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U.S. Citizenship and Immigration Services

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Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

SUBJECT: Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)

I. Purpose

This memorandum provides instruction to California Service Center (CSC) personnel involved in the adjudication of EB-5 Regional Center Proposals, and affiliated Forms I-526, Immigrant Petition by Alien Entrepreneur and Forms I-829, Petition by Entrepreneur to Remove Conditions. This memorandum rescinds in its entirety the USCIS memorandum, *Establishment of an Investor and Regional Center Unit*, dated January 19, 2005, and provides guidance regarding:

- The timing of the adjudication of EB-5 eligibility issues;
- The procedures to be used when there appears to be a material change in circumstances relating to an eligibility issue following the issue's prior adjudicative resolution;
- Targeted Employment Area (TEA) determinations;
- How an alien may seek approval of a new Form I-526 petition in order to change the focus of his or her investment to a new capital investment project or commercial enterprise; and
- The respective EB-5 program responsibilities of CSC and Service Center Operations (SCOPS) personnel.

This memorandum also addresses the issue of communication with non-USCIS individuals or entities regarding case specific information.

II. Background

The Immigrant Investor Program, also known as "EB-5", was created by Congress in 1990 under § 203(b)(5) of the Immigration and Nationality Act (INA) to stimulate the U.S. economy through job creation and capital investment by alien investors. Alien investors have the opportunity to obtain lawful permanent residence in the United States for themselves, their spouses, and their minor unmarried children by making a certain level of capital investments and associated job creation or preservation.

There are two distinct EB-5 pathways for an alien investor to gain lawful permanent residence, the Basic Program and the Regional Center Pilot Program. Both programs require that the alien investor make a capital investment of either $500,000 or $1,000,000 (depending on whether the investment is in a TEA or not) in a new commercial enterprise located within the United States. The new commercial enterprise must create or preserve 10 full-time jobs for qualifying U.S. workers within two years of the alien investor's admission to the United States as a Conditional Permanent Resident (CPR).[1] When making an investment in a new commercial enterprise affiliated with a USCIS-designated regional center under the Regional Center Pilot Program, an alien investor may satisfy the job creation requirements of the program through the creation of either direct or indirect jobs. Notably, an alien investing in a new commercial enterprise under the Basic Program may only satisfy the job creation requirements through the creation of direct jobs.

Note: *Direct jobs* are those jobs that establish an employer-employee relationship between the newly established commercial enterprise and the persons that they employ.

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[1] The statutory framework for the EB-5 program can be found at INA sections 203(b)(5) and 216A, which were modified by:

- Section 610 of Pub. L. 102-395, as amended by section 116(a)(l) of Pub. L. 105-119 and section 402(a) of Pub. L. 106-396;
- Section 4 of Pub. L. 108-156, relating to the Regional Center Pilot Program; and
- Sections 11031-11034 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, relating to certain aliens with conditional resident status who filed I-829 petitions before November 2, 2002.

The regulatory framework for the EB-5 program can be found at 8 CFR 204.6 and 8 CFR 216.6.

There are also four EB-5 precedent decisions:

- *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998);
- *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998). **Note:** Pub. L. 107-273 eliminated the requirement set forth in *Izummi* that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations;
- *Matter of Hsiung*, 22 I&N, Dec. 201 (BIA 1998); and
- *Matter of Ho*, 22 I&N Dec. 206 (BIA 1998).

Indirect jobs are the jobs held by persons who work outside the newly established commercial enterprise. For example, indirect jobs include employees of the producers of materials, equipment, and services that are used by the commercial enterprise. There is also a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. *Induced jobs* are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

Under the Regional Center Pilot Program, an individual or entity must file a Regional Center Proposal[2] with the CSC to request USCIS approval of the proposal and designation of the entity that filed the proposal as a regional center. A "Regional Center" is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. The Regional Center Proposal must provide a framework within which individual alien investors affiliated with the regional center can satisfy the EB-5 eligibility requirement and create qualifying EB-5 jobs.

The Regional Center Proposal may also include copies of the commercial enterprise's organizational documents, capital investment offering memoranda, and transfer of capital mechanisms for the transfer of the alien investor's capital into the job creating enterprise so that USCIS may determine if they are in compliance with established EB-5 eligibility requirements. Providing these documents may facilitate the adjudication of the related I-526 petitions by identifying any issues that could pose problems when USCIS is adjudicating the actual petitions. For example, if a new commercial enterprise's limited partnership (LP) agreement contains a redemption clause guaranteeing the return of the alien investor's capital investment, then the alien investor's capital investment will not be a qualifying "at-risk" investment for EB-5 purposes. Likewise, if the LP agreement requires the payment of fees from the alien investor's capital investment of $1,000,000 (or $500,000 if in a TEA) to such extent that the investment will be eroded below the qualifying level, preventing the full infusion of sufficient capital into the job creating enterprise, then the alien investor's capital investment will not meet the required EB-5 level of investment. The approval of a Regional Center Proposal containing defects such as these is not in the best interest of the prospective regional center or the USCIS EB-5 program as the end result will most likely be the denial of the individual alien investor's Form I-526 petition.

