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Comment Submitted by Klasko Immigration Law Partners LLP

Posted by the **U.S. Citizenship and Immigration Services** on Oct 24, 2022

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Comment

Please see attached letter submitted by Klasko Immigration Law Partners, LLP.

In addition to the comments submitted in the attached letter, some petitioners reported that they are not able to check their I-526E case status on the USCIS' website. Also, the receipt notices issued for I-526Es filed after October 1, 2022 only included the \$3,675 filing fee, but not the additional \$1,000 fee for the Integrity Fund.

Attachments 1



Agency Information Collection Activities Form I-526E Immigrant Petition by Regional Center Investor



[Download](#) (https://downloads.regulations.gov/USCIS-2007-0021-0081/attachment_1.pdf)

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October 24, 2022

Samantha L. Deshommes
Chief, Regulatory Coordination Division
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

OMB Control Number 1615-0026
Docket ID: USCIS-2007-0021

Re: Agency Information Collection Activities; Form I-526E, Immigrant Petition by Regional Center Investor

Dear Ms. Deshommes:

Klasko Immigration Law Partners LLP (“KILP”) respectfully submits the following comments (collectively the “Comment”) to the above-referenced Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”) Agency Information Collection Activities: Form I-526E (Docket ID: USCIS-2007-0021) (hereinafter “Form I-526E”) published in the Federal Register on August 23, 2022.

KILP is the counsel for all plaintiffs in *EB5 Capital, et al. v. DHS, et al.*, (No. 3:22-cv-3948-VC (N.D. Cal.)), and plaintiff Invest in the USA (“IIUSA”) in *Behring Regional Center LLC vs. Alejandro Mayorkas et al*, Case No. 3:22-cv-2487VC (ND Cal.).

Form I-525E Instructions

• Page 1 - General Instruction Section / Signatures Minors and Mentally Incompetent

Signature. *Each petition must be properly signed and filed. For all signatures on this petition, USCIS will not accept a stamped or typewritten name in place of a signature. If you are under 14 years of age, your parent or legal guardian may sign the petition on your behalf. A legal guardian may also sign for a mentally incompetent person.*

KILP Comment: KILP applauds the USCIS in confirming that an EB-5 Petitioner/Investor can be a minor (under 14) or mentally incompetent person.

• Page 3 - Specific Instructions / Part 1. Petition Type

The EB-5 Reform and Integrity Act (“RIA”) allows good faith investors to receive relief in the statute if they are the victims of a termination or debarment of the regional center, NCE or JCE. In

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the event of such a termination or debarment, the good faith investor has 180 days to take action. In the case of a terminated regional center, the NCE must associate with another regional center (without respect to geographical boundaries), or the alien must make a qualifying investment in another NCE. In the case of the debarment of the NCE or JCE, the good faith investor must associate with a new NCE and invest additional capital, if necessary, to satisfy job requirements. The good faith investor must file an amended petition to document compliance with this requirement within 180 days. Such petitions may be approved without any changes being deemed material changes. In addition, any funds recovered by the investor from third parties, including insurance proceeds, shall be considered the investor's capital for purposes of complying with the capital investment requirement. The good faith investors who comply with these requirements retain their priority date.

KILP Comment: There is presently no formal procedure for the "debarment" of an NCE or JCE. Since the relief available to good faith investors depends on such debarment, KILP urges the agency to publish clear guidance and procedures for debarment of NCE or JCE as soon as possible.

- **Page 5 - Part 4. Information About Your Regional Center and Project Application**

Part 4. Information About Your Regional Center and Project Application

Item Numbers 1. – 3. Regional Center Association. Provide the receipt number for the approved regional center application and the receipt number for the Form I-956F, Application for Approval of an Investment in a Commercial Enterprise, upon which your petition is based. Also, provide the NCE identification number (NCEID) associated with the NCE into which you have invested or are actively in the process of investing, if available. USCIS assigns an NCEID to an NCE at the time of issuing the receipt notice for a Form I-956F application for an NCE. Petitioners can obtain the NCEID from the regional center. **NOTE:** If the regional center has not yet received a receipt notice for its Form I-956F, USCIS will reject your application.

