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

Submitted via www.regulations.gov

Docket ID No. USCIS-2019-007

Re: Department of Homeland Security, U.S. Citizenship and Immigration Services, Notice of Proposed Rulemaking, *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services*

Dear Mr. McDermott:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments to the above-referenced Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”) Notice of Proposed Rulemaking, *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services* (USCIS Docket No. USCIS-2019-0007, RIN 1615-AC14) (hereinafter “Proposed Rule”) published in the Federal Register on September 11, 2020.¹ AILA will be submitting an additional comment jointly with the American Immigration Council (Council) and the Immigration Defense Clinic at Colorado Law strongly opposing the finalization of this Proposed Rule. In addition to the reasons enumerated in that comment, we provide these additional comments as it relates to the taking of biometrics of Regional Center principals annually.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws, including on the requirements of the EB-5 Immigrant Investor Visa program. Our members’ collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

¹ 85 Fed. Reg. 56338 (September 11, 2020).

I. The Proposed Rule does not describe how biometrics reporting will provide further information beyond the background checks already completed on principals.

At the outset, AILA opposes the finalization of this Proposed Rule, because DHS has failed to provide a reasoned analysis that necessitates such a significant and overbroad intrusion on the privacy of Regional Center applicants. DHS states in the Proposed Rule that it already conducts background checks based on biographic data submitted by principals on the Form I-924 and I-924A. USCIS already collects names, dates of births, and social security numbers on the Form I-924 and Form I-924A, which is collected annually. The I-924A Annual Report goes even further to also require regional center operators to supply a valid government issued photo identification document. The breadth and scope of regional center operator information ALREADY collected every year by DHS is exemplified in the Form I-924A Instructions, which reads in part:

Part 4. Information About the Organizational Structure, Ownership, and Control of Regional Center

Item Numbers 1.a. - 11. Information About the Owners of the Regional Center Entity.
For those persons that hold an ownership interest in the regional center entity, provide each person's full legal name, date of birth, country of birth, social security number, the percentage of ownership held in the regional center entity, and the current position/ title held within the regional center entity (if applicable). All such principals are required to provide a copy of a valid government-issued photo identification document and should provide a social security number. If the principal is an entity or organization, such as a limited liability company or partnership, provide the entity's legal name, Federal Employer Identification Number, and the name of all persons having ownership, control or a beneficial interest in that entity or organization. Also provide the date of birth, country of birth, percentage of ownership and the position held (if any) of all persons having ownership, control, or a beneficial interest in the entity or organization. For each owner, provide any other names and aliases used (if applicable), as well as their mailing address, telephone number, email address, and website address. [Emphasis added].

NOTE: *If there are multiple principals with ownership interest in the regional center entity, provide the information requested in the space provided in Part 11. Additional Information.*

Moreover, the I-924A Instructions (Item Numbers 17.a. - 26.) extend that same comprehensive personal information collecting and reporting to any “Principal Non-Owner” of the regional center. The Instructions define a “principal” extremely broadly to include “any person or legal entity or organization (for example, a corporation, limited liability company, partnership, or governmental entity) that is an owner of the regional center entity, that is in a position of executive managerial authority over the regional center entity, or that is otherwise in a position to control, influence, or direct the management or policies of the regional center.”

Notwithstanding that current collection of personal information and data about regional center owners and principals, the new rule provides no explanation how the biometrics collection will enhance the background checks already completed.

As noted in our additional comment, DHS references USCIS's need to "verify identities of principals, because there are identified trends of regional centers engaging in fraud,"² citing to three GAO reports on the EB-5 investor visa program. But the GAO reports say no such thing. The first GAO report cited references three "unique fraud risks" identified by USCIS: (1) "uncertain source of immigrant investor funds," (2) "legitimacy of investment entity," and (3) "appearance of favoritism and special access."³ At no point does the report raise any concern about the "identity of principals," nor does it mention the need to improve identity verification or biometrics. Similarly, the other two GAO reports cited by DHS do not reference the need for identity verification of principals, nor do they suggest increased biometrics as a solution to fraud in the EB-5 program.⁴ To the contrary, the current process to background check principals already reveals past criminal actions and there is no suggestion that there is identity fraud in the context of I-924 or I-924A Applications.

