AMERICAN IMMIGRATION LAWYERS ASSOCIATION

April 11, 2017

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Re: NPRM: EB-5 Immigrant Investor Program Modernization
RIN 1615-AC07
DHS Docket No. USCIS-2016-0006

Submitted via www.regulations.gov

Dear Chief Deshommes,

The American Immigration Lawyers Association (AILA) submits these comments on the Notice of Proposed Rulemaking (NPRM), "EB-5 Immigrant Investor Program Modernization," that was published in the Federal Register on January 13, 2017.

AILA is a voluntary bar association of more than 14,500 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this notice and believe that the collective expertise and experience of our members makes us particularly well-qualified to offer views that will benefit the public and the government.

Before we provide detailed comments on two specific provisions of the NPRM, priority date retention and retention of conditional residence status upon denial of an I-829 petition, we would like to provide some more general comments on the EB-5 Program. The EB-5 Program has burgeoned well beyond the bounds of what the original Congressional architects could have imagined in 1990. Our laws and regulations, however, have not kept up with this growth. To allow the EB-5 Program to continue to serve the U.S. economy, EB-5 reform must contain the following elements:

- Reasonable oversight of program participants;
- Protections for good faith investors;

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- Expanded visa capacity;
- Long-term EB-5 Program reauthorization;
- Measures to ensure integrity and efficiency in USCIS adjudications;
- A transition period for current projects, or at minimum, a prospective effective date;
- Targeted Employment Area (TEA) reforms minimizing harms of disruption; and
- Investment amounts adjusted to maintain investor demand.

Our vision for this valuable program is one where it would be efficiently regulated for high quality participation while promoting economic growth in both established areas and in areas in need of investment. In our view, this NPRM and the Advance Notice of Proposed Rulemaking (ANPRM) which was published on January 11, 2017, fall short of the elements of needed reform.

Significantly, the NPRM, if adopted, would raise the investment requirements by close to 400 percent. Most EB-5 investments today qualify at the TEA level of $500,000. Under the NPRM, a majority of these projects would cease to qualify at the TEA level and would be required to meet the new non-TEA investment amount of $1.8 million USCIS states that it cannot measure the impact of this change and it is unclear whether a study can, in fact, be undertaken to measure the impact. However, a change of this scale would chill U.S. investor visa demand to a significant degree and diminish EB-5 capital into the U.S. economy, thus stymying a central objective of the EB-5 Program and our immigration laws.

Equally important, the NPRM and the ANPRM bifurcate rather than combine needed reform elements. Notably, the NPRM seeks to reform TEA designation and investment amounts, but oversight, investor impacts, and proposals for improved adjudications are relegated to the ANPRM. EB-5 Program reform should be fashioned comprehensively so that changes to the program address interconnected impacts, provide orderly implementation, and minimize transition costs to the government and the private sector.

For USCIS to meet the challenges of the EB-5 Program's growth and maturity, Congress must pass comprehensive EB-5 reform legislation. DHS has indicated to Congress that it needs additional statutory authority to effectively oversee the EB-5 Program. We agree with this view and believe that any proposed regulations, including the NPRM, will fall short. In addition, we question the timing of the NPRM that potentially conflicts with legislative changes to the EB-5 Program that could supersede many or most of the regulatory provisions or render them moot. Investment amounts and TEAs are two areas that have been the subject of multiple legislative proposals and will likely be the subject of final legislation this fiscal year.

For these reasons, we stand with EB-5 industry organizations in requesting that the NPRM and ANPRM be withdrawn for further consideration, and in recognition that comprehensive EB-5 legislation that reforms the EB-5 Program to ensure that it continues to stimulate the U.S. economy by creating jobs and attracting foreign investment is urgently needed. With respect to substance, although AILA does not profess to bring to bear any particular legal expertise regarding the proper investment amounts or how TEAs should be designated, we believe that any regulation

that would propose a greater than 350% increase in most investments with immediate effect would severely reduce the desirability of the EB-5 Program among prospective investors.

Not only would the amount of the investment likely render the program undesirable as compared to other countries' immigrant investment programs, it would be completely impractical for investors from China (the predominant user of the program), who are limited to a $50,000 currency export per year, an amount that is likely to be reduced by the Chinese government. Moreover, unlike other competitive programs, the U.S. subjects the investor to taxation on worldwide income, requires an at-risk investment, and requires proof of job creation, which further impact the desirability of the EB-5 Program to many investors.

In addition, notwithstanding the substantial increase in the investment amount, the NPRM does nothing to reduce the waiting period for China, which is likely to delay the entry of an investor from China for at least 6 or 7 years. We believe that USCIS can address this issue by regulation as the statute provides for the admission of 10,000 *investors*, not 3,000 or 3,500 investors plus their family members.

We also note that the proposed investment amount and TEA regulatory changes do not permit grandfathering for projects that are already in the market and for which some investors have already invested at the $500,000 level. Without grandfathering, many projects and investors could be seriously harmed since the increased investment amount may well make the project unmarketable. This would result in a deficiency in the capital stack and jeopardize the future of the project. The impact on individuals who have already invested would be the loss of both their investment money (if the project fails after the money has been expended) and the loss of immigration benefits.

Although AILA is not commenting on any suggested definition of a TEA, we ask that USCIS implement a procedure whereby projects and investors can ascertain whether the project is in a qualified TEA without delaying project investments. The imposition of a new TEA definition should also have a deferred effective date to enable projects that are presently in the market to conclude investor subscriptions at the present TEA rate of investment. We also note that the NPRM divests states of the authority to decide which areas should be designated as TEAs and transfers that authority to the federal government. This is directly contrary to the government's asserted priority to transfer authority from the federal government to the states.

Priority Date Retention

We agree with the proposal to allow priority date retention for EB-5 petitioners based on I-526 approval, consistent with priority date retention accorded to EB-1, EB-2 and EB-3 beneficiaries under 8 CFR §204.5(e)(2). We further agree that a priority date should be retained even if an I-526 petition is subsequently revoked, as long the revocation was not due to fraud or willful misrepresentation of a material fact, which is consistent with 8 CFR §204.5(e)(2)(i) and (iv). However, we do not agree that a priority date shall be lost – perhaps many years later – if USCIS decides that it made a material error for which the investor is blameless. Investors (and their children) make many life decisions based on when they may immigrate to the United States, as

indicated by their priority date, and it is unfair for USCIS to unilaterally decide that it made an error and to prejudice the investor based on that error.

We recommend that the rule include priority date retention for investors who supplement I-526 petitions to address changes in the investment project (material or otherwise), as long as they can prove the original I-526 petition was approvable when filed. Under current USCIS policy, if material changes occur in a project while an investor's I-526 is pending, or after it is approved but before the investor has obtained conditional resident status, the investor must file a new I-526 petition based on the changed business plan.[1] However, material changes to a project that occur during I-526 pendency can easily be addressed by supplementing the I-526 petition.[2] Allowing priority date retention for supplemented I-526 petitions to address changes in the EB-5 project fairly and reasonably reflects the general reality of changing business conditions. Further, it encourages investors to proactively and transparently apprise USCIS of project changes, which ultimately promotes efficient I-526 adjudication and EB-5 Program oversight.

We recommend that the rule also permit priority date retention for the following two categories of investors whose I-526 petitions are pending but not yet approved, as long as the original I-526 petitions were approvable when filed:

(i) Investors who are defrauded (as established through objective evidence) by any person involved with the regional center, new commercial enterprise, or EB-5 project with which their investment is associated; and

(ii) Investors whose EB-5 project cannot proceed due to *force majeure* (established by showing any extreme circumstance beyond anyone's control)

Investors who have been victimized by fraud or *force majeure* should not be penalized for circumstances that were impossible to foresee or control despite undertaking thorough due diligence measures prior to making the investment. Thus, although USCIS may reasonably require such investors to file new I-526 petitions based on new investments, USCIS should allow such investors to retain their original I-526 priority dates in recognition of their good faith. Allowing priority date retention in such situations would encourage victimized investors to salvage their cases through new investments rather than walking away from the EB-5 Program entirely. This, in turn, would further the EB-5 Program's goal of economic benefit and job creation for the U.S.

With respect to the children of investors thwarted by fraud or *force majeure*, any period for which the age of an investor's child has been frozen under the CSPA should not lose the benefit of the frozen period. Without preserving the frozen period, many children of victimized investors will age out. This will deter many victimized investors from refiling their I-526 petitions, which is also contrary to the objective of job creation and economic growth.

[1] *See* USCIS Policy Manual, Volume 6, Part G, Chapter 4.
[2] AILA's comments to the Advance Notice of Proposed Rulemaking provides our detailed views on the issue of material change, and we incorporate those views in this comment to the extent applicable.

For purposes of priority date retention in the above circumstances, the definition of "approvable when filed" should be consistent with the well-established meaning of the term in the INA §245(i) adjustment of status context: the I-526 petition must have been properly filed, meritorious in fact, and non-frivolous ("frivolous" meaning patently without substance).

Right to Travel, Admission, and Extension of LPR Status for Investors with Pending or Denied I-829 Petitions

The regulations, at 8 CFR §216.6(d)(2), must reflect the statute, existing pertinent regulations, and binding case law that affirm that a conditional permanent resident investor remains a lawful permanent resident, with all the rights and privileges of such status, unless and until a final administrative order of exclusion, deportation, or removal is issued. Thus, 8 CFR §216.6(d)(2) must be amended as follows, to clearly reflect that the investor's conditional resident status is preserved notwithstanding USCIS's denial of the Form I-829 petition:

> In accordance with the regulations at 8 CFR § 1.2 and the Immigration and Nationality Act (INA) § 101(a)(20), the investor's lawful permanent resident status, and that of his or her spouse and any children, shall terminate only upon entry of a final administrative order of exclusion, deportation, or removal. The rights, privileges, responsibilities, and duties which apply to all other lawful permanent residents shall continue to apply equally to conditional permanent residents, including but not limited to the privilege of residing permanently in the United States as an immigrant, unless such status changes upon entry of a final administrative order of exclusion, deportation, or removal, in accordance with INA § 101(a)(20) and 8 CFR §§ 1.2 and 216.1.

When USCIS denies a Form I-829 petition to remove conditions on lawful permanent residence, the investor has a right to have that decision reviewed by an immigration judge.[3] Because of this, they do not lose their conditional resident status when USCIS issues the I-829 petition denial. Instead, a conditional resident loses his or her status only upon the entry of a final administrative order of removal by an immigration judge or the Board of Immigration Appeals.[4] Therefore, until there is a final order of removal entered against an alien investor, USCIS is required

[3] *See* INA §216A(c)(3)(D) (an EB-5 investor "may request a review of [a Form I-829 petition denial] in a proceeding to remove the alien"); 8 CFR §216.6(d)(2).

[4] *See* INA §101(a)(20) (defining "lawfully admitted for permanent residence" as the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed); 8 CFR §§1.2 (defining "lawfully admitted for permanent residence" and adding, "[s]uch status terminates upon entry of a final administrative order of exclusion, deportation, or removal"); 8 CFR §216.1 (defining "conditional lawful permanent resident"); and 8 CFR §1241.1 (defining "final order of removal"). *See also Matter of Lok*, 18 I&N Dec. 101, 106 -07 (BIA 1981) (the lawful permanent resident status of an alien terminates within the meaning of INA §101(a)(20) with the entry of a final administrative order of deportation, i.e., when the BIA renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired); *Matter of Stowers*, 22 I&N Dec. 605, 612 n.10 (BIA 1999) (en banc) ("an alien's lawful permanent resident status does not cease until the entry of a final administrative order removing the alien from the United States, generally where the [BIA] renders its appellate decision"); *Matter of A-M-*, 25 I&N Dec. 66, 69 (BIA 2009) (an alien's lawful permanent resident status does not terminate until the entry of a final administrative order); *Matter of Abosi*, 24 I&N Dec. 204, 206 (BIA 2007) (same).

pursuant to statutory and regulatory guidance, binding case law, and longstanding practice and policy, to document the investor's conditional resident status through the issuance of a temporary I-551 stamp or any other similar document.[5]

The implications of a proposed regulatory change to terminate conditional residence status upon I-829 denial are not only unfair but can be devastating to investors and their families. By definition, the U.S. is the primary or sole residence of these individuals. Investors who are outside the U.S. when a denial is issued will be unable to return to their homes and businesses and will be unable to seek review of the denial before an immigration judge. Investors who are in the U.S. will immediately be rendered out of status and will begin accruing unlawful presence. Investors running businesses with U.S. employees may have to close down operations, and their children may no longer be able to attend school. For these reasons, the USCIS policy that has existed for more than two decades should continue.

Conclusion

We appreciate the opportunity to comment on this NPRM, and look forward to a continuing dialogue with USCIS on these issues.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[5] *See Stowers*, 22 I&N Dec. at 612 n.10 (recognizing that a "terminated conditional lawful permanent resident should be issued a temporary I-551") (*quoting* Memorandum of Kathy A. Redman, Acting Ass't Comm'r for Adjudications, "Status of Conditional Residents in Proceedings" (Oct. 9, 1997), *reprinted in* 74 Interpreter Releases, No. 43, Nov. 7, 1997, app. III at 1731); INS General Counsel, "Status of a Conditional Permanent Resident After Denial of I-751 During Pendency of Review by EOIR," 1996 WL 33166343, 96 Op. Gen. Counsel 12 (Aug. 6, 1996); William Yates, Acting Assoc. Dir. Ops., "Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of Marriage (Apr. 10, 2003) (reaffirming policy of issuing temporary I-551 stamps for conditional residents whose petitions to remove conditions have been denied). Former AFM Chapter 25.2(k) recognizes that "[i]f [a] Form I-829 is still pending or has been denied but no final order of removal has been entered, the IIO must [...] follow established procedures for providing a temporary extension of the alien's conditional resident status." Although this portion of the AFM was replaced by the USCIS's Policy Manual, Vol. 6 Part G, *see* USCIS, *Policy Alert: Employment-Based Fifth Preference Immigrants: Investors* (Nov. 30, 2016), *available at* http://bit.ly/2gJ8zwY, the Policy Manual does not address the procedure for providing evidence of continued CR status to investors whose Form I-829 petitions have been denied. Since the Policy Manual does not contain guidance related to temporary I-551 stamps in this circumstance, the "established procedures" referenced in the AFM remain in force. *Id*. (recognizing that the Policy Manual supersedes only "*related* prior USCIS guidance") (emphasis added).