Any individual Form I-526 and Form I-829 petitions claiming new commercial enterprise affiliation with a regional center and thus EB-5 eligibility based on indirect job creation must be denied if they are filed prior to the approval of the Regional Center Proposal.

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[2] USCIS is developing a Regional Center Proposal form through the standard Office of Management and Budget (OMB) form development process. The new form will require the submission of a filing fee for the filing of an initial Regional Center Proposal and for Proposal Amendments that are filed subsequent to the initial approval and designation of the regional center. There is no filing fee for the submission of Regional Center Proposals and Proposal Amendments at the present time.

Each alien investor must file an individual Form I-526 petition to establish his or her eligibility for classification as an EB-5 alien investor under either the Basic Program or the Regional Center Pilot Program. If the Form I-526 petition is approved, then the alien must file a Form I-485, Application to Register Permanent Residence or Adjust Status, to adjust status in the United States, or apply for an immigrant visa abroad, in order to obtain CPR status. The alien investor must file a Form I-829 petition within the 90-day period immediately preceding the two-year anniversary of his or her admission to the United States or adjustment of status as a CPR. The Form I-829 petition must demonstrate that all of the terms and conditions of the EB-5 program have been met by the alien investor in order for the conditions on his or her permanent residence to be removed.

III. Rationale for Updated Field Guidance

A. Streamlining EB-5 Case Processing.

USCIS wishes to streamline the Regional Center Proposal and EB-5 petitioning processes. Distinct EB-5 eligibility requirements must be met at each stage of the EB-5 immigration process. If USCIS evaluates and approves certain aspects of an EB-5 investment, that favorable determination should generally be given deference at a subsequent stage in the EB-5 process. However, a previously favorable decision may not be relied upon in later proceedings where, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation in the record of proceeding, or the previously favorable decision is determined to be legally deficient.

USCIS is aware that there are times when Immigration Service Officers (ISOs) question whether a previously established EB-5 eligibility requirement has been met at a later stage in the process even though the facts of the case have not changed. USCIS is also aware that some designated regional centers have subsequently made material alterations to documentation initially provided in support of the regional center proposal. For example, there have been cases where a regional center has made significant changes to the organizational documentation, the transfer of capital mechanisms, or other aspects of the new commercial enterprise after approval of the regional center proposal. This documentation was changed to such a degree that it no longer resembled the documentation upon which USCIS based the approval of the Regional Center Proposal, and it appeared that the new commercial enterprise would no longer comply with EB-5 Program requirements.

In some instances, the adjudication of EB-5 petitions has been prolonged due to the issuance of requests for evidence (RFEs) that inappropriately seek to revalidate previously favorable determinations. Likewise, the finalization of EB-5 petitions have

been delayed due to the material alteration of documentation vetted during the Regional Center Proposal Process, requiring that previously decided issues be re-adjudicated within the EB-5 petitioning processes. This has prompted USCIS to deny EB-5 petitions.[3] Information provided in support of EB-5 petitions may also prompt USCIS to reopen a Regional Center Proposal and ultimately terminate the regional center designation under 8 CFR 204.6(m)(6) if the regional center is shown to be operating in a manner not in accordance with section §610(a) of Public Law 102-395.

In light of the above, USCIS is incorporating guidance into the AFM that highlights the adjudicative issues to be resolved at each stage of the Regional Center Proposal and EB-5 petitioning processes. In addition, the guidance outlines the factors that should be in place in order to revisit previously approved EB-5 eligibility requirements at a later stage in the process. USCIS is also adding guidance into the AFM update that explains how a regional center may provide an exemplar Form I-526 with the supporting documentation required by 8 CFR 204.6 in order to determine if the documentation is EB-5 compliant, and thus can generally be favorably acted upon if submitted unaltered in support of an actual Form I-526 petition.

B. Changes in Form I-526 Business Plans.

USCIS is aware that some EB-5 aliens may encounter difficulties when unforeseen circumstances cast doubt on the achievement of the requisite job creation as outlined in an approved Form I-526 petition. This may occur when the job creating capital investment project or commercial enterprise that was relied upon for the approval of the Form I-526 petition fails, or otherwise cannot be completed, within the alien's two-year period of conditional residence. The statutory structure of the EB-5 program and relevant precedent decisions limit an alien entrepreneur's options when a planned investment project fails. The capital investment project identified in the business plan in the approved Form I-526 petition must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment.[4] The business plan in the Form I-526 petition may not be materially changed after the petition has been filed.[5] In addition, USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions beyond the timeframes outlined in INA section 216A(d)(2) and 8 CFR 216.6(a) and (c).