KILP Comment: The instructions for Part 4, Item Numbers 1. – 3. need to be updated to comply with the settlement agreement pursuant to *Behring Regional Center LLC, et al. v. Mayorkas, et al.* (No. 3:22-cv-2487-VC (N.D. Cal.)) and *EB5 Capital, et al. v. DHS, et al.*, (No. 3:22-cv-3948-VC (N.D. Cal.)). Specifically, under the settlement agreement, for an immigrant's Form I-526E petition, if a Form I-956F receipt notice is not issued within ten calendar days of physical delivery of the I-956F filing, USCIS will accept the lockbox notice along with a copy of at least the first six pages of the filed Form I-956F (Parts 1-5) for purposes of providing "the receipt number for the regional centre's Form I-956F" in order to facilitate the petitioner's ability to file their I-526E petition. In the event that a Previously Approved Regional Center does not receive a receipt or notice from USCIS within ten calendar days of physical delivery of the Form I-956F, USCIS will accept proof of cashed check or credit card charge (along with regional center name, new commercial enterprise name, job creating entity name if available, and approximate Form I-956F filing date) for purposes of providing "the receipt number for the regional center's Form I-956F." USCIS will not contest a Previously Approved Regional Center's representation that it has not received a receipt or notice.

Form I-526E

- **Part 2 Information About You / Question 19**

The Form requires the Petitioner to provide employment information as noted:

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Employment History

Provide your employment history. List present employment first. If you need extra space to complete this section, use the space provided in **Part 12. Additional Information**.

19. Have you ever been employed?

Yes No

If you answered "Yes" to **Item Number 19.**, provide the following information for any previous employment.

The corresponding Instructions provide as follows:

"Item Numbers 19. - 22. Employment History. Provide your current employment information and all prior employment information. Indicate the full legal name of the employer and address of employment, job title, and dates of employment for each position."

KILP Comment: KILP strongly objects to the USCIS' approach to mandate the Petitioner to disclose "all" prior employment information. It makes compliance with Question 19 exceptionally burdensome especially for petitioners who have long employment history. Further, it would likely have no impact on Petitioner's eligibility for the benefit sought, or the veracity of the lawful source of funds. Specifically, relating to the lawful source of funds, the Petitioner's investment capital may be derived from many different means other than employment income (such as gifts, investment gain, or sale of properties). Regardless of his/her employment, the Petitioner is always required to provide detailed evidentiary records to demonstrate lawful source of funds, and therefore, there is no justification for mandating the disclosure of a lifelong employment history.

This question should be modified to, at most, capture the past ten years of employment history. Even the State Department only requires a maximum of ten (10) years of employment history on Form DS-260, and the USCIS only requires a maximum of five (5) years of employment history on Form I-485, Application to Register Permanent Residence or Adjust Status.

We note also that even within 10 years, records of exact employment dates, positions, titles, etc. may not be available, and memories may not be perfect. The instructions should allow for approximate dates and the best information available while acknowledging that the information may not be perfect based on the passage of time.

• Part 4 Information About Your Regional Center and Project Application

Question 4 requires the Petitioner to indicate which category applies to the offering and project in the Form I-956F associated with his/her petition:

4. Indicate whether the offering and project in the Form I-956F associated with your petition is based on an investment in the following (select all that apply):

- Rural Area
- High Unemployment Area
- Infrastructure Project
- High Employment Area
- None of the Above

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KILP Comment: KILP recommends the elimination of “High Unemployment Area” category option. The instructions for Form I-526E provide that a high employment area is “an area experiencing unemployment **significantly below** the national average unemployment rate. The investment amount required in a high employment area is the same as the standard investment amount.” However, the phrase “significantly below” is not defined. In the absence of a clear definition or criteria, this classification should be removed to avoid confusion it may cause.

- **Part 5 Information About Your Investment / Question 2 - 7**

Question 2-7 requires the Petitioner to itemize the “Composition of Investment”

KILP Comment: It is unclear what purpose this question serves. First, unlike direct/standalone EB-5 investors, a vast majority, if not all, of the regional center investors invest only cash in the NCE. More importantly, even for situations where the investment is not in cash, the question does not capture all possibilities. For example, question #4 asks for the “Total Value of All Property Transferred From Abroad for Use in NCE”, but there is no similar question relating to property transferred from within the U.S. And, there is no definition of “Other Capital”.

- **Part 5 Administrative Costs and Fees / Question 9**

Question 9 requires the Petitioner to provide information about Net Worth, as follows:

Your Net Worth	
9. Your Current Net Worth	\$ <input type="text"/>

KILP Comment: KILP strongly objects to this Question. First, the Instructions do not provide clear definition of “Net Worth.” Is the Petitioner only allowed to include liquid assets? Does the Petitioner need to do appraisals for all the assets (s)he owns? It makes answering the question exceptionally burdensome, and makes it extraordinarily likely that petitioners will use inconsistent methodologies or formulas, leading to data that is practically useless for any statistical purposes. It is also unclear why the USCIS requests such information, since it appears to serve no purpose, and would likely have no impact on Petitioner’s eligibility for the benefit sought, or the veracity of the lawful source of funds-- especially since it is the USCIS’s long-standing practice to disallow using net worth to demonstrate lawful source of funds.

- **Part 7. Bona Fides of Persons Involved With Regional Center Program**

Part 7 and Questions 1 to 13 presumes a Petitioner holds a “position of substantive authority” in the NCE, JCE or RC solely because he or she is an owner of the NCE, and therefore is considered a “Persons Involved with Regional Centre Program”:

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Part 7. Bona Fides of Persons Involved With Regional Center Program

Each person involved with a regional center, NCE, or affiliated JCE must answer the questions below. A person is involved with a regional center, NCE, or affiliated JCE if the person is, directly or indirectly, in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance or control or use of any funding. A person may be in a position of substantive authority if they serve as a principal, a representative, an administrator, an owner, an officer, a board member, a manager, an executive, a general partner, a fiduciary, an agent or in a similar position at the regional center, NCE, or affiliated JCE.

Each petitioner must answer the questions in their capacity as an owner of the NCE associated with the Regional Center.

1. Have you committed a criminal or civil offense involving fraud or deceit within the previous 10 years? Yes No
2. Have you ever committed a criminal or civil offense involving fraud or deceit that resulted in a liability in excess of \$1,000,000? Yes No
3. Have you ever committed a criminal or civil offense for which you were convicted and sentenced to a term of imprisonment of more than 1 year? Yes No

KILP Comment: KILP strongly objects to this Question, and strongly disagrees with the agency's interpretation of the statute as to who are considered "Persons Involved With Regional Center Program." The RIA provides that a person is involved with a regional center, a new commercial enterprise, any affiliated job-creating entity if the person is:

directly or indirectly, in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the program ... An individual may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner, an officer, a board member, a manager, an executive, a general partner, a fiduciary, an agent, or in a similar position at the regional center, new commercial enterprise, or job-creating entity, respectively.

(Emphasis added).

In other words, under the statute, even if an individual is an owner of an NCE, (s)he is not a person "involved in a regional center program" if (s)he cannot make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of EB-5 funding. The statute requires operational or managerial control over a very specific and limited number of activities. It is possible to be a managerial employee of an entity, with the ability to hire and fire employees, and manage important functions of a business and still not have any operational or managerial control over pooling, securitization, investment, release, acceptance, or control or use of EB-5 funding. Most employees, non-managing owners, minority shareholders, etc. will have absolutely no involvement in the management or control over these limited functions. Importantly, a vast majority, if not all, of the regional center investors serve only as a limited partner or non-managing member of the NCE and have limited control over the NCE's daily management or operations. It is absurd to think that they have any operational or managerial control over pooling, securitization, investment, release, acceptance, or control or use of EB-5 funding.

More importantly, mistakenly classifying an I-526E Petitioner as "Persons Involved With Regional Center Program" unduly subject the Petitioner to biometrics requirement. Many I-526E petitioners reside overseas at the time of filing the I-526E Petition, and not all of them have a valid visitor visa

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to enter the U.S. to attend their biometrics appointments. Further, petitioners who need to apply for a tourist visa to travel to the U.S. will need to disclose that (s)he has a pending immigrant petition and could as a result be found ineligible for a travel visa by the State Department due to immigrant intent. KILP is very concerned about requiring biometrics for Petitioners living overseas may cause delays for adjudicating petitions, or even denials for Petitioners who are unable to travel to the U.S. to attend biometrics appointments.

Finally, we note that the INA provides for grounds of inadmissibility in INA § 212. By deeming EB-5 investors to be persons involved with a regional center when they have no substantive managerial or operational control essentially creates grounds of inadmissibility that do not exist in the statute. It also exceeds the statutory eligibility requirements for EB-5 investors.

- **Part 6 Processing Information**

Part 1 requires the Petitioner to elect if (s)he chooses Immigrant Visa Processing or Application for Adjustment of Status to seek lawful permanent resident status.

KILP Comment: KILP suggests the USCIS to add a third option for the Petitioner who has not determined whether they wish to proceed with Immigrant Visa Processing or Application for Adjustment of Status at the time of filing the I-526E. KILP encourages the USCIS to give an opportunity to the Petitioner to decide later, without having to file a Form I-824, Application for Action on an Approved Application or Petition and pay a fee currently at \$465 and wait an inordinate amount of time for USCIS to process the application, to transfer his/her petition to a Consulate overseas for immigrant visa processing.

Conclusion

We appreciate the opportunity to comment on the Proposed Form I-526E and look forward to a continuing dialogue with DHS on this important matter.

Sincerely,

Klasko Immigration Law Partners, LLP