



Memorandum

TO: Richard Flowers
Acting Citizenship and Immigration Services Ombudsman

FROM: Michael Aytes /S/ **June 12, 2009**
Acting Deputy Director

SUBJECT: Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5)
Program Recommendations

Recommendation

The CIS Ombudsman recommends that USCIS:

- Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions;
- Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud;
- Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances;
- Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes;
- Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications;
- Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee;

- “Prioritize” the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs, and;
- Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS Response

1. Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.

USCIS is actively working to finalize and publish regulations regarding EB-5 investors affected by the 2002 EB-5 legislation. The rule has already been reviewed by the U.S. Department of Homeland Security’s (DHS) Office of General Counsel (OGC), and the agency is attempting to streamline the current draft as well as incorporate substantive decisions that are not subject to OGC’s review. During the past year or so the agency was directed to issue several rulemakings that were designated as priority rules for the Department of Homeland Security, including rules related to H-1B, H-2A, H-2B, I-9, TN, and T and U Adjustment of Status; therefore, the agency could not finalize this EB-5 rule. USCIS will urge the Department to put this rule on the priority list as many of the investors are in the process of litigating their right to citizenship.

2. Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.

USCIS concurs with the intent of this recommendation to the extent that EB-5 adjudicators should not re-adjudicate the indirect job creation methodology for Regional Center cases absent clear error or evidence of fraud. USCIS will, however, continue to review the I-829 petitions to ensure that all measurable variables and assumptions that underlie the indirect job creation methodology have, in fact, been met. For example, an investor may make a proposal to create a shopping center that would be leased to various businesses. At the I-526 stage, the investor may claim that this proposal would result in the hiring of a certain number of employees by the tenant-businesses and that a certain number of indirect jobs would be created as well. USCIS must ensure that the tenant jobs have substantially been filled to support the indirect job count. This is not re-adjudicating the job creation methodology, merely, verification of an assertion previously made during the I-526 stage. In the alternative, if the job creation was based on total expenditure of capital to create the shopping center, USCIS must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count.

USCIS regulations provide some flexibility to respond to changed circumstances at the time the I-829 is filed by permitting the conditions to be removed from the alien investor’s permanent residence based upon a showing that the jobs will be created within a reasonable time. USCIS has encouraged stakeholders to contact the agency should they have any concerns about how the agency

has applied the reasonable timeframe standard at the Form I-829 stage. USCIS will confer internally to develop additional training sessions for adjudicators rather than issue SOPs or policy guidance via the AFM for Forms I-526 and I-829.

3. Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.

USCIS concurs with the intent of this recommendation, but believes that it is more beneficial to issue new policies through formal rulemaking or policy guidance which would provide examples of certain factual circumstances via the AFM. On occasion, USCIS will certify unique or novel decisions to the AAO for clarification on certain issues. Unfortunately, issuing a precedent decision is a multi-department and time-consuming process.

4. Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.

USCIS acknowledges that the regulations governing the EB-5 Program need to be updated. During the past 20 months the agency was directed to issue several rules that were designated as priorities by the previous presidential administration. USCIS met these challenges despite limited resources, and we are continuing with rulemaking efforts that are agency priorities. USCIS will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations which are currently in progress.

5. Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

USCIS is exploring the possibility of developing an inter-governmental advisory group to discuss operational and policy issues with respect to domestic business, economic, and labor considerations relevant to EB-5 adjudications. USCIS will advise the CIS Ombudsman if a group is convened.

6. Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.

USCIS concurs with this recommendation. USCIS Service Center Operations recently advised attendees at the EB-5 quarterly stakeholders meeting that the agency is committed to offering Premium Processing Service for some or all EB-5 form types in the future. However, because of the complexity of the issues presented by EB-5 petitions, the agency does not believe that it is possible to provide Premium Processing Service for EB-5 petitions under the current statutory scheme.¹ The agency believes that a longer processing time as well as an increase in the premium processing fee may be necessary before EB-5 petitions will be eligible for Premium Processing Service. In

¹ Currently the Premium Processing Service provides a 15 calendar day processing time for an additional cost of \$1000.

addition, the agency intends to meet the targeted cycle times before it pursues adding EB-5 applications to Premium Processing Service.

7. “Prioritize” the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

USCIS currently prioritizes the review and processing of all Regional Center-affiliated petitions and will continue to do so. Regional Center-affiliated petitions are separated and assigned to specific officers who are trained to complete such specialized adjudications. With the increased number of staff dedicated to the processing of I-526 and I-829 petitions,² we fully anticipate that the cycle times will continue to decrease. Recently, we requested that stakeholders include a copy of the Regional Center approval notice when submitting petitions and applications. This will enable our contractor to easily identify the Regional Center cases and segregate them so that they can be worked more quickly.

8. Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS believes that this suggested initiative focuses more on high-level promotional efforts rather than operational matters. USCIS is responsible for administering immigration benefits and not necessarily for promoting increased commercial enterprises within the United States. For this reason, USCIS believes that other agencies and departments, such as the U.S. Department of Commerce, would be better suited to promote such a program. However, USCIS may potentially discuss the promotion of the program within the proposed inter-governmental advisory group or in other cross-cutting department panels.

² There are currently 16 officers dedicated to adjudicating EB5-related petitions (Form I-526 and Form I-829). There were previously only 2 officers assigned to adjudicating EB5-related petitions.