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[3] EB-5 petitioners must establish eligibility as of the date of filing of the petition. See 8 CFR 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Note also that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. at 175.

[4] See 8 CFR 216.6(c).

[5] See *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998) and 8 CFR 103.2(b).

As a result, USCIS is incorporating guidance into the AFM outlining the procedures for an ISO to follow when adjudicating:

- A new Form I-526 petition seeking to change the capital investment and job creation scheme outlined in an alien's previously filed Form I-526 petition; and
- If such new Form I-526 petition is approved, a Form I-485 application requesting re-adjustment of status.

C. Communication with EB-5 External Stakeholders.

It is critically important that all USCIS staff involved in the EB-5 Program understand that any case-specific communication with non-agency stakeholders may not be considered in the adjudication of an application or petition unless it is included in the record of proceeding of the case. USCIS may only provide information about specific cases 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.[6] The agency will only recognize one attorney of record at a time as reflected in the most current Form G-28 available in the record.[7]

If USCIS receives evidence about a specific case from anyone other than an affected party or his or her representative, such information is not part of the record of proceeding and cannot be considered in adjudicative proceedings, unless the affected party has been given notice of such evidence and, if such evidence is derogatory, he or she has been given an opportunity to respond to the evidence as required in 8 CFR 103.2(b)(16). Note that the opinion of a USCIS official outside of the adjudicative process is not binding and no USCIS officer has the authority to pre-adjudicate a Regional Center Proposal or an EB-5 petition. *Matter of Izummi*, 22 I&N Dec. at 196.

In light of the above, USCIS staff is directed to include in the record of proceeding copies of all case-specific written communication with external stakeholders involving receipt of information relating to specific EB-5 Regional Center Proposals or individual petitions pending on or after the date of this memorandum. In the very limited instances where oral communication takes place between USCIS staff and external stakeholders regarding specific EB-5 cases, the conversation must either be recorded, or detailed minutes of the session must be taken and included in the record of proceeding. As provided above, if the documentary or oral evidence was not provided by the affected party or his or her representative, the party must be notified of the evidence.

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[6] See 8 CFR 103.3(a)(iii)(B), 103.2(a)(3). See also sections §§551(14) and 557(d) of the Administrative Procedures Act (APA).

[7] See 8 CFR 292.4(a) providing for substitution of counsel via subsequent execution and submission of a new G-28. See also 8 CFR 292.5(a) and (b), 103.2(a)(3), and 103.2(b)(11), all of which refer to a singular "attorney" or "representative" permitted to represent the petitioner or applicant.

The EB-5 program maintains an e-mail account at USCIS.ImmigrantInvestorProgram@dhs.gov for external stakeholders to use when seeking general EB-5 program information, inquiring about the status of pending cases, or requesting the expedite of a pending EB-5 case. USCIS personnel are instructed to direct all case-specific and general EB-5 related communications with external stakeholders through this email account, or through other established communication channels, such as the National Customer Service Center (NCSC), or the USCIS Office of Public Engagement.

USCIS believes that transparency in the administration of this program is critical to its success. USCIS is aware that some external stakeholders routinely contact SCOPS HQ personnel with questions regarding general EB-5 eligibility issues. SCOPS HQ has routinely responded directly to the external stakeholders in accordance with the EB-5 oversight authority delegated to the Investor and Regional Center Unit in the USCIS memorandum, *Establishment of an Investor and Regional Center Unit*, dated January 19, 2005. Unfortunately this method of communication is very resource intensive and only serves to inform the external stakeholders who contact SCOPS HQ. USCIS is formally rescinding the January 19, 2005, memo. SCOPS HQ will no longer respond to questions from external stakeholders regarding EB-5 eligibility issues that have not been vetted through the National Customer Service Center at (800) 375-5283, the EB-5 email account at USCIS.ImmigrantInvestorProgram@dhs.gov, or are raised through other established USCIS communication channels.

EB-5 eligibility issues that are raised through the EB-5 email account will be reviewed by the CSC EB-5 staff who will:

- Respond to those that involve routine EB-5 questions; and
- Raise issues involving novel adjudicative questions to SCOPS HQ personnel.

SCOPS HQ will publish EB-5 FAQs and in some cases, policy memoranda, on the USCIS website to address novel adjudicative issues raised by external stakeholders. This method of communication will promote transparency and the free flow of EB-5 related information in a manner that makes all EB-5 external stakeholders privy to the information, not just a select few.

IV. Field Guidance

USCIS EB-5 program staff are directed to follow the guidance provided in this memorandum in the adjudication of all Regional Center Proposals and EB-5 petitions pending or filed as of the date of this memo.

V. AFM Update

The Adjudicator's Field Manual is revised as follows:

1. Chapter 22.4(a)(2) of the AFM is revised to read as follows:

(2) Regional Center Pilot Program.

(A) Program Overview. The Regional Center Pilot Program was first instituted in 1992. Three thousand of the 10,000 total available EB-5 visas are set aside for aliens who invest in a USCIS designated "regional center" in the United States organized "for the promotion of economic growth, including improved regional productivity, job creation, and increased domestic capital investment." Section 610 of Pub. L. 102-395, as amended by section 116(a)(l) of Pub. L. 105-119 and section 402(a) of Pub. L. 106-396.

An alien investing in a new commercial enterprise affiliated with and located in a regional center is not required to demonstrate that the new commercial enterprise itself directly employs ten U.S. workers; a showing of indirect job creation and improved regional productivity will suffice. Implementing regulations for the Pilot Program are found at 8 CFR 204.6(m).

Note: *Direct jobs* are those jobs that establish an employer-employee relationship between the commercial enterprise and the persons that they employ. Regional centers typically use the RIMS II or IMPLAN economic models to determine the number of indirect jobs that will be created through investments in the regional center's investment projects. *Indirect jobs* are the jobs held by persons who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise, such as steel producers or outside firms that provide accounting services. There is a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. *Induced jobs* are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

A Regional Center Proposal must be filed with the CSC to request USCIS approval of the proposal and designation of the entity that filed the proposal as a regional center. A "Regional Center" is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. The Regional Center Proposal must demonstrate that capital investments made by individual alien investors within the geographic area of the regional center will satisfy the EB-5

eligibility requirements in order to create qualifying EB-5 jobs. The Regional Center Proposal should also demonstrate that the new commercial enterprise's organizational documents, capital investment offering memoranda, and transfer of capital mechanisms for the transfer of the alien investor's capital into the job creating enterprise are in compliance with established EB-5 eligibility requirements.

(B) Regional Center Proposal EB-5 Eligibility Requirements. Regional Center Proposals must demonstrate the following EB-5 eligibility requirements in order to be approved:

(i) A clearly identified, contiguous geographical area for the regional center. If the regional center proposal bases its predictions regarding the number of direct or indirect jobs that will be created through EB-5 investments in the regional center, in whole or in part, by offering investment opportunities to EB-5 investors with the reduced $500,000 threshold, then the Targeted Employment Areas (TEAs), Rural Areas (areas with populations under 20,000 people) and areas of high unemployment (areas with unemployment rates 150% or more of the national rate), should be identified. Note: An alien filing a regional center affiliated Form I-526 must still establish that the investment will be made in a TEA at the time of filing of the alien's Form I-526 petition, or at the time of the investment, whichever occurs first, to qualify for the reduced $500,000 capital investment threshold.

(ii) A detailed description of how EB-5 capital investment within the geographic area of the regional center will create qualifying EB-5 jobs, either directly or indirectly. This analysis must be supported by economically and statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported [if any], and/or multiplier tables.

(iii) A detailed prediction of the proposed regional center's predicted impact regionally or nationally on household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and outside of the geographic area of the proposed Regional Center.

(iv) A description of the plans to administer, oversee, and manage the proposed Regional Center, including but not limited to how the regional center will:

- Be promoted to attract EB-5 alien investors, including a description of the budget for the promotional activity;
- Identify, assess and evaluate proposed immigrant investor projects and enterprises;
- Structure its investment capital, e.g., whether the investment capital to be sought will consist solely of alien investor capital or a combination of alien investor capital and domestic capital, and how the distribution of the investment capital will be structured, e.g. loans to developers, venture capital, etc.; and
- Oversee all investment activities affiliated with, through or under the sponsorship of the proposed Regional Center.

(C) The Regional Center Proposal may also include an "exemplar" Form I-526 petition that contains copies of the commercial enterprise's organizational documents, capital investment offering memoranda, and transfer of capital mechanisms for the transfer of the alien investor's capital into the job creating enterprise. USCIS will review the documentation to determine if they are in compliance with established EB-5 eligibility requirements. Providing these documents may facilitate the adjudication of the related I-526 petitions by identifying any issues that could pose problems when USCIS is adjudicating the actual petitions. For example, if a new commercial enterprise's limited partnership (LP) agreement contains a buy-back agreement (i.e. a redemption clause guaranteeing the return of the alien investor's capital investment), then the alien investor's capital investment will not be a qualifying "at-risk" investment for EB-5 purposes. Likewise, if the LP agreement requires the payment of fees from the alien investor's capital investment of $1,000,000 or $500,000, respectively, to the extent that the investment will be eroded below the qualifying level, preventing the full infusion of the capital into the job creating enterprise, then the alien investor's capital investment will not meet the required EB-5 level of investment. The approval of a Regional Center Proposal containing defects such as these is not in the best interest of the prospective regional center or the USCIS EB-5 program as the end result will most likely be the denial of the individual alien investor's Form I-526 petition.

Any individual Form I-526 and Form I-829 petitions claiming new commercial enterprise affiliation with a regional center and thus EB-5 eligibility based on indirect job creation must be denied if they are filed prior to the approval of the regional center's Regional Center Proposal.

(D) Regional Center Proposal and Amendment Request Processing. There are two general workflows for the adjudication of Regional Center

Proposals, one for Initial Regional Center Proposals and one for Regional Center Amendment requests. ISOs adjudicate cases within these workflows in "first in, first out" order, unless an expedite request is granted by the CSC director in accordance with the routine expedite criteria that is used for all cases filed with USCIS.

(E) Amended Regional Center Proposals.

(i) Amendments Due to Material Changes in EB-5 Related Organizational Structure or Capital Investment Instruments. Designated regional centers may elect to file an amended Regional Center Proposal and receive an updated approval of the regional center designation prior to the filing of individual EB-5 petitions that use supporting documentation relating to EB-5 eligibility issues that has been materially altered or is inconsistent with the documentation used as the basis for the approval of the regional center designation. Doing so, may assist in the streamlining of the adjudication of affiliated individual EB-5 petitions, as the altered documentation may otherwise need to be re-evaluated within the individual EB-5 petitions to determine if they still EB-5 compliant.

(ii) Other Amendments. Some Regional Center Proposals are approved for an industry segment using a hypothetical investment project in order to demonstrate how an actual investment project will be capitalized and operate in a manner that will create at least 10 direct or indirect jobs per alien investor. Individual Form I-526 petitions are then filed with copies of the business plan for the hypothetical investment project as well as the regional center's actual investment project. If the actual investment project is not different in a material way from the exemplar investment project, then the job creating efficacy of the investment project, if carried through as specified in the business plan will generally be established.

Regional centers may opt to file an amendment of their Regional Center Proposal in order to eliminate the uncertainty as to whether the actual investment project is different in a material way from the exemplar investment project that was approved in the Regional Center Proposal. The filing of these amendments is in the best interest of the EB-5 program as it may assist in the streamlining of the adjudication of the individual Form I-526 petitions. These amendments should be supported by detailed documentation relating to the actual investment project. Once approved, then only the documentation relating to the actual approved project would be provided in support of the Form I-526

petition, eliminating the uncertainty regarding whether the actual project meets EB-5 eligibility requirements.

A regional center may also file an amendment in order to provide an exemplar Form I-526 with the supporting documentation required by 8 CFR 204.6 in order for USCIS to determine if the documentation is EB-5 compliant, and thus facilitate adjudication of an actual but identical Form I-526 petition, if the evidence of record otherwise establishes EB-5 eligibility.

Note: If the Regional Center requirements are met and a determination of eligibility is made, then the favorable determination regarding regional center eligibility requirements for the capital investment structure and job creation should generally be given deference and not revisited in the adjudication of individual EB-5 petitions, as long as the underlying facts upon which the favorable decision was made remain unchanged. The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of an EB-5 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies, or the exemplar Form I-526 petition has materially changed since the most recent approval of the regional center designation;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) to include the determination that the exemplar Form I-526 petition is EB-5 compliant was legally deficient.

2. Chapter 22.4(c)(3) of the AFM is revised to read as follows:

(3) General Review. Review the Form I-526 petition for completeness and signature of the petitioner.

- Verify that the name given in Part 1 (Information about you) is identical to the signature in Part 7 (Signature block).

- Remember that the petition can only be signed by the petitioner and not by his or her authorized representative.

The following EB-5 eligibility requirements must be established in the Form I-526 petition:

- The capital investment is in a new commercial enterprise;

- If the petitioner claims that the capital investment qualifies for the reduced capital investment threshold of $500,000, that the new commercial enterprise is located in a TEA;

- The investment capital was obtained by the alien through lawful means;

- The required amount of capital has been fully committed to the new commercial enterprise;

- The new commercial enterprise will create not fewer than 10 full-time positions; and

- The alien investor will be engaged in the management of the new commercial enterprise.

Note: If the new commercial enterprise identified in the petition is affiliated with a regional center, then the petitioner must provide with the Form I-526 petition a copy of the regional center's:

- Most recently issued approval letter; and
- Documentation relating to its approved capital investment structure and job creation methodology.

If the evidence provided remains unchanged from the documentation that was the basis for the approval of the regional center proposal, then the prior approval of the capital investment structure and the job creation methodology should generally be given deference. The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of Form I-526 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies has materially changed since the approval of the regional center designation;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) to include the determination that the exemplar Form I-526 petition is EB-5 compliant was legally deficient.

3. Chapter 22.4(c)(4)(D)(iii) of the AFM is revised to read as follows:

(iii) Clarification of the Meaning of Full-time Position. Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position." Adjudicating ISOs should keep the following points in mind when determining if positions meet this requirement:

- Economic input/output (I/O) models, such as RIMS II or IMPLAN, used to evaluate the calculation of the number of indirect jobs (including induced jobs) created through a commercial enterprise affiliated with a regional center do not distinguish between full-time and part-time jobs. In other words, the job creation results of the multipliers in the economic I/O models do not distinguish between the full-time and part-time nature of the positions. Therefore, the number of indirect jobs quantified through the I/O model analysis will be considered to be full-time and qualifying for EB-5 purposes. Accordingly, determinations regarding whether jobs qualify as "full-time" are only relevant to the analysis of direct jobs created by a commercial enterprise claiming the creation of direct jobs as a result of the EB-5 capital investment.

- USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. See, e.g., Spencer Enterprises v. U.S., 229 F.Supp.2d 1025 (E.D. Cal. 2001). Historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent. USCIS, however, now interprets that direct construction jobs may now count as permanent jobs if they:
  - Are created by the petitioner's investment; and
  - Are expected to last at least two years, inclusive of when the petitioner's Form I-829 is filed.

  Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the direct positions, as described in the petition, are continuous full-time employment rather than intermittent, temporary, seasonal or transient.

For example, if a petition reasonably describes the need to directly employ general laborers in a construction project that is expected to last several years and require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if the same project called for electrical workers to provide services as direct employees during three to four five week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.

- Generally, it is the position that is critical to the full-time direct employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment.

  For example, the positions described in the above bullet would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week, as long as the need to directly employ general laborers in the position remains constant. This interpretation is consistent with 8 CFR 204.6(e), which includes job sharing arrangements as part of the regulatory definition of full-time employment.

- It is important to note, however, that this interpretation does not override the regulatory definitions of employee and full-time employment at 8 CFR 204.6(e). Thus, direct jobs must still be filled by qualifying employees and not by independent contractors. Positions filled by independent contractors are not qualifying direct jobs and may only be credited for EB-5 job creation purposes in petitions involving commercial enterprises that are affiliated with a regional center. In addition, multiple part-time positions may not be combined to create one full-time position, unless those part-time jobs can be shown to be part of a job-sharing arrangement.

- Full-time employment relating to the creation of direct jobs as defined in 8 CFR 204.6(e) means year-round employment and not seasonal full-time employment. Full-time employment consists of 35 hours a week. Seasonal positions do not qualify for purposes of the full-time employment requirement for direct jobs.

4. Chapter 22.4(c)(4)(F) of the AFM is revised to read as follows:

(F) New Commercial Enterprise in a Targeted Employment Area (TEA). A TEA is either a rural area or an area experiencing a high unemployment rate at the time of the capital investment or the time of filing of the Form I-526 petition, whichever occurs first. If the petitioner shows that the area where he or she is investing is a rural area, the petitioner need not also establish that the area has high employment. Conversely, if the area is a high unemployment area, the petitioner need not also show that it is a rural area.

INA 203(b)(5)(B) and 8 CFR 204.6(e) require that in order to establish eligibility for the reduced EB-5 investment threshold of $500,000, the area in which the alien makes a capital investment must qualify as an rural area or an area of high unemployment when the investment is made. *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998) provides in pertinent part that:

> A petitioner has the burden to establish that his enterprise does business in an area that is considered "targeted" as of the date he files his [Form I-526] petition. The fact that a business may be located in an area that was once rural, for example, does not mean that the area is still rural.

A conflict between the statutory and regulatory requirements, and *Matter of Soffici* may arise when an alien makes a capital investment at a point in time prior to the filing of the Form I-526 petition when the area in which the investment is made qualifies as a TEA, only to have the area no longer qualify as a TEA at the time of filing of the Form I-526 petition. In order to promote predictability in the capital investment process and to reconcile the potential conflict outlined above, ISOs must identify the appropriate date to examine in order to determine that the alien's capital investment qualifies for the reduced $500,000 threshold according to the following "if, then" table:

TEA "if then" Table	
If the Investment…	Then…
Is made into the commercial enterprise's job creating project prior to the filing of the Form I-526 petition…	The TEA analysis should focus on whether the location of the investment qualifies as a TEA at the time of the investment.
Has yet to be committed to the commercial enterprise's job	The TEA analysis should focus on whether the location of the

creating project at the time of filing of the I-526, i.e. is still in escrow or is otherwise not irrevocably invested into the commercial enterprise pending the approval of the I-526 petition…	investment qualifies as a TEA at the time of the filing of the I-526 petition.

Note: In some instances, an alien may request eligibility for the reduced investment threshold based on the fact that other EB-5 aliens who previously invested in the same project qualified for the $500,000 minimum investment, even though the area did not qualify at the time of the instant alien's investment or the filing of his or her Form I-526. Each alien must establish that his or her capital investment qualifies for the reduced investment threshold, and cannot rely on previous TEA determinations made based on facts that have subsequently changed.

Note also that the area where the new commercial enterprise is located may qualify as a TEA at the time the capital investment is made or the I-526 petition is filed, (whichever occurs first), but may cease to qualify by the time the Form I-829 petition is filed. Changes in population size or unemployment rates within the area during the alien investor's period of conditional permanent residence are acceptable as increased job creation is the primary goal of the EB-5 program.

(i) Rural Area Defined. The term "rural area" means any area that is both outside of a metropolitan statistical area (MSA) and outside of a city or town having a population of 20,000 or more based on the most recent decennial census of the United States. See INA § 203(b)(5)(B)(iii) and 8 CFR §204.6(j)(6)(i). MSAs are designated by the Office of Management and Budget and can be found at www.census.gov.

(ii) Definition of High Unemployment Area. The term "high unemployment area" means an area which has experienced unemployment of at least 150 percent of the national average rate. See INA § 203(b)(5)(B)(ii). The I-526 petitioner must demonstrate that, at the time the capital investment is made or the petition is filed (whichever occurs first), there has been an unemployment rate of at least 150% of the national unemployment rate within the MSA or other non-rural area in which the commercial enterprise that will create or preserve jobs is located. This should be based on the most recent information available to the general public from federal or state governmental sources as of the time the I-526 petition is submitted.

In some instances I-526 petitioners may claim high unemployment in only a portion or portions of a geographic area or political subdivision for which distinct unemployment data is not readily available to the general public from federal or state governmental sources. This may be indicative of an attempt by the petitioner to "gerrymander" a finding of high unemployment when in fact the area does not qualify as being a high unemployment area. Such a claim is not sufficient to establish that the area is a high unemployment area unless it is accompanied by a designation from an authorized authority of the state government. (State designations are discussed below in (iii) of this section.)

The Bureau of Labor Statistics (BLS) provides data regarding the national average rate of unemployment at www.bls.gov/cps/. BLS's **Local Area Unemployment Statistics (LAUS)** program produces monthly and annual unemployment and other labor force data for census regions and divisions, states, counties, metropolitan areas, and many cities, by place of residence. This information can be found at www.bls.gov/lau/. States, the District of Columbia, and the U.S. territories may also publish local area unemployment statistics on their government websites.

(iii) State Designation of a High Unemployment Area. The state government of any state of the United States may designate a particular geographic area or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such a state as an area of high unemployment. Before any such designation is made, an official of the state must notify USCIS of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area. Evidence of such a designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be submitted in support of the Form I-526 petition in lieu of other documentary evidence of high unemployment in the area where the new commercial enterprise is located. See 8 CFR 204.6(i). The statistics used in the analysis must reflect the national and local unemployment rates for these regions at the time of the alien investor's capital investment. See 8 CFR 204.6(e).

The designation of high unemployment areas are within the purview of each U.S. state governor, or if applicable, his or her designee. USCIS

personnel have no substantive authority to question or challenge such high unemployment designations, and therefore must rely on the high unemployment designations that conform to the requirements outlined above that are made by a U.S. state governor or his or her designee. ISOs should notify the CSC EB-5 program manager and seek guidance regarding how to address the TEA issue in petitions that contains a state designation letter that does not conform to the requirements of 8 CFR 204.6(i), utilizes statistics that do not reflect the national and local unemployment rates at the time of the alien investor's capital investment, or has been issued by an official of a state that has not notified USCIS regarding who in the state government has the authority to issue such designations.

Note: State designations of high unemployment areas also include designations issued by the appointed government body with authority to make such certifications by the governors of the U.S. territories or the mayor of the District of Columbia.

5. Chapter 22.4(c)(4)(G) of the AFM is added as follows:

(G) Eligibility Requirements for the Review of a Form I-526 Petition that Seeks Consideration of a Business Plan that Differs from the Business Plan in a Previously Approved Form I-526 Petition.

Some EB-5 aliens may encounter difficulties when unforeseen circumstances cause the achievement of the requisite job creation outlined in the Form I-526 petition to be cast in doubt. This may occur when the job creating capital investment project or commercial enterprise that was relied upon for the approval of the Form I-526 petition fails or otherwise cannot be completed within the alien's two-year period of conditional residence. The structure of the EB-5 program is inflexible in that the capital investment project identified in the business plan in the approved Form I-526 petition must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment. The business plan in the Form I-526 petition may not be materially changed after the petition has been filed. In addition, USCIS may not act favorably on requests to delay the filing or adjudication of Form I-829 petitions beyond the timeframes outlined in 8 CFR 216.6(a) and (c).

The following "if, then" table explains how an EB-5 investor can seek consideration of a business plan that differs from the business plan in a previously approved Form I-526 petition.

New Form I-526 Petition "If, Then" Table	
If…	Then…
The alien wishes to change the business plan from the business plan outlined in a previously filed Form I-526 petition…	S/he may file a new Form I-526 petition with fee that is supported by the new business plan and addresses all requirements of the I-526 petition.
If the new Form I-526 Petition is Filed…	Then…
Before the alien adjusts status (AOS) or is issued an immigrant visa (IV)…	The new petition, if approved, will be the basis for the AOS or the IV and the new business plan will be used as the basis for evaluating EB-5 eligibility at the I-829 stage.
After the alien adjusts status or is issued an IV, but before the due date of the filing of the I-829 petition (90 days prior to the end of the two-year CPR period).	Upon approval of the new Form I-526 petition, S/he may file Form I-407 with a Form I-485 adjustment application. The prior CPR status will be terminated and the new AOS application will be approved, if otherwise approvable, granting a new two year period of CPR status. The new I-526 petition will be used as the basis when evaluating eligibility at the I-829 stage. If the new Form I-526 is denied, then the alien will have to file the I-829 petition and use the initial Form I-526 petition as the basis for the eligibility evaluation in the Form I-829 petition.
After the alien adjusts status or is issued an IV on or after the due date for the filing of the I-829 petition.	If the new I-526 is approved, S/he may request the withdrawal of the initial I-829 petition and file an AOS application. The prior CPR status will be terminated and the new AOS application will be approved, if otherwise approvable, granting a new two year period of CPR status. The new I-526 petition will be used as the

	basis when evaluating eligibility at the second I-829 stage. If the new I-526 petition is denied, then the initial Form I-829 petition will be adjudicated using the project plan in the initial I-526 petition as the basis for the initial I-829 eligibility evaluation.
Note: Dependents will have to file I-407s at the same time as required for the principals as well as Form I-485 applications in order to terminate their CPR status and be "re-adjusted" to CPR anew. The dependents must be eligible to be classified as EB-5 dependents at the time of the filing of new Form I-485 application, i.e. the dependents must be the spouse or unmarried child under the age of 21 years of the EB-5 principal alien	

6. Chapter 25.2(e)(4) of the AFM is revised by adding new paragraph (E) to read as follows:

(E) I-829 Consideration of Form I-526 EB-5 Eligibility Requirements. Pursuant to section 216A(c)(3) of the Act, USCIS must determine that the facts and information contained in the petition are true. ISOs should generally give deference to the approval of EB-5 eligibility requirements previously made in the alien investor's Form I-526 petition and affiliated regional center designation, as applicable, if the facts presented in the earlier proceedings remain unchanged to include:

- The new commercial enterprise's capital investment structure;
- That the commercial enterprise qualifies as "new" for EB-5 purposes;
- If the commercial enterprise is affiliated with a regional center, the direct and indirect job creation methodology;
- If the Form I-526 petition was approved for reduced capital investment threshold of $500,000, that the new commercial enterprise was located in a TEA at the time of filing of the Form I-526, and;
- That the alien investor's investment capital was lawfully obtained.

The CSC EB-5 program manager should be notified to determine the appropriate action to take if an ISO discovers during the adjudication of the Form I-829 petition that:

- Documentation relating to the regional center's capital investment structure or job creation methodologies or the eligibility requirements favorably decided-upon in the Form I-526 petition have materially changed post-approval of the regional center designation or Form I-526 petition;
- The record contains evidence of fraud or misrepresentation; or
- The evidence of record indicates that the previously favorable decision to approve the regional center proposal (or amendment) was legally deficient.

If the documentation of record presents material inconsistencies that impact the alien investor's EB-5 eligibility, then ISOs should require the petitioner to resolve the inconsistencies prior making a favorable determination in the case. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

Note: EB-5 petitioners must establish eligibility as of the date of filing of the petition. See 8 CFR 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Note also that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. at 175.

7. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD09-38	Chapter 22 and Chapter 25	This memorandum revises Chapters 22 and 25 of the *Adjudicator's Field Manual* (*AFM*) by amending sections 22.4 and 25.2 to clarify issues pertaining to EB-5 (Immigrant Investor) Regional Center Proposal petitions for classification (Form I-526) and petitions for removal of conditions (Form I-829).

VI. Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does

not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

VII. Questions

Questions regarding this memorandum should be directed through appropriate channels to Alexandra Haskell in the Business and Employment Services Team of Service Center Operations.

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