II. The Proposed Rule does not outline how biometrics data will be used in the context of USCIS Regional Center applications, nor does the Proposed Rule outline the procedural steps USCIS will follow to notify regional centers of derogatory information.

DHS proposes to collect biometrics and perform background checks on U.S. citizen and lawful permanent resident principals of a regional center. USCIS will review the results of a national security and criminal background check in order to decide whether the principals of the intending or existing regional center, and the regional center itself, are bona fide and "capable of credibly promoting such economic growth." We propose that DHS must outline to regional centers and EB-5 stakeholders how information obtained through the background checks will be used by DHS in the context of I-924 and I-924A Applications, as the current proposal does not sufficiently outline how such collected information will be used to make a determination that the principals of the intending or existing regional center, and the regional center itself, are bona fide and capable of credibly promoting such economic growth.

As an initial matter, USCIS should give sufficient notice to regional centers, principals and stakeholders by outlining in the Proposed Rule whether it will use derogatory information to terminate regional centers. The Proposed Rule should make clear if USCIS intends to use derogatory information to send Notices of Intent to Terminate ("NOIT") to regional centers and

² Proposed Rule, 85 Fed. Reg.

³ U.S. Government Accountability Office (GAO), GAO-15-696, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," August 12, 2015.

⁴ See GAO, GAO-16-828, "Immigrant Investor Program: Progress Made to Detect and Prevent Fraud, but Additional Actions Could Further Agency Efforts," February 11, 2016; GAO, GAO-16-431T, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," September 13, 2016.

whether such derogatory information and a chance to rebut such information will also be provided to principals. Moreover, the Proposed Rule does not specify consequences if regional center principals do not attend scheduled biometric appointments, or remedies available to regional center principals to rectify missed appointments. The Proposed Rule also only mentions the biometrics collection from U.S. citizen and lawful permanent resident principals but does not mention whether biometrics will be required for regional centers with foreign national principals. It is not clear from the Proposed Rule whether those non USC or LPR principals are governed by this Proposed Rule, whether they will need to return to the U.S. to obtain biometrics capturing, or what procedures may be in place if biometrics appointments cannot be attended because a foreign national principal cannot travel back to the United States for health or other legitimate reasons.

Further, the Proposed Rule should outline if in-person biometrics capturing will be required annually, bi-annually, or some other time interval, as USCIS has the ability to reuse previously captured biometrics and reapply those captured biometrics to run new background checks. In the Proposed Rule, DHS states that “the biometrics requirement may include additional collections or checks for the purpose of continuous vetting.” However, there is no further description of what “additional collections or checks” will be required beyond the biometrics captured in the context of an I-924 Application or an I-924A Application. The Proposed Rule should make clear what additional checks may be required by principals so fair notice is given, including whether USCIS will conduct routine checks without notice to the principals.

The Proposed Rule should outline the factors that USCIS may use to issue NOITs to regional centers where derogatory information is found. The statutory mandate for regional centers is broad and provides little guidance for when a regional center fails in the “promotion of economic growth” or “increased domestic capital investment.” The purpose of the regional center program is to promote economic growth. We propose that USCIS adopt a totality of the circumstances balancing test to determine failure to promote economic growth in the termination context when derogatory information is obtained on a regional center principal because of the biometrics capture. This totality of the circumstances test should be outlined by USCIS in the Proposed Rule so that all stakeholders are clear as to how USCIS will use and share derogatory information gathered on regional center principals.

Under a totality of the circumstances test, no single factor should be dispositive. Factors may include:

- Whether the derogatory information is linked to a sponsored EB-5 capital raise or whether the offense is not linked to the regional center’s operations, new commercial enterprises or projects;
- The severity of the offense(s);
- The number of offenses;
- Whether the offense was committed by a principal that is the controlling/majority owner or a non-controlling owner;
- The length of time that has passed since the offense;

- Lack of other offenses and the passage of time with no derogatory information found;
- Rehabilitation steps taken by the principal;
- Whether the regional center is sponsoring I-526 petitions. The derogatory information obtained should be balanced against the number of investors sponsored by the regional center and the economic benefit brought to the region because of it;
- Whether EB-5 capital from investors is in escrow ready for deployment or already deployed to job creating activities and there is no link to derogatory information with respect to the EB-5 funds;
- Whether any actual job creation, direct or indirect, has occurred because of deployment of EB-5 capital and there is no link to derogatory information with respect to the EB-5 funds; and
- Whether the regional center is engaged in monitoring and oversight duties consistent with clearly defined compliance policies published by USCIS.

Rather than using single factor tests such as whether a past criminal conduct exists for a regional center principal, we recommend a termination standard consistent with the recent non-precedent *Matter of S-D-R-C-*, ID# 13768 (AAO March 15, 2017)⁵ (the “AAO decision”). While this decision focused on “inactivity” of a regional center, it provides a basis for adopting a totality of the circumstances test in the context of regional center terminations. In that decision, the AAO rejected adopting “inactivity” as the test for failure to promote economic growth and found that USCIS is not limited to “mere inactivity” as grounds for regional center termination. The AAO remanded the case to the IPO to instead apply a balancing test on a case-by-case basis:

“In sum, we must balance all the equities on a case-by-case basis to determine whether a regional center is continuing to promote economic growth. Where both positive and negative indications of the promotion of economic growth exist, we look at all relevant documentation to reach a conclusion regarding whether, on balance, the regional center is continuing to promote economic growth. Positive factors include job creation, capital investment, and other signs of positive economic impact. Negative factors include mismanagement, theft, or fraud by the regional center or related entities. Each case will therefore be assessed on its own merits. In doing so, we consider the factors’ relative weight as determined by surrounding circumstances. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001) (“In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case.”).”

⁵ Available at: https://www.uscis.gov/sites/default/files/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2017/MAR152017_01K1610.pdf

This test requires USCIS to carefully evaluate all the facts and assign weight based on a totality of the circumstances. Given the vast diversity of regional center history, operations, and activities and the gravity of termination consequences, we can recommend no alternative standard.

Finally, USCIS states in the Proposed Rule that it will use the biometrics captured to conduct national security and *criminal* background checks to determine if a regional center is promoting economic growth. Absent from the Proposed Rule is a review of past civil judgments and how those are used by USCIS in the context of NOITs sent to regional center. In the past, USCIS on at least several occasions, has attempted to use past civil judgments against regional center principals to state that the regional center is no longer promoting economic growth. Since the Proposed Rule does not include such language regarding civil judgments, USCIS should make clear in the Policy Manual that past civil judgments are not part of the derogatory information that will be used by USCIS in the “promotion of economic growth” analysis.

III. The Proposed Rule does not clearly define “regional center principal.”

The Proposed Rule states that biometrics will be captured for regional center principals, and where the regional center is owned by another entity, biometrics must be captured for those persons having ownership, control, or beneficial interest in such legal entity. This language mirrors the language in the Form Instructions to Form I-924 and I-924A. USCIS should further define “principal” for the purposes of this biometrics rule. For example, “beneficial interest” is not defined by USCIS. Some regional centers are owned by large, corporate entities where many individuals may have a beneficial interest in ownership. In those instances, those individuals may have nothing to do with the regional center or its operations. Therefore, USCIS should limit the capture of biometrics to just those individuals with managerial authority over the regional center or who are responsible for the flow of EB-5 funds.

Conclusion

We appreciate the opportunity to comment on the Biometrics Rule as it relates to EB-5 regional center principals and look forward to a continuing dialogue with DHS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION