unemployment statistics once a year. Assume that a regional center starts a project in a census tract that is a TEA for the current period but may not be a TEA for the

following year. If funding is not completed until the second year, when the tract may no longer qualify as a TEA, can EB-5 investors who come into the project the second year nevertheless invest \$500,000 rather than \$1 million? It makes little sense to require investors who have invested in a project at different amounts, based on the sole fortuity of when a state updates its TEA list.

USCIS Answer: Each Form I-526 petition in which the petitioner claims eligibility for the reduced capital investment threshold of \$500,000 as a result of a capital investment in a new commercial enterprise principally doing business in a high unemployment area must demonstrate that the area qualifies as a high unemployment area as of the date of filing of the Form I-526 petition. [See 8 C.F.R. §204.6(j)(6)(ii) and 8 C.F.R. §103.2(b)(1). See also Matter of Katigbak, 14 I&N Dec. at 49.]

- (b) Since regional center investment projects are securities offerings that are marketed internationally, shouldn't the dollar amount of the investment be fixed at the time the securities offering is made available to the public?

USCIS Answer: USCIS is concerned with the dollar amount of the capital investment. The dollar amount of the capital investment must be shown to at least \$1,000,000 or \$500,000, respectively, depending on the required EB-5 capital investment threshold, at the time that the Form I-526 is filed, regardless of whether the investment vehicle is classified as a securities offering.

- (c) INA §203(b)(5)(B)(ii) and 8 CFR §204.6(e) state that “targeted employment area” is determined “at the time of investment.” Please confirm that an investor who invests in a project within a TEA at the time of investment is eligible at the \$500,000 investment amount even if the geographical area is not a TEA at the time the petition is filed or adjudicated.

USCIS Answer: [Please see the answer to question #20(a).] Each Form I-526 petition in which the petitioner claims eligibility for the reduced capital investment threshold of \$500,000 as a result of a capital investment in a new commercial enterprise principally doing business in a high unemployment area must demonstrate that the area qualifies as a high unemployment area as of the date of filing of the Form I-526 petition.

21. (a) In a “troubled business” scenario, may an EB-5 regional center structure an investment project to claim both the full-time direct, indirect, and induced jobs preserved and the full-time direct, indirect, and induced jobs created through expansion of an existing business, if the project achieves at least a 40 percent net expansion within two years?

USCIS Answer: For an EB-5 project involving a “troubled business,” the regulations state that the I-526 petition must be accompanied by evidence that the ~~number of existing employees is or will be maintained at no less than the pre-~~investment level for a period of at least two years. One can qualify for EB-5 purposes by maintaining the number of existing employees and by creating additional new full-time jobs for not fewer than 10 qualified employees which may be created through the expansion of an existing business, including at least a 40 percent net expansion within two years.

- (b) Assume a regional center buys the assets but not the liabilities of a troubled business. After the purchase, the troubled business has a new corporate name and EIN number, but in all other respects it is the same company. The regional center now wants to bring in EB-5 investors to help preserve jobs in the troubled business. 8 CFR § 204.6(e) states in part that “[f]or purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same

period of time as the business they succeeded.” 8 CFR § 204.6(h)(3) states in part that “[i]n the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).” Does this fact pattern qualify as a successor in interest and a capital investment in a troubled business?

USCIS Answer: Whether a specific transfer of assets and/or liabilities from one company to another creates a successor-in-interest relationship must be decided on a case-by-case basis. USCIS believes that an investor would get the benefit of creating or maintaining ten jobs even if the EB-5 investor decided to change the corporate name and EIN number, but in all other respects it is the same company, provided the business will likely qualify as a troubled business. A troubled business is defined in 8 CFR 204.6 (e) as a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

22. The Adjudicator’s Field Manual states that adjudicating officers are, under most circumstances, governed by the preponderance of the evidence standard of proof. Compared to other legal standards of proof, the “preponderance of the evidence” is the lowest, requiring only that the facts to be proven are “more likely than not” established by the evidence. Once the petitioner has met the burden of establishing a prima facie case, the Service does not have unbridled discretion to request additional evidence or deny the application. Instead, as the Field Manual outlines, the adjudicating officer has the legal responsibility to articulate a “material doubt” about the evidence presented (chapter 11). Where a petitioner has made a prima facie showing of eligibility, an

adjudicating officer who requests more evidence without “articulating material doubt,” has effectively and improperly elevated the standard of proof to a level beyond that required by law.

In the EB-5 area, our members have experienced a number of situations where it appears that the appropriate standard of proof, as articulated in the Field Manual, has not been followed. In addition to requesting copious amounts of evidence, RFEs fail to articulate a “material doubt” regarding the evidence contained in the initial submission and provide no basis to explain why the credibility of the evidence provided by the petitioner is in question. Such RFEs may be driven, in part, by lack of a clear understanding of the required standard of proof and the impact of the standard of proof. Some officers may also use the RFE process to confirm the validity of documents they suspect are not valid or that their intuition tells them might not be true.

We certainly appreciate that investigating and uncovering fraud is a high priority within the Service. However, informal fraud investigations conducted by an adjudicating officer ~~on the basis of a hunch or suspicion are not appropriate, nor authorized by law.~~ Such informal fraud investigations that are not based on material doubt that has been communicated to the applicant lack transparency and are tantamount to applying a higher than appropriate standard of proof. The Field Manual mandates that when a prima facie case has been presented, requesting additional evidence should always be accompanied by information clearly articulated by the adjudicating officer that is significant enough to cast material doubt over the evidence submitted.

Please confirm whether the Service concurs that the “preponderance of the evidence” standard is the appropriate standard for adjudicating an EB-5-related petition. Please advise whether the Service will articulate the importance of following this standard of proof to EB-5 adjudicators. If we believe there are examples where the preponderance of the evidence standard is not being utilized properly in connection with RFEs or denials, to whom should such examples be presented?

We are attaching a Memorandum prepared by the AILA VSC Liaison Committee discussing this issue in more detail.

USCIS Answer: In adjudicating all EB-5 related petitions, officers use the preponderance of the evidence standard. If the officer issues an RFE, the petitioner should respond to the request in a timely manner. The petitioner may choose not to provide all of the requested evidence and request a decision on the merits if he or she believes that eligibility has been established by the evidence already in the record or that the request is not proper. See 8 CFR 103.2(b)(11).

Separately from the adjudicative process, if there are repeated cases in which an RFE is improvidently issued, you may send an e-mail to the EB-5 mailbox. USCIS will investigate the matter and, if necessary, will take appropriate action.
