PUBLIC SUBMISSION

As of: September 24, 2012
Received: September 24, 2012
Status: Posted
Posted: September 24, 2012
Tracking No. 81125a81
Comments Due: September 20, 2012
Submission Type: E-mail

Docket: USCIS-2007-0046
Agency Information Collection Activities; OMB 1615-0061; Form I-924

Comment On: USCIS-2007-0046-0019
Agency Information Collection Activities: Application for Regional Center Under the Immigrant Investor Pilot Program, Form I–924 and Form I–924A; Extension, Without Change, of a Currently Approved Collection

Document: USCIS-2007-0046-0023
Comment Submitted by Betsy Lawrence, American Immigration Lawyers Association

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General Comment

See attached file(s)

Attachments

Comment Submitted by Betsy Lawrence, American Immigration Lawyers Association- Attachment

From: Betsy Lawrence [mailto:BLawrence@aila.org]
Sent: Thursday, September 20, 2012 4:48 PM
To: USCISFRComment@dhs.gov; oira_submission@omb.eop.gov
Subject: AILA Comments to Form I-924 Information Collection--OMB Control Number 1615-0061

Please accept the attached comments of the American Immigration Lawyers Association to the 30-day notice of information collection: Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program (OMB Control No. 1615-0061).

Thank you,

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September 20, 2012

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Submitted via e-mail: uscisfrcomment@dhs.gov
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Re: 30-Day Notice of Information Collection under Review: Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program
OMB Control No. 1615-0061
77 Fed. Reg. 50520 (Aug. 21, 2012)

Dear Sir or Madam,

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) Notice of Information Collection under Review: Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program, published in the Federal Register on August 21, 2012.

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. The organization has been in existence since 1946. 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 the Notice of Information Collection and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

Background

Pub. L. No. 102-395, Title VI, §610, 106 Stat. 1874, as amended in 2002 by Pub. L. 107-273, authorizes U.S. Citizenship and Immigration Services (USCIS) to designate regional centers under the Immigrant Investor Pilot Program as follows:

> *[O]n the basis of a **general proposal**, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. 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.*

Certain sections of Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program (Form I-924) are unclear and/or do not accurately reflect the statutory requirements. AILA provided comments to the information collection notice dated May 10, 2012, under our cover letter dated July 6, 2012. We provide these further comments in order to emphasize a few aspects of our earlier submission.

Initial Evidence Requirements

Form I-924 prescribes certain mandatory evidentiary elements for an initial application for "Approval and Designation of a Regional Center" that are inconsistent with Pub. L. 102-395, as amended. In our earlier comment, we recommended that Form I-924 be revised to indicate that project-level specificity is only required where actual project approval is sought alongside an initial regional center designation. Where the I-924 does not include a request for project approval, USCIS must adhere to the plain language of the statute which provides for a general proposal. Form I-924 must be amended to allow for this level of proof.

Under Pub. L. 102-395, as amended, an initial regional center designation may be approved on the basis of a ***general*** proposal with ***general*** predictions. Such proposals are typically based upon a hypothetical project that may or may not come to fruition, representing merely the kind of capital investment project that the regional center intends to undertake. By its nature, a general proposal cannot supply the level of detail the I-924 instructions and current USCIS practices require. While Form I-924 in some respects follows the language of 8 CFR §204.6(m)(3), that regulation was promulgated based on the initial language of Pub. L. 102-395, and has not been changed since the amendments made by Pub. L. 107-273. An agency's failure to amend regulations in keeping with statutory changes does not excuse the use of forms that embody outdated regulations. The present version of Form I-924 essentially ignores the 2002 statutory amendment.

It is contrary to the plain meaning of the statute and to reason to require actual project-level specificity in the case of a hypothetical that is merely intended to illustrate the range of requested industry sectors and how a methodology would estimate future job creation. In the next iteration of Form I-924, USCIS must clarify the evidentiary standard appropriate for initial proposals containing only hypothetical projects. Such clarification, alongside specification of the different preapproval categories and the evidence required for each, is necessary to eliminate confusion and to conform USCIS standards to the statute.

Industry Category Title

When Form I-924 was initially published for comment, there was no indication that it purported to change the standards for regional center eligibility under the statute and regulations. Nor did USCIS provide notice that Form I-924 would alter the legal standard for the qualification of a specific investment project. In initial public comments about the purpose of Form I-924 and the use of NAICS codes, USCIS advised that it was merely an information collection tool consistent with the use of NAICS codes by other federal agencies.

Yet, the experience of practitioners indicates that the introduction of Form I-924 has marked a change in adjudication standards. A review of USCIS (and legacy INS) regional center designations, released in accordance with the Freedom of Information Act, reveals that prior to implementing Form I-924 in 2010, less than 5 percent of all designation letters referenced an NAICS code. When an NAICS code was referenced, typically a two-digit number appeared. With the implementation of Form I-924, we have seen an increase in USCIS requiring four- or six-digit NAICS codes in the adjudication of Forms I-924 and I-526. This trend is seen in RFEs, denials and in comments made by USCIS in 2012.[1] This aspect of Form I-924 is therefore in violation of the Administrative Procedure Act inasmuch as it introduces a new legal standard without sufficient notice and public comment.

The insistence on industry specificity is also inconsistent with statutory intent. The statute clearly provides that regional centers are to be designated based on a "general proposal" for economic growth and job creation. The intent of the 2002 amendment was to counter the practice of legacy INS in denying regional center proposals for a lack of specificity about commercial enterprises that would receive EB-5 capital. For USCIS to insist on specific four-digit NAICS codes in regional center proposals is to ignore the purpose of the 2002 amendment.

The statute also states that a regional center proposal must include "general predictions**"** concerning "the kinds of commercial enterprises" that will receive capital and "the jobs that will be created." Even if USCIS's focus on "industry sectors" amounts to a useful interpretation of the statutory phrase "kinds of commercial enterprises," there is no authority for insistence on four-digit NAICS codes, and such insistence is inconsistent with the sense of "general predictions" about those kinds of commercial enterprises.

Once USCIS has embedded specific NAICS codes in a charter letter approving the regional center, projects that do not fit neatly within the approved codes cannot be used as EB-5 investment projects until USCIS approves an amendment to include new NAICS codes. As we stressed in our initial comment, we request that Form I-924 clarify that the NAICS codes for requested industries may be broader than those represented by any project documents submitted with the proposal.

[1] For example, in the May 1, 2012 EB-5 Stakeholder Minutes, USCIS states that it requires "four digit NAICS codes at minimum." *See* AILA InfoNet Doc. No. 12041241 (*posted* 7/18/12); also available at: http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/May%202012/May_2012_Quarterly_EB5_Engagement_Executive_Summary.pdf

The narrowness of the required industry codes unnecessarily limits the use of regional center approvals. If a regional center is approved for a certain job creation methodology but only for a very narrow NAICS code, the regional center must file and await approval of an I-924 amendment before affiliated investors in a project with a slightly different NAICS code may file an I-526 petition claiming credit for indirect job creation. USCIS is currently taking more than 1 year to adjudicate regional center amendments. As a result, job-creating investment projects are unnecessarily delayed, with the result that many projects will not go forward with EB-5 funding, or will not go forward at all. USCIS has not justified the burden on EB-5 stakeholders caused by its narrow approach to NAICS codes.

Recommendations

We make four specific recommendations for the next iteration of Form I-924:

First, USCIS should make it clear that four-digit NAICS codes are not always required for regional center proposals. It may be appropriate to describe a requested industry sector using a two-digit NAICS code; in other instances, a requested industry sector may be best captured with six-digit specificity. USCIS should also make clear that more specific NAICS codes used in hypothetical projects for illustrative purposes will not be used to limit approved industry sectors to those specific NAICS codes.

Second, USCIS should clarify that once a regional center is approved for an industry with reference to an NAICS code, actual projects using more specific NAICS codes will be encompassed within the approved more general code. For example, if a regional center is approved for NAICS code 23, a project most accurately captured by NAICS 23621 should be accepted as within the approved NAICS 23. USCIS has issued RFEs questioning whether a more specific NAICS code used for an actual project is "more appropriate" for a regional center than the more general NAICS code approved in the initial designation. USCIS should not use later more specific project NAICS codes to suggest that the broader regional center designation is inappropriate, or should be narrowed.

Third, USCIS should clarify in Form I-924 and the instructions the extent to which it uses NAICS codes in adjudications, and provide that NAICS codes will be used only to assess conformity with approved regional center sectors, and not to test conformity with NAICS codes used in job impact analysis. It is a reasonable economic methodology for economists to reference or use NAICS codes for input activities that may not conform to approved regional center industry sectors or NAICS codes. For example, a regional center may be approved for "commercial real estate" or "real estate development." In certain instances, USCIS has acknowledged that at the very least, tenant-related jobs resulting from approved regional center activity such as real estate development may be counted. In those cases, an economist will use tenant activity NAICS codes as inputs to drive impacts from those activities rather than an NAICS code corresponding with real estate development. The point here is that USCIS should not look for precise correspondence between regional center approved sectors and NAICS codes appearing in job creation impact studies, although in some cases it may be appropriate.

Fourth, USCIS should clarify that even if "construction" per se is not specifically approved as an industry sector for a regional center, job creation impacts from construction activities directed toward an approved industry sector should be counted. Stakeholders know that USCIS is now focused on NAICS codes, but they do not know how exactly they are used in adjudication. If a regional center is approved, for example for oil and gas extraction, construction activity to enable this approved activity should be deemed encompassed within the approved sector allowing construction-related impacts to count.

Conclusion

We appreciate this opportunity to comment on Form I-924, Application for Regional Center under the Immigrant Investor Pilot Program.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION