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June 21, 2013

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Laura Dawkins
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via www.Regulations.gov
Docket ID: USCIS-2007-0021

**Re: 60-Day Notice of Revision of a Currently Approved
Collection: Form I-526, Immigrant Petition by Alien
Entrepreneur (OMB Control No. 1615-0026)
78 Fed. Reg. 32261 (May 29, 2013)**

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 Revision of a Currently Approved Collection: Form I-526, Immigrant Petition by Alien Entrepreneur, published in the Federal Register on May 29, 2013.

The following comments were submitted on January 29, 2013, in response to the November 30, 2012, 60-day Federal Register notice. However, the May 29, 2013 notice states that USCIS did not receive any comments in connection with the 60-day notice. We hereby resubmit these comments to be sure that they are recognized in the administrative record.

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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form I-526 and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

First, we applaud this and other efforts U.S. Citizenship and Immigration Services (USCIS) has initiated in the past year to improve the EB-5 immigrant investor program. These efforts have been meaningful and will lead to greater confidence in the EB-5 program on the part of stakeholders, the public, and the international community of investors. We welcome particularly USCIS's commitment to engaging the public in its policy formulation. We hope our participation in this larger dialogue will assist USCIS in building a transparent and stable investment immigration program.

USCIS states that it is revising Form I-526 and the accompanying instructions in order to add additional data fields related to passport and travel document information captured by CBP at the port-of-entry so that USCIS can search TECS and ADIS to verify status in the United States.

However, we believe that additional revisions to Form I-526 would assist both USCIS and program participants by eliminating confusion in certain sections, tracking more precisely the regulations in other sections, and incorporating recent policy and procedural changes. We also propose three substantive modifications: (1) the addition of parts relating to the associated regional center, if applicable; (2) the correction and clarification of conflicting questions in Part 4 about the enterprise and Part 5 about employment creation; and (3) the addition of a section for dependents.

Add Parts Relating to the Associated Regional Center

Regional centers have proliferated in number and activity in the past few years. As published in recent USCIS materials, approximately 90 to 95 percent of all I-526 petitions are associated with regional centers.¹ Regional centers form the new commercial enterprise, identify investment opportunities, and engage economists to predict indirect job creation. Despite the significant role of the regional center in the vast majority of petitions, the current form gives the USCIS examiner no information about the associated regional center. To overcome the current form's limitation, USCIS has requested that petitioners type or write the name of the associated regional center in the space on the form above "Part 1" after "START HERE." This clearly indicates that a revision to the form requesting information about the affiliated regional center, if applicable, is warranted. Accordingly, the *proposed new* Part 1, Section 1 requests "Information about the Regional Center."

Similarly, the current Form I-526 would be improved by adding a section setting forth any affiliated exemplar or amendment filing. The exemplar filing, introduced in the December 11, 2009 USCIS memorandum, post-dates the last revision to Form I-526. While we appreciate that the effect, form, and even nomenclature of exemplar (or preapproval) filings are matters of evolving USCIS policy, it would make sense to incorporate a reference to an "associated Form I-924," assuming these filings will

¹ EB-5 Immigrant Investor Quarterly Engagement, June 30, 2011, *published on* AILA InfoNet at Doc. No. 11050462 (*posted* June 30, 2011)

continue to be made on Form I-924. Accordingly, the *proposed new* Part 5, Section 1 requests Form I-924 information under “Employment Creation Information.”

Finally, we propose a related structural modification to Form I-526 to divide the form into two parts. The first part would relate to the new commercial enterprise and would collect information generally made available by a regional center. This part would also cover new commercial enterprise information for basic, non-regional center cases. The second part would relate to the petitioner and would collect information about the investor, investment, and whether the investor will adjust status or consular process after petition approval. This proposal would simply reorder the existing parts without eliminating any existing part.

Courtesy Copy Notices Sent to Regional Center

Given that Form I-924A requires a regional center to annually provide USCIS with the total number of approved, denied, and revoked Forms I-526 and I-829 (see Form I-924A, Part 3, items 4 and 5), we proposed in our October 11, 2011 comments that the new Form I-526 allow a regional center to appear as a formal party to the petition. This would permit a regional center to receive notices of USCIS action on the petition so that it may make accurate reports on Form I-924A. At that time, we had proposed the creation of a new Part 4, “Signature of Regional Center Authorized Representative.” That prior proposal has been met with resistance from USCIS for various reasons, including the stated justification of logistics.

While we continue to believe that the regional center should be added as a signature party to Form I-526, we assert that (at minimum) Form I-526 be amended to allow the petitioner to “opt-in” or to “opt-out” of having USCIS send a courtesy copy notification of any actions to the named regional center. This would permit a regional center to reliably receive notices of USCIS action on the petition and would facilitate accurate reporting on Form I-924A, as required by new USCIS rules. Absent the direct notice plan suggested above, regional centers cannot accurately attest to case filing statistics as required by Form I-924A. In addition, direct notice to regional centers would allow them to better assist petitioners in responding to USCIS requests for evidence, notices of intent to deny, and on motions to reopen or reconsider.

The proposal, one of simple courtesy copy notification, follows current USCIS practices used in other types of petitions (such as employment-based classifications). Accordingly, we strongly urge the addition of the proposed new Part 1. Section 2, B3. “Petitioner’s Release of Information to Regional Center.”

Correcting and Clarifying Conflicting Questions in Part 4 about the Enterprise and Part 5 about Employment Creation

The proposed changes to Part 4, “Type of Enterprise,” eliminate imprecision in the current form. To determine whether an investment is in a “new commercial enterprise,” the initial inquiry is whether the investment is in a commercial enterprise that was

established after November 29, 1990.² If the investment is in a commercial enterprise that was established after November 29, 1990, the requirement is met. If the investment is made in a commercial enterprise established on or before November 29, 1990, the investor must meet one of two tests: (1) the investor must purchase an existing business and restructure or reorganize it; or (2) the investor must expand the business in such a way as to accomplish a 40% increase in either the net worth or the number of employees.

We note that 8 CFR §204.6(h)(1), with respect to commercial enterprises established after November 29, 1990, references the “creation of an original business.” This regulation is obsolete since it refers to the requirement in the law prior to November 2, 2002, that the investor must “establish a commercial enterprise.” With the removal of that requirement by the 21st Century Department of Justice Appropriations Authorization Act, the alien is no longer required to create an original business; it is sufficient if he or she invests in and is engaged in a new commercial enterprise. Therefore, in order to be consistent with the 2002 amendments to the statute, the I-526 should ask the following questions with respect to a new commercial enterprise:

- Was the commercial enterprise in which you are investing established after November 29, 1990?
- If not:
 - Have you restructured or reorganized the commercial enterprise?
 - Have you expanded the commercial enterprise by increasing its net worth by at least 40%?
 - Have you expanded the commercial enterprise by increasing the number of employees by at least 40%?

Adding a Dependents Section

We ask USCIS to consider adding a part to Form I-526 to include the petitioner’s dependents, similar to that which is included in other immigrant petition forms. For example, Form I-140, Immigrant Petition for Alien Worker, contains a Part 7, “Information on Spouse and All Children of the Person for Whom You Are Filing,” that includes a question about whether the dependents will apply for adjustment of status or a visa abroad.

Collecting this data on Form I-526 would permit USCIS to include critical information in its transmittals to the National Visa Center (NVC) to facilitate dependent visa processing. Accurate data collection on dependents is critical to post-USCIS actions by NVC, which must calculate the visa fee bill based on the number of dependents in the petition, and the petitioner must pay the fee bill to allow further processing. However, because the current Form I-526 does not collect the names of the dependents, fee bills often omit one or more dependents. This requires significant time and remedial efforts by the petitioner and NVC to correct.

² See 8 CFR §204.6(e) (definition of “new”).

We have also observed that NVC and some consulates continue to struggle with interpreting the Child Status Protection Act (CSPA), resulting in visa delays for some dependents who are clearly protected under the CSPA. We would be grateful if USCIS would consider including in its transmittal to NVC a determination of dependent coverage under the CSPA.

Other Proposed Changes.

We propose the following additional changes to provide clarity as well as greater consistency with regulations and newer policies and procedures:

<u>Current Form I-526</u>	<u>Proposed Revised Form I-526</u>	<u>Rationale</u>
Part 1. Information About You	NEW Part 1, Section 2. Information About Regional Center. Type of EB-5 Petition (check one): ☐ A. This petition is NOT affiliated with any regional center (skip to Part 2) ☐ B. This petition is affiliated with a USCIS approved Regional Center (complete the following questions): B.1. Name of affiliated Regional Center. B.2. Address of Regional Center. B.3. Petitioner's Release of Information to Regional Center: (check one): ☐ I AUTHORIZE and	See main body of comments section above.

	DIRECT USCIS to transmit a courtesy copy of any actions, requests, or notices relating to the adjudication of this Form I-526 to the above named Regional Center. ☐ I DO NOT AUTHORIZE USCIS to transmit a courtesy copy of any actions, requests, or notices relating to the adjudication of this Form I-526 to the above named Regional Center.	
Part 3. Information About Your Investment (“Targeted Employment Area”)	MODIFY/EXPAND If you indicated in Part 2 that the enterprise is primarily doing business in a targeted employment area, please check one: ☐ Located in a qualifying rural area (name of county, state); ☐ Located in a qualifying high unemployment area as demonstrated by, either: A. An official state-issued “high unemployment area” designation letter (provide name of state agency, and date of issuance); OR B. Other evidence (describe).	The current form only appears to seek information about targeted employment areas (TEA) that are rural, defined by county level. However, this fails to capture data for “high unemployment areas” which represent a majority of the TEA-based petitions filed with USCIS. Accordingly, we recommend that USCIS modify/expand the current form to allow the petitioner the opportunity to identify this other class of TEA eligibility.

Part 4. Additional Information About the Enterprise Type of Enterprise (check one) ☐ New commercial enterprise resulting from the creation of a new business ☐ New commercial enterprise resulting from the purchase of an existing business ☐ New commercial enterprise resulting from a capital investment in an existing business	MODIFY/EXPAND Part 1, Section 4. Additional Information About the Enterprise Type of Enterprise (check one) ☐ New commercial enterprise resulting from investment in a business created after November 29, 1990 ☐ New commercial enterprise resulting from investment in a business created on or before November 29, 1990 and associated restructuring or reorganization ☐ New commercial enterprise resulting from investment in a business created on or before November 29, 1990 and associated expansion	Eliminates confusion by tracking the types of enterprises listed on Form I-526 to the types set forth in 8 CFR §204.6(h)
Part 4. Additional Information About the Enterprise Composition of the Petitioner's Investment: [5 categories of investment listed] Other \$_____	MODIFY/EXPAND Part 2. Information about the Petitioner Section 2. Information about Your Investment Composition of the Petitioner's investment: Total cash contributed \$_____	Eliminates confusion about which category to select where more than one may apply – for example, U.S. bank account and stock purchase. The original categories track the examples of optional evidence of investment set forth in 8 CFR §204.6(j)(2). Since most investments will be made in cash capital, a clearer and simpler approach would be to

	Total value of all non-cash assets contributed \$_____ Other \$_____	provide the categories of “cash” and “non-cash assets,” retaining “other” for other forms of qualifying capital.
Part 4. Additional Information About the Enterprise Net worth: When you made the investment Gross \$_____ Now \$_____	Part 1. Section 4. Additional Information About the Enterprise Net worth: When the investment was made \$_____ Now \$_____	The current form contradictorily requests “gross” <i>net</i> worth. We propose that the revised form simply request net worth when the investment was made and net worth “now.”
Part 5. Employment Creation Information	NEW Part 5. Section 1. Employment Creation Information in Regional Center. (For regional center cases only. This section shall be completed only if the petitioner named an approved Regional Center in Part 1, Section 2): 1. What are the total number of new jobs projected to result from investment in the new commercial enterprise? ____ 2. What are the total number of preserved jobs projected to result from investment in the new commercial enterprise? ____ 3. Did the Regional Center file an amendment with USCIS seeking prior approval for this specific new commercial enterprise?	See main body of comments section above.

	☐ Yes ☐ No. (If yes, provide the current status of that application).	
Part 5. Employment Creation Information How many of these new jobs were created by your investment? How many additional new jobs will be created by your additional investment?	NEW Part 5. Section 2. Employment Creation Information. (To be completed in all non-regional center cases, where the new commercial enterprise may only claim direct job creation or preservation). Section 2A. Is the petition based on an investment in a troubled business? ☐ No. (proceed to Section 2B) ☐ Yes. (complete following): 1. Number of existing full-time jobs at time of investment ____ 2. Number of full-time jobs expected to be created ____ Section 2B. New Job Creation. 1. Number of existing full-time jobs at time of investment directly employed by the new commercial enterprise ____ 2. Number of new full-time qualified jobs planned to be created by the new commercial enterprise ____	The current form has no place to inform USCIS if the petition is based on a troubled business. The proposed changes remedy this.

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Part 6. Processing Information.	NEW Part 6B. Information on Spouse and All Children of the Person for Whom You Are Filing. List husband/wife and all children related to the individual for whom the petition is being filed.	This section already exists on Form I-140 (Section 7) and is needed on Form I-526 for the same reasons - to identify and include dependents to facilitate NVC processing. See Example: http://www.uscis.gov/files/form/i-140.pdf
Part 8. Signature of Person Preparing Form.	NEW Add data field for “Preparer’s E-Mail Address (if any)”	This section already exists on Form I-140 (Section 9) and is equally needed on Form I-526 for the same reasons – to facilitate NVC processing. After I-526 petition approval, NVC sends the fee bill to the attorney of record via e-mail. Capturing the attorney’s e-mail address will ensure the accuracy of NVC communications. See Example: http://www.uscis.gov/files/form/i-140.pdf

We thank USCIS for its initiatives to improve the EB-5 program and to elicit greater stakeholder participation toward this end. We appreciate the opportunity to comment on Form I-526 and look forward to a continuing dialogue with the Department on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION