Association to Invest In the USA (IIUSA)

Peter Joseph, Interim Executive Director
2237 North Lawndale Avenue
Chicago, IL 60647
Telephone: 617.212.8774
Email: peter.joseph@iiusa.org
http://www.iiusa.org

July 26, 2010

POSTED TO:

regulations.gov – U.S. Citizenship and Immigration Services
Fee Schedule Docket Folder

U.S. Citizenship and Immigration Services – Dept. of Homeland Security
Attn: Ms. Sunday Aigbe, Chief, Regulatory Products Division
111 Massachusetts Avenue, NW, Room 3008
Washington, DC 20529-2210

RE: Comment on proposed Forms I-924, I-924A, and fee rule

Dear Ms. Aigbe,

The Association to Invest In the USA ("IIUSA" or "the Association") appreciates the opportunity to comment on the proposed new Forms I-924, I-924A, and fee rule, posted by the United States Citizenship and Immigration Services ("USCIS" or "the Agency") to the *Federal Register* on June 9, 2010. The proposal would have a drastic impact on all aspects of the EB-5 Regional Center Pilot Program ("EB-5 Program" or "the Program"), and therefore requires careful consideration by USCIS and all other stakeholders before implementation. As background, IIUSA is the national 501(c)(6) not-for-profit industry trade association of EB-5 Regional Centers, and other stakeholders of the Program. The Association has several missions, as follows:

- Stimulate economic development and job growth in the United States, while aiding to reduce foreign trade imbalances.
- Further immigration to the United States by qualified, educated, highly skilled, and investment-oriented foreign nationals.
- Educate the public and government about the benefits derived by the Regional Centers through the EB-5 Regional Center Program.
- Help Regional Centers address administrative, regulatory and legislative issues.
- Advance and maintain Regional Center industry standards and best practices.

- Be a strong, unified voice for permanent authorization and improvement of the EB-5 Regional Center Program to enhance Regional Center activities.

IIUSA supports USCIS efforts to raise the standards of Regional Center applications, information collection, data aggregation and publication, and monitoring of Regional Center activities. However, the Association is also concerned that the manner in which these efforts is being put into practice lacks regulatory or statutory authority. Furthermore, IIUSA is concerned that implementing such big changes to the EB-5 Program without the proper authority and without going through the standard rulemaking process will lead to uncertainty and unintended consequences that will negatively impact the Program at a time when it is contributing more to the U.S. economy than ever. EB-5 visa usage more than tripled from FY2008 to FY2009. USCIS has already adjudicated more I-526 petitions in FY2010 than they did all of FY 2009. The purpose of this letter is to provide USCIS with the necessary information and insight to bolster its efforts to improve the EB-5 Program by demanding the legal authority and procedure to back up the Agency in its policy and rulemaking. Only then will the Program enjoy the certainty necessary to run a successful international investment Program.

Proposed new fee for Regional Center designation ($6,230)

IIUSA recognizes that there are real costs involved in the adjudication process for Regional Center applications. These include personnel, training, management and oversight. It benefits the Program if USCIS has the resources required to maintain an adequate workforce required for the timely processing of applications. IIUSA supports the collection of fees for those necessary activities. IIUSA, however, has the following comments on the proposed fee:

Pre-filing consultation under proposed fee

IIUSA believes the proposed I-924 fee for regional center designation (and amendment, including exemplar petitions for project review and amendments thereto) should also support a "pre-filing cooperative consultation" between USCIS, the regional center, and any developer involved. These filings can involve complex and substantial investments under fairly urgent market conditions in relation to complex rules for which USCIS interpretation is not well settled, and under these circumstances it makes sense to allow the filing parties to discuss the matter cooperatively with USCIS officers and/or counsel in order to obtain initial reaction to plans and drafts. Open discussion would allow the filing parties to quickly make changes to documents and arrangements in advance of formal filing in a way that cannot happen quickly in a process of written submissions, request for submissions, and formal responses. Of course USCIS can make a record of the pre-filing consultation discussions in order to protect the parties from any appearance of impropriety. This kind of process is allowed by other federal agencies when substantial investments and planning are involved and when the developer's unawareness or misunderstanding of the regulator's position on what the project would become could

be very costly and could undermine the purposes of the government program by scaring away parties who would fear being shut down after making significant efforts without any government interaction and guidance. Pre-filing consultation can be an option and could even carry a separate fee commensurate with the government time expected.

The following are examples of pre-filing consultation arrangements offered by U.S. federal agencies and a wide range of other government agencies:

> *Treasury Issues Final CFIUS Regulations to Implement FINSA* (reviewing foreign investment in U.S. business for national security): http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2021
>
> *IRS Pre-Filing Agreements Consultation*: http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_tax_irs_prefiling_050508.pdf
>
> *FERC pre-filing process*: http://www.fws.gov/habitatconservation/gas_prefiling_FERC_staff_NEPA_guidance_2004.pdf
>
> *Interagency Task Force Report on Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process* (environmental review of project, characterized as "Collaborative pre-filing consultation process" under 18 CFR 4.34 (i)): http://www.nmfs.noaa.gov/habitat/habitatprotection/pdf/anadfish/itf/esa_final.pdf
>
> *SEC Guidance for Consulting with the Chief Accountant* (Once a decision has been made as to the appropriate resolution for the accounting, auditing or independence issue, the company will be contacted by phone to communicate the staff conclusion and basis thereof. At this point, the company may wish to request a review of the OCA staff accounting, auditing or independence conclusion by the Chief Accountant, which is often accomplished through an in-person meeting between the company and the staff. The company should inform the team leader if it wishes to request such a review.): http://www.sec.gov/info/accountants/ocasubguidance.htm and speech ("Pre-filing consultations are strongly encouraged by the staff to facilitate the processing of filings containing complex or unusual transactions. Such consultations eliminate the time-consuming effort during the review process to identify and resolve an issue which could prolong the review process."): http://www.sec.gov/news/speech/speecharchive/1996/spch083.txt

Massachusetts Division of Fisheries and Wildlife MESA Project Review Process: http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_project_review.htm

Recommendation to FDA for pre-filing consultation: http://books.nap.edu/openbook.php?record_id=9453&page=1

China's Anti-Monopoly Law: http://www.mayerbrown.com/chinaantimonopolylaw/article.asp?id=6008&nid=11757

Lower filing fee for amendments to Regional Center designations and exemplar I-526s

The USCIS, like all federal agencies, is required to follow the Office of Management and Budget ("OMB") *Circular No. A-25 Revised* (http://www.whitehouse.gov/omb/rewrite/circulars/a025/a025.html) when determining the fees to charge for its services. In the case of the proposed $6,230 fee for proposed Form I-924, IIUSA does not believe USCIS has met this burden set forth in Section 7f of the aforementioned Circular. That section states that "every effort should be made to keep the costs of collection to a minimum." In A12d of the *Supporting Statement: Application for Regional Center under the Immigrant Investor Pilot Program: Form I-924, and Form I-924A* (OMB No. 1615-NEW), USCIS states that the adjudication of amendments to Regional Center designations required 10 hours of work per response, compared to 40 hours for initial designation. IIUSA believes USCIS should consider a separate and lower fee based on the 30 hours difference in adjudication time between initial designation applications and amendments to existing designations. This rationale also applies to "exemplar I-526 petitions." The Association supports a full fee for initial exemplar petition adjudication. However it is IIUSA's position that USCIS should lower the fee for filing amendments to already approved exemplar I-526 petitions, which are usually filed to make sure all "material change" requirements have been met. USCIS states that an amendment takes 25% as much time to adjudicate. According to Section 7f of the OMB Circular, USCIS is required to keep the fees associated with this service to a minimum. As such, the fee for amendments to existing Regional Center designations or approved exemplar I-526 petitions should be 25% of the initial designation fee.

Form I-924 Instructions

Two-year job creation timeline requirement

Under the heading, *What Is the Immigrant Invest Pilot Program and How Is It Different From the Basic "EB-5" Immigrant Investor Program?,* Section d, it states "The new commercial enterprise must create or maintain at least 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)." USCIS has stated this in the past in policy memos. This has no basis in statute or regulation, is contrary to the recognized purpose

of the Pilot Program, and would serve to frustrate the transformational purposes of the Pilot Program as a practical matter.

A. The statute does not mention timing of job creation at all.

Neither the 1990 Act creating the EB-5 program nor the 1992 Appropriations Act creating the Pilot Program mention anything about a timeline for job creation. INA §§ 203(b)(5) and 216A contain no reference to a deadline for job creation.

B. The regulations impose no specific time limit for Pilot Program job creation.

In 1991 INS proposed and finalized the initial regulations for the newly created EB-5 program. The key section concerning eligibility at the initial I-526 stage was (and still is) 8 CFR 204.5(j), which contains separate sections for each of the primary eligibility requirements: enterprise establishment, investment (being) made, lawful means of obtaining capital, job creation, management, and targeted area (if applicable). The section on "Job Creation" at 8 CFR 204.6(j)(4) contained two subsections, one for "General" investments and one for "Troubled businesses." The "General" provision required showing that 10 jobs would be created within 2 years. The "Troubled business" provision required showing that the existing jobs would be preserved for at least two years. Interestingly, neither the proposed nor final rule discussed the two-year requirements in their respective preambles. See 56 Fed. Reg. 30707-08 (July 5, 1991); 56 Fed. Reg. 60901-04 (Nov. 29, 1991).

In 1992, Congress in an Appropriation Act created the Pilot Program for regional centers. In the August 1993 interim rule implementing the Pilot Program, INS stated, quoting the Appropriations Act:

> Section 610 of the Appropriations Act expressly relaxes the job creation requirement currently set forth at 8 CFR 204.6 by allowing aliens investing in a new commercial enterprise located in regional centers to establish "reasonable methodologies" for determining the number of jobs created, "including such jobs which are estimated to have been created indirectly through revenues generated from increased exports resulting from the pilot program."

58 Fed. Reg. 44606-07 (August 24, 1993). See also 59 Fed. Reg. 17920 (April 15, 1994) (final rule, making no relevant changes). (Note: 2002 statutory amendments eliminated the export component but have not yet been incorporated in the regulations).

The 1993 regulation added a third way to meet the job creation requirement, unique to regional center investments and exclusive of the other two ways. Following these amendments, 8 CFR 204.6(j)(4) provides three separate adjudication scenarios – general,

troubled business, and Pilot Program, and in the latter case for Pilot Program based petitions. There is no requirement of a comprehensive business plan providing for job creation within 2 years. The current regulation is as follows, with the 1993 additions highlighted and certain emphasis added through bold and italics font:

> **(j) Initial evidence to accompany petition.** A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. In the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center designated by the Service in accordance with paragraph (m)(4) of this section. The petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below.
>
> > [**(1)-(3)** re enterprise established, investment (being) made, lawful means of obtaining capital]
> >
> > **(4) Job creation** --
> >
> > > **(i) General.** To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
> > >
> > > > (A) Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
> > > >
> > > > (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, ***within the next two years***, and when such employees will be hired.
> > >
> > > **(ii) Troubled business.** To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at

no less than the pre-investment level ***for a period of at least two years***. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

(iii) Immigrant Investor Pilot Program. To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either **directly or indirectly** through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by **reasonable methodologies** including those set forth in paragraph (m)(3) of this section.

[**(5)** and **(6)** re management and targeted area]

The obvious is worth articulating: In subsections (j)(4)(i) and (ii), two years is clearly stated: 10 jobs will be created within 2 years, or existing employees will be maintained for 2 years. But in subsection (iii), which is totally separate and independent from (i) and (ii), *there is no mention of a time period at all*. Paragraph (m)(3), referred to in subsection (j)(4)(iii) concerning "reasonable methodologies" that can be used to show job creation for regional centers, also does not contain any reference to a two-year period. That is not an accident. Subsection (iii) mentions the "statutory employment creation requirement," which does not include a time limitation. It says "will create" 10 jobs "either directly or indirectly." Indirect job creation takes time. "Promotion of economic growth" is the clear statutory purpose. Two years is too short. For example, obtaining permits and building anything substantial often takes more than two years, and the indirect job creation takes even longer. Indirect job creation can be predicted by a qualified economist but is not normally measured as of a particular time period, because it is not physically connected to the target investment. The regulation imposes time frames for job creation or retention in two instances and purposely leaves out any reference to two years for regional center investments. USCIS cannot impose a non-statutory requirement based on a regulation that clearly and purposely omits the requirement.

The framework of 8 CFR 204.6(j)(4) makes it clear that each of its subparts – (i), (ii) and (iii) – is intended to be read disjunctively. That is, when part (i) is applicable to adjudication of the I-526 petition, parts (ii) and (iii) do not also apply. Conversely, when part (iii) governs the adjudication of the I-526 petition for a regional center investment, then neither part (i) nor part (ii) apply. Any requirement applicable to all three

subsections would have been articulated in introductory language of 204(j)(4) preceding the subsections, but there is no such language. The word "General" introducing subsection (i) refers to those cases not covered by the other two subsections—not to requirements generally applicable to all three subsections. For example, subsection (i) *General* requires evidence of tax records and I-9 forms for employees. Part (ii) *Troubled business* also explicitly requires evidence of tax records and I-9 forms for employees. There would be no need for this explicit reference in part (ii) if part (i) were intended to be interpreted as a catch-all set of requirements for all I-526 petitions. The correct reading, rather, is that parts (i), (ii) and (iii) are separate and alternative requirements; the petitioner satisfies the job creation aspect of the regulation by fitting within just one of these alternatives. Naturally, part (iii) relating to Pilot Program-based investor petitions does not require evidence of tax records and I-9 forms, let alone a comprehensive business plan that identifies specific employment positions within the 2 year conditional period, because indirect jobs are not susceptible to that kind of proof.

C. Requiring proof of job creation within 2 years would frustrate congressional intent.

The Pilot Program was enacted "*in order to increase interest in the existing alien entrepreneur immigrant classification* under section 203(b)(5) of the Act" (Interim Rule, 58 Fed. Reg. 44606 Aug 24, 1993), and that is accomplished insofar as the Pilot Program "*expressly relaxes the job creation requirement* currently set forth in 8 CFR 204.6 by allowing alien investing in new commercial enterprises located within regional center to establish reasonable methodologies for determining the number of jobs created." (Id.) Thus, Pilot Program based petitions need not be based on qualified employees who are employed directly in the new commercial enterprise. The proposed standard, if adopted as law, would have the consequence of eliminating from EB5 consideration all those commercial ventures that have longer duration build-out or ramp-up periods. Rather than "increase interest" in EB5, such a standard would severely hinder its use.

D. Not requiring regional center jobs within 2 years is consistent with standards for removing conditions.

The statute uses sparse words for what is required for approval of petitions to remove conditions. Originally, INA § 216A(d)(1) required proof that the alien established the enterprise; that the alien had invested, or was in the process of investing, the required capital; and that the alien had sustained the investment activity throughout the two years. The 2002 DOJ Act (Pub L No 107-273), at § 11036(b)(2), eliminated the "established" requirement and added a requirement that the alien "is otherwise conforming to the requirements of section 203(b)(5)." Regulations promulgated in 1999, and not amended to implement the 2002 statutory changes, include only the following concerning job creation:

> Evidence that the alien created ***or can be expected to create within a reasonable time*** ten full-time jobs for qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Forms I-9.

8 CFR 216.6(a)(4)(iv) (emphasis added). The regulation already dealt with the job creation requirement, so the 2002 statutory amendment's requirement of compliance with applicable EB-5 requirements does not affect the regulation for purposes of the instant discussion.

The regulation for I-829 adjudication quoted above does not distinguish between "General" and Pilot Program investors. Interestingly, this regulation allows "General" investors, who are required to have shown at the I-526 stage that they will create the 10 jobs within two years, to confess that they did not accomplish the task, as long as they show at the I-829 stage that that they "can be expected to create [10 jobs] within a reasonable time."[1] For Pilot Program investors, this standard is the same as it was at the I-829 stage: within a reasonable time. Allowing regional centers to acknowledge from the start that their indirect job creation will take longer than two years accomplishes congressional intent, recognizes the reality of indirect job creation, and does not offend a framework that allows "General" investors to take more than two years in the end.

E. <u>The 2002 Fix Provisions do not support a 2 year timeline for regional center jobs.</u>

The 2002 Appropriations Act[2] does not put a timeline on regional center job creation and in fact supports the opposite. The 2002 Act included three types of provisions affecting the EB-5 program: (1) fixes for the investors who had gotten caught in an interpretational shift reflected in *Matter if Izummi* ("Fix Provisions"); (2) removing the requirement that any investor "establish" the enterprise rather than invest in it (including clarification that limited partnerships can qualify); and (3) removing regional centers' requirement to increase exports and allowing them to use "general predictions" of "positive economic effects" in their proposals to USCIS for designation.

First, the 2002 Appropriations Act was enacted by a different Congress than the one that enacted the EB-5 program in 1990 or the one that added the Pilot Program for regional

[1] "The Service recognizes that a bona-fide and good faith investment may not, by the end of the two-year period, meet all the expectations envisioned when the alien entrepreneur obtained conditional resident status." 59 Fed. Reg. 26587-26593 (May 23, 1994).

[2] 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002. USCIS has not issued regulations interpreting this Act.

centers in 1993. Any provisions not directly affecting the issue at hand do not establish Congressional intent behind any statute enacted by a previous Congress.

Even aside from that, the Fix Provisions were for a very specific and limited purpose, providing exceptions to the then-current interpretations of the statute for investors who had gotten caught in a change of interpretation reflected by *Matter of Izummi* and had been denied their I-829 petitions to remove conditions to their permanent residence. The covered petitioners must have obtained I-526 approval between 1995 and 1998—all at least 4 years before the 2002 Appropriations Act was enacted. The Fix Provisions did not direct INS/USCIS to go back and analyze matters as of the times that the denied petitions had been originally adjudicated. Rather, it allowed those investors to receive credit for jobs that were already created up to the date of a new first adjudication under the Fix Provisions and, if less than 10 jobs had been created (or less than the requisite capital had been invested), allowed them yet another two years to come back and demonstrate that any combination of enterprises had created 10 jobs. This was an extraordinary resolution for a complex problem that cannot reasonably be read to require that all 10 jobs have already been created for any EB-5 petition to be approved. INS/USCIS already had longstanding regulations allowing I-829 petitioners to show that any jobs not already created would be created "within a reasonable time." 8 CFR 216.6(a)(4)(iv). The Fix Provisions did not purport to change that, and USCIS has not found that regulation to be affected.

Moreover, even in requiring this special group of previously denied I-829 petitioners to show, at some point in the future, that 10 jobs would have already been created, the Fix Provisions still made the requirement of job creation "subject to subparagraphs (B) and (C)" of Section 11031(c)(1). Those excepted subsections changed the normal Fix Provision rule for two types of investments: Pilot Program and troubled business investments. These are the very same two types of investments that the regulations have always treated differently with regard to job creation. The Fix Provisions' exception for Pilot Program investments states simply that the investment must meet the requirements of the 1993 Appropriations Act creating the Pilot Program,[3] which essentially reiterates the "reasonable methodologies" requirement at 8 CFR 204.6(j)(4)(iii). The Fix Provisions do not support the notion that regional center investments must meet the same timing requirements as "General" investments. Instead, the Fix Provisions confirm the distinction that had already been made by INS in the regulations, which allow inclusion of indirect jobs as shown by reasonable methodologies and naturally do not require their creation within two years. Proof of job creation within a 2 year period is not required for regional program investors.

[3] The Fix Provisions froze the Pilot Program rules, for this particular purpose, as of the moment of the Fix Provisions' enactment, protecting the special group of affected investors from any further rule changes that might have occurred for all other Pilot Program investments in the future.

Reference to 8 CFR 204.6(m)(3)(iv) – "detailed prediction"

Section 5, under the heading, *Who Must File Form I-924 Supplement for Each Fiscal Year?*, states:

> In reference to 8 CFR 204.6(m)(3)(iv), provide a *detailed prediction* which addresses the prospective impact of the capital investment projects sponsored by the Regional Center, regionally or nationally, with respect to increases in household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the Regional Center. (Emphasis added.)

The statement about a detailed projection is superseded by § 11037(a)(3) of the 21st Century Department of Justice Appropriations Authorization Act, which authorizes the approval of Regional Centers based on "general predictions." The provision reads as follows:

> The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

IIUSA urges USCIS to change the reference on the Form I-924 Instructions to the 2002 amendments, allowing Regional Center applications based on "general predictions."

Typo on filing fee

The filing fee is stated as $6,245 under the heading "*What is the Filing Fee?"* It is our understanding that the proposed fee is **$6,230**.

Exemplar petitions – What Is the Purpose of This Form? Section B

I-526 petitions based on approved exemplar I-526 petitions should be eligible for premium processing. Those petitions should only be adjudicating the investors immigration aspects of the petition. This is no different than the many other immigrant and nonimmigrant visa categories that enjoy premium processing service.

IIUSA objects to the third basis for re-adjudicating a project that has been approved through exemplar petition, that the project approval was "legally deficient." Regional Center operators and EB-5 investors should not be asked to shoulder all of the consequences if USCIS did not properly adjudicate the exemplar I-526 in the first place. It is too late to re-adjudicate once people have committed. If the Regional Center's business plan is followed, based on USCIS positive adjudication of the exemplar I-526, it has to be approved[4]. The law is too unclear and developing to allow the program to hinge

[4] Chang v. U.S., 327 F.3911, 928-29 (9th Cir. 2003)

on successive USCIS adjudicators agreeing or disagreeing with each other (or same adjudicator not changing his or her mind). This basis of re-adjudicating project represents another aspect of uncertainty that the EB-5 Program cannot afford. There is too much capital, economic growth, and job creation at stake to allow for that.

Material Change – What Is the Purpose of This Form? Section 3(3)

There remains no definition or guidance of what makes for a "material change" that requires a Regional Center to submit an amendment (either to their designation or to a previously approved exemplar I-526). Changes in initial business plans are a part of doing business. In fact, the ability to adapt to those changes quickly often defines the success of a fledgling business. It is in the interest of the Program as a whole that there are clear guidelines on this issue so Regional Centers know when they have to submit an amendment. This kind of certainty is imperative to investors' confidence, which will always be the backbone of this, or any investment deal. It is the position of IIUSA that material change should be narrowly defined to only apply when changes in the business plan lower the total job creation prediction below ten per investor.

It is the position of IIUSA that USCIS should be very reluctant to find a "material change" and should only do so when the purposes of the program would be frustrated. Changes to business operations involving EB-5 petitions should not require any additional filings when they represent the normal vicissitudes of business in reaction to changing market conditions and don't fundamentally change the type of business being invested in and the way that jobs will be created. And even when material change may have occurred, USCIS should allow a regional center to file an exemplar petition for a previously approved project in order to give notice to USCIS of revisions to the business plan without requiring every investor to file a new individual petition and without causing "age out" of children who turned 21 after the initial I-526 was filed. Investors should be allowed to file an I-829 petition with evidence of a filed or approved I-924 to revise a business plan for the affected investors, showing that the new plan is viable and is reasonably likely to create the requisite jobs within a reasonable time using "reasonable methodologies," as is appropriate under the language in the legislation creating the regional center program and the normal regulator standard for I-829 approval.

Grammatical/clarity

Page 1, sub-section B – When USCIS is describing when a Regional Center amendment may be filed for preliminary project approval:

- B.1. talks about an exemplar form and seems to be what the 12/11/2009 memo is about.

- B.2. states, "An actual investment project where an exemplar investment project that is materially the same as the actual investment project was previously approved for use by the regional center for EB-5 capital investments."

What does that mean?

Page 4, Item 4- A verb is left out of the last line. "Submit a plan of operation for the Regional Center which addresses how investors will be recruited and how the Regional Center will conduct its due diligence to ensure that all immigrant investor funds affiliated with its capital investment projects will [arise?] from lawful sources."

Form I-924

Form I-924 introduces standardized collection of Regional Center information. IIUSA supports USCIS in these efforts, so USCIS can monitor Regional Center activities more closely and so the agency can provide aggregated statistics on the EB-5 Program as a whole (i.e. capital invested; jobs created; separation of principal and derivative visa usage statistics, etc.) Such statistics have not been published, despite being collected twice by USCIS in recent years. IIUSA's support of these efforts does have a caveat, however. The Association believes that big changes to the Program, like the ones introduced in Form I-924, should go through the standard rulemaking process before being implemented. Without said process, stakeholders never know when new rules may change the rules of the game without fair warning. This kind of uncertainty is dangerous to the long term viability of the Program. The most important aspect of all investments, EB-5 or not, is confidence. A predictable process for rulemaking is an imperative aspect of fostering that confidence. Detailed reasoning for this position is provided below.

Five year Regional Center re-designation concept

The concept of "Regional Center re-designation" is brand new and represents a big change to the EB-5 Program. Changes this big should not be implemented via Form. They need to go through the Administrative Procedure Act ("APA") rulemaking process. Furthermore, IIUSA finds no evidence of regulatory or statutory authority to implement this re-designation process or for the five-year limit on a Regional Center designation. Lastly, the process for an EB-5 investor to become an unconditional permanent resident *and* potentially have his or her capital returned from investment usually lasts at least five years. This provides another angle of risk for investors who are already being asked to shoulder the immigration and capital investment risk. Investors should not be asked to take on another element of risk in this situation. IIUSA asks that USCIS instead put the concept of "re-designation" itself through the standard APA rulemaking process so that the agency can take all public comment on the process into consideration before implementing such a big change to the Program.

IIUSA would also be interested in USCIS's responses to the following questions on the topic:

- What are the standards for re-designation?
- Where did the five-year cycle come from and under what authority?
- Is the fee ($6,230) the same for re-designation as for an initial application?
- Do all supporting documents need to be included in an application for regional center re-designation?

Collecting ownership information

This Form I-924 provides a unique opportunity to provide Congress with the information it needs to oversee a successful EB-5 Program and should be used as such. With that in mind, IIUSA believes Congress would want to know if Regional Centers are being owned by one or more foreign nationals or foreign entities. Form I-924 is the ideal means of USCIS collecting and providing that data to Congress accordingly. USCIS should consider whether Regional Center ownership by foreign nationals or entities is appropriate or healthy for the Program and whether it should be allowed and quickly make any rules on this issue.

North American Industry Classification System ("NAICS") codes

IIUSA understands that the use of NAICS codes helps USCIS recreate the job creation predictions using the Regional Center's economic model, thereby improving oversight and data collection abilities. The Association reminds USCIS that applications for Regional Center designation can be based on "general predictions." Therefore, only two or three digit NAICS codes ought to be required for Regional Centers themselves. Complete five or six digit NAICS codes can be used for individual investment projects under the jurisdiction of the Regional Center. IIUSA urges USCIS to make that distinction clear on Form I-924.

Parts 2 and 3 questions

IIUSA would also be interested in the answers to the following questions regarding Parts 2 and 3 of Form I-924:

Part 2: Amendment to an approved Regional Center designation

- Do all sections of the I-924 need to be filled out for an amendment, or only applicable sections?

Part 3: Information about the Regional Center

- Do all questions need to be answered on the form, or can the corresponding materials be referenced to attached supporting materials (i.e. "see exhibit 3 attached")?

- (A): why does it ask for the Social Security # of the Regional Center? Shouldn't this be an EIN instead?
- (D): Name of other Agent: should this be completed for the managing principal(s)?
- (D)(9)(c): *Has or will the Regional Center or any of its principals or agents receive fees, profits, surcharges, or other like remittances through EB-5 capital investment activities from this commercial enterprise?* What information is the Agency looking for here?

Form I-924A

IIUSA reiterates its general support for USCIS efforts to standardize the collection of information from Regional Centers so it can better monitor their activities and provide aggregated statistics about the EB-5 Program as a whole. USCIS has collected such information in the past, but it has never been published. IIUSA urges that this aggregated information be published as soon as possible by USCIS. These statistics are imperative to understanding the overall economic impact of the EB-5 Program and to help solidify the EB-5 Program as an important tool of economic growth and job creation during a time of national economic fragility.

IIUSA would be interested in clarification on the following points:

- **Part 3, #5:** *Note: USCIS may require case-specific data relating to individual EB-5 petitions and the job creation determination and further information regarding the allocation methodologies utilized by a regional center in certain instances in order to verify the aggregate data provided above (I-526/I-829 petitions approved/denied/revoked).* What does this mean?
- Would USCIS consider a fee exemption for not-for-profit Regional Centers?

IIUSA again thanks you for the opportunity to comment and looks forward to engaging directly on the topics in this letter. These comments are meant to protect the integrity and international confidence in the EB-5 Program so that it can continue to grow and contribute positively to the fragile recovery of the national economy. Without the certainty and predictability suggested in this letter, investor confidence will falter, and so will the Program. There is too much capital, too many jobs, and too much potential for economic growth at stake for USCIS to implement drastic changes the Program in haste. Predictability in all aspects of the EB-5 Program, especially the rulemaking and policymaking processes, is the best way to provide it with the certainty it needs to thrive.

Please contact me with any questions.

Sincerely,

Peter Joseph
Interim Executive Director

CC: U.S. Citizenship and Immigration Services – Dept. of Homeland Security
Attn: Ms. Sunday Aigbe, Chief, Regulatory Products Division
111 Massachusetts Avenue, NW, Room 3008
Washington, DC 20529-2210