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Sent: Monday, December 22, 2014 5:46 PM

To: USCIS FR Comment

Cc: Laura Lynch

Subject: Docket ID USCIS-2007-0046, OMB Control Number: 1615-0061, AILA Comments on Form I-924 and Form I-924A

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) proposed revision of Forms I-924 and I-924A, Application for Regional Center Under the Immigrant Investor Program and Supplement, published in the Federal Register on October 22, 2014.

Please contact me if you have any additional questions.

Best regards,
Laura

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AMERICAN
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ASSOCIATION

December 22, 2014

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

Submitted via: www.regulations.gov

Docket ID No. USCIS-2007-0046

Re: OMB Control Number 1615-0061

USCIS 60-Day Notice and Request for Comments: Application for Regional Center Under the Immigrant Investor Program and Supplement, Form I-924 and I-924A; Revision of a Currently Approved Collection.

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice on the proposed changes to the Application for Regional Center Under the Immigrant Investor Program and Supplement, Form I-924 and I-924A, published in the Federal Register on October 22, 2014.¹

AILA is a voluntary bar association of more than 13,000 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, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this notice and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government. Toward that end, we offer the following comments on the proposed revision.

Comments to Proposed Instructions for Form I-924

Page 1 – What is the Purpose of Form I-924?

¹ 79 Fed. Reg. 204 (Oct. 22, 2014).

The Form I-924 instructions should be revised to state that regional centers do not necessarily need to file Form I-924 for an amendment pursuant to the EB-5 Adjudications Policy Memorandum.² Currently, the proposed Form I-924 instructions provide that the form is only used for two purposes: (1) applications for original regional center designation; and (2) applications for amendment of a regional center designation. However, not all amendments require prior USCIS approval. As indicated in the EB-5 Policy Memo, "...formal amendments to the regional center designation ... are not required when a regional center changes its industries of focus, its geographic boundaries, its business plans, or its economic methodologies."³ Other smaller changes, such as a change of address, should not require the filing of an I-924, but instead should be communicated to USCIS by written notice to the Immigrant Investor Program Office and also provided when filing the annual Form, I-924A.

In addition, this section does not refer to adding North American Industry Classification System (NAICS) industry codes to the regional center's designation. If USCIS seeks to exempt the addition of new NAICS industry codes from the I-924 amendment process, Form I-924 instructions should expressly state that an I-924 amendment is no longer required for a regional center to request new NAICS industry codes in conformity with the EB-5 Policy Memo.

The Form I-924 instructions should also use the standard terminology set out in the EB-5 Policy Memo to describe projects or I-924 applications based on a hypothetical project, an actual project, or an actual project with an I-526 exemplar application.

Page 1 – What is the Purpose of Form I-924?

The proposed wording under section (2)(A) illustrates an expansion of the number of instances in which regional centers are required to file an amended Form I-924. USCIS should avoid expanding the use of Form I-924 for standard occurrences in regional center operations. It is burdensome and expensive for regional centers to pay a filing fee and seek prior approval for any change in its administration or organizational structure. Moreover, such a requirement is impractical. For example, some organizational changes (such as the death of a regional center manager) are unavoidable and cannot be reported prior to their occurrence. We are also concerned that the expanded use of Form I-924 will generate an unnecessarily large volume of filings that will overwhelm USCIS personnel and lead to unacceptably long processing times and uncertainty for investors that will ripple throughout the EB-5 program.

If USCIS decides to keep the instructions as proposed, we suggest additional revisions. Section (2)(A) states that an approved regional center is required to "immediately" request an amendment to seek approval for changes to its "organizational structure, ownership, or administration." The definition of immediately is vague since the trigger date of the event is not known. We recommend using a more precise time frame such as "within 60 days of the closing

² USCIS Memorandum on EB-5 Adjudications Policy (May 30, 2013), AILA InfoNet at Doc. No. AILA Doc. No. 13053051, available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Appealed%20as%20final%205-30-13\).pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Appealed%20as%20final%205-30-13).pdf). (hereinafter "EB-5 Policy Memo").

³ See EB-5 Policy Memo at p. 23.

of any transaction or completion of any event that would require the filing of an I-924 amendment.”

Additionally, the terms “organizational structure” and “administration” could refer to any change in management. These words are overly broad and should be modified to capture only very significant changes in the regional center’s organizational structure (e.g., merger or other significant reorganization) or principal management team (e.g., appointment of a receiver or trustee in bankruptcy).

The instructions also state that an amended Form I-924 must be filed to seek approval of changes in ownership, contrary to current USCIS practice which simply requires notice of such a change. We recommend that changes in regional center ownership remain subject to post-closing written notice to USCIS. USCIS should state that failure to timely notify the Service of such changes will prejudice the continuity of the regional center’s approval and that USCIS retains the right to investigate any such changes.

Page 1 – What is the Purpose of Form I-924?

The proposed wording under section (2)(A) is confusing. This section refers to adding a new commercial enterprise “and/or” seeking an exemplar approval. The use of “and/or” is not appropriate because readers are led to mistakenly believe that an I-924 amendment may be appropriate to extend regional center sponsorship to a new commercial enterprise. These same instructions could also be interpreted as stating that the filing of an I-924 exemplar prohibits petitioners from filing I-526 immigrant petitions under that project. This does not conform to current USCIS practice which permits I-526 visa petitions to be filed subsequent to the filing of a Form I-924 exemplar application for the same capital investment project.

We recommend that the instructions be amended to read: “Seek a determination of EB-5 compliance for an exemplar **Form I-526, Immigrant Petition by Entrepreneur**, for a new commercial enterprise which shall apply to individual entrepreneurs who subsequently file their I-526 visa petitions based on investments in the same new commercial enterprise.”

Page 1 – General Instructions – How to Fill Out Form I-924

The instructions require that the form be completed in black ink only. Form I-924 and the instructions should be amended to permit applicants to complete and sign the form in either blue or black ink. Requiring black ink alone is unnecessarily restrictive. This change should be implemented for all USCIS forms.

Page 2, Part 3 – Application Type

USCIS should provide more detailed instructions on the criteria and circumstances for selecting the check-boxes, in conformity with the information set out in the EB-5 Policy Memo.

Page 4, Part 4 – Principals of the Regional Center Entity – Non-Owners, Item Number 31. – 32.b, Geographic Area of Regional Center.

These instructions add new requirements to determining the territorial scope of a regional center which are not supported by the statute or regulations at 8 CFR §204.6(m)(3). The instructions (and proposed Form I-924) refer to a “limited, contiguous geographic area...” and seem to require that the boundaries be “reasonable based on the evidence that the proposed area is contributing significantly to the supply chain and labor pool of the proposed new commercial enterprise.”

The addition of these requirements will generate an exponential new set of issues as applicants are forced to establish a relationship between the geographic service area of the regional center and ambiguous social facts such as “supply chain” and “labor pool,” all of which must be related by a vague standard of “contributing significantly” thereto. We strongly urge USCIS to delete item 32.b and any reference to novel standards on an issue that is clear and well accepted throughout the EB-5 program, and which presents no systemic problems in EB-5 adjudications.

Page 4, Part 4 – Principals of the Regional Center Entity – Non-Owners, Item Number 34 – Administration, Oversight and Management Functions.

Item 34 essentially repeats item 37. Thus, we recommend deleting 34 and merging its content into item 37. Additionally, there is a typo in item 34, line 2 (“...a plan that [sic] 37 that ...”) and we recommend consistently referring to the “plan” as the “operations plan” for the sake of clarity.

Page 4, Part 4 – Principals of the Regional Center Entity – Non-Owners, Item Numbers 35.a. – 37. Documentary Evidence, Promotional Activities, and Plan of Operation.

Items 35, 36 and 37 make no reference to the statutory standard. Pursuant to P.L. 102-395, as amended in 2002 by P.L. 107-273, an initial regional center request for designation may be approved on the basis of a general proposal with general predictions. The level of detail that USCIS requires in operational plans and descriptions of management or vetting investors goes far beyond both P.L. 102-395 and the preponderance of the evidence standard. We strongly recommend that a transparent statement of the controlling legal standards be stated in the instructions to Form I-924. The instructions should also be amended to discuss the different nature and the degree of specificity of the supporting evidence for a hypothetical versus an actual project.⁴

Page 5, Part 5 – Information About the Industries that Will Be the Focus of EB-5 Capital Investments Sponsored Through the Regional Center, Item Numbers 1. – 2.c – Included Industries and Economic Analyses and/or Business Plan.

⁴ See EB-5 Policy Memo; and Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicator’s Field Manual (AFM) Update to Chapters 22.4 and 25.2 (11 Dec 2009), published on AILA InfoNet at Doc. No. 09121561, available at <http://www.aila.org/content/default.aspx?docid=30795>. (hereinafter “December 2009 Memo”).

The instructions pertaining to NAICS codes should state that NAICS codes requested in Form I-924 will commence with at least two (2) to four (4) digits that are not zero (0). Additionally, construction activity, as a necessary component of any project and if identified as an economic sector in the input/output report, should be deemed included in the I-924. Standard NAICS codes for residential and commercial construction could be included as check-boxes.

The approval of NAICS codes for a regional center should be made more flexible to avoid unnecessary uncertainty in future I-526 visa petitions. At present, NAICS codes are frequently requested by the new commercial enterprise directly in the I-526 visa petitions pursuant to the EB-5 Policy Memo.

Page 5, Part 6 – Organization Structure, Ownership, and Control of any New Commercial Enterprises in Which Investors Have Made or Will Make Their Capital Investments

This section proposes that a regional center may file a Form I-924 in the event that it wishes to “add a new commercial enterprise associated with the regional center or if the regional center requests to amend a previously added new commercial enterprise.” The instructions and form should expressly state whether this section relates only to the filing of an I-924 exemplar application. They should also note that it is not necessary to file a Form I-924 to extend regional center sponsorship to a new commercial enterprise according to the EB-5 Policy Memo.

These instructions do not use the standard terminology to describe projects or I-924 applications as being based on an actual or hypothetical project or an actual project seeking I-526 exemplar treatment. Thus, they are confusing because applicants cannot discern when they should be followed, and what standard of analysis is applicable to each type of project.

Page 5, Part 6 – Organization Structure, Ownership, and Control of any New Commercial Enterprises in Which Investors Have Made or Will Make Their Capital Investments, Item Number 14 – Fees, Profits, Surcharges, and/or Other Remittances.

The instructions (and Form I-924, at Part 6, Item 13 and Item 14), state that the regional center must provide a business plan that identifies “any and all fees, profits, surcharges or other remittances that will be paid to the regional center or any of its principals, managing companies or agents through the new commercial enterprise.” This statement requests new information without providing an explanation as to why such information is relevant to the business plan of the new commercial enterprise. Specifically, the fact that a regional center may earn fees charged by the new commercial enterprise for raising capital is only relevant to an I-924 application if those fees are paid from the capital contribution of investors, which is not permitted.

Moreover, the fact that the new commercial enterprise may generate a profit (after deducting all expenses from all income), and part of that profit may be paid to the regional center principals, is not germane to the approval of Form I-924 unless such income somehow erodes the capital contribution of the investors. Finally, the fact that the new commercial enterprise has operating expenses which are fees for finders and other service providers – from accountants, to attorneys,

to marketing firms – should be of no surprise to USCIS since these items are required in the Operational Plan’s marketing budget. Thus, it is unnecessary to create a separate part of the form that seeks to determine which entities are charging money for services rendered to the new commercial enterprise. We recommend deleting Item 13 and Item 14.

USCIS should ask a regional center to provide it with information on the system the regional center will adopt for disclosing fees to investors. Similarly, USCIS should ask the regional center to expressly state that all minimum capital contributions of EB-5 investors will not be used to pay fees to the regional center.

If USCIS decides not to delete Item 13 and 14, it should at least delete the term “agents” from this list. The concept of an “agent” of a regional center is expansive, and could include everyone from lawyers, to accountants, finders and marketing personnel.

Page 9 – Processing Information, Requests for Interview.

Reference to a request for interview and fingerprinting appears incongruous to the I-924 context. It would be much more helpful to refer to the potential for an appearance before the Review Board.

Comments to Proposed Form I-924

Page 1, Part 1 – Information About the Regional Center, General.

The “Application Type” listed in Part 3 should be stated as the first item on the form to avoid confusion to applicants who are filing Form I-924 for the first time. The application is much easier to understand if the type of application is stated first.

Page 1, Part 1 – Information About the Regional Center, 3.c. – Receipt Number of the Approved Form I-924, Application for Regional Center Under the Immigrant Investor Program.

The form should clarify whether this is the original receipt number for the regional center or a subsequent amendment to the regional center’s designation based on an approved Form I-924.

Pages 1-2, Part 2 – Information About Managing Company or Agency

The use of the word “agency” is overly broad. Read literally, it can mean any person or entity having any authority to represent the regional center for any purpose. The word “agency” should be replaced with a clear concept that addresses the core question of which persons and entities have formal management rights over the regional center and its business operations.

Page 2, Part 3 – Application Type

We recommend placing this section in Part 1 (see comments above).

Additionally, the concept of “adding a new commercial enterprise associated with the regional center” is unclear and raises significant substantive and procedural uncertainty. Substantively, does this require regional centers to file Form I-924 to add a new commercial enterprise to its regional center designation, or is this solely required for exemplar approval? Procedurally, does this require regional centers to file Form I-924 to obtain approval of the addition of a new commercial enterprise prior to filing subsequent I-526 visa petitions in relation to said new commercial enterprise? We strongly recommend that USCIS only require filing of Form I-924 for the approval of an exemplar application.

The idea of using a Form I-924 to notify the USCIS of changes raises the following questions: (a) whether such notice requires USCIS approval; and (b) whether the filing of Form I-924 to notify USCIS of changes in the regional center requires the payment of the required filing fee. We recommend reducing the need for pre-approval filings because it bogs down the business operations of regional centers and increases uncertainty in both existing projects and USCIS visa petitions filed under them, and in the development of new projects. We also strongly urge USCIS to not require payment of I-924 filing fees for regional center changes that merely require notice to USCIS.

Page 6, Part 6 – Organizational Structure, Ownership, and Control of any New Commercial Enterprises in Which Investors Have Made or Will Make Their Capital Investments, Items 2 – 9, Information About Owner of the New Commercial Enterprise.

This section creates significant uncertainty because the ownership and identity of the owners of the new commercial enterprise may be determined only after the completion of the capital raised and subscription of the corresponding ownership units of the new commercial enterprise by EB-5 investors. Thus, the question of ownership of the new commercial enterprise on Form I-924 should – at most – request the “current ownership” of the new commercial enterprise. Moreover, as a practical consideration, limited partnerships and limited liability companies may be formed by a general partner or manager without any owners. The owners are determined in the future upon the subscription of limited partnership interests or membership units. It appears that this question is really intended to address the issue raised in item 13, page 7 of the form.

Page 7, Part 7 – Authorized Individual’s Statement, Contact Information, Certification, and Signature.

USCIS must simplify this section, which is long and confusing to execute.

Comments to Proposed Form I-924A Supplement:

Page 1, Part 3 – Reporting Period for Regional Center Activity.

This should state that it is for the “federal” fiscal year since regional centers may have a different tax year for their accounting.

Page 2, Part 4 – Information About the Organizational Structure, Ownership, and Control of Regional Center Entity.

This section only makes sense if changes in ownership do not require the prior approval of an I-924 amendment. We urge USCIS to not require prior approval of changes in ownership through the filing of an I-924 amendment. If an ownership change requires the filing of an I-924 amendment and prior approval, then section is redundant and should be deleted.

USCIS should add a check box to this section to allow the applicant to state that there has been no change in the ownership or control of the regional center entity since the last reporting period.

Page 3, Part 5 – Information about the Regional Center’s Operations, *Aggregate Capital Investment and Job Creation*

This section should be optimized for data collection to enable accurate job creation figures to be gleaned from I-924A filings. Additionally, USCIS should add the words “from all sponsored projects” at boxes 1.a, 1.b, and 1.c.

Page 4, Part 5 – Information about the Regional Center’s Operations, *North American Industry Classification System (NAICS)*

This section should be stated in a schedule in table format. It does not lend itself to the type of organization in the draft form because of the volume of industries and other data figures that are required for reporting.

After filing Form I-924A, USCIS should deliver a receipt to the regional center listing all confirmed industries and territories of the regional center in order to keep a current record of the regional center’s approved territory and industries of focus that investors can examine.

Page 4, Part 6- Information About New Commercial Enterprise, *NAICS*

Information about the Job Creating Entity may be limited because it will likely be a third party to the new commercial enterprise. Thus, it is not practical or reasonable to request information at Item 6.b. This item should be deleted. For the same reason, the information requested in Items 6.c and 6.d may be speculative, and USCIS should consider deleting these items.

Page 5, Part 7 – Petitions Filed by EB-5 Investors

USCIS should add a box for the number of I-526 and I-829 visa petitions pending before USCIS.

Page 6, Part 8 – Statement, Contact Information, Certification, and Signature of the Authorized Individual:

USCIS must simplify this section, which is long and confusing to execute.

Conclusion

AILA appreciates the opportunity comment on this notice, and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION