



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

September 9, 2016

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

Submitted via www.regulations.gov, Docket ID No. USCIS-2007-0021

**Re: 60-Day Notice: Form I-526, Immigrant Petition by Alien Entrepreneur
(OMB Control No. 1615-0026)**

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 Activities: Form I-526, Immigrant Petition by Alien Entrepreneur, published in the Federal Register on July 11, 2016.

Founded in 1946, AILA is a voluntary bar association of more than 14,000 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, 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 changes to Form I-526 and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views on this matter.

First, we applaud this and other efforts USCIS has initiated to improve the EB-5 immigrant investor program. Collectively, these efforts will lead to greater confidence in the EB-5 program on the part of stakeholders, the public, and the international community of investors. We also welcome USCIS's commitment to engaging with the public as it formulates policy in the EB-5 arena. We hope that our participation in this larger dialogue will assist USCIS as it continues to build a transparent and stable immigrant investor program.

Revisions to the Form I-526, Immigrant Petition by Alien Entrepreneur, would assist both USCIS and program participants by eliminating confusion in certain sections, tracking the regulations more precisely in other sections, and incorporating recent policy and procedural changes. We propose the following modifications to the draft form dated July 1, 2016:

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1. **Font Size should be Adjustable.** From previous experience, all required information cannot fit in the designated boxes on the current Form I-526. In order to be able to fill in essential information, the fillable form should allow the font size to be adjustable.
2. **Provide Physical Address Information for the Last Two Years Instead of the Last Five Years.** The draft Form I-526 requires the investor's physical address for the past five years (Part I: Information about You, Page 2). However, as a result of their business activities, many investors live in multiple cities simultaneously and have multiple addresses. To avoid confusion, we suggest requesting the investor's current registered household address instead of all addresses from the last five years.
3. **Date Requirements.** Many individuals are unable to recall specific dates accurate to the day ("dd") regarding residence, employment, and education history. Permitting the investor to provide only the month and year would be sufficient and would avoid the need to repeatedly explain that the date is an estimate or approximation. We suggest "mm/yyyy" instead of "mm/dd/yyyy."
4. **Part 1, Q.20: Replace "Sex" under Part I by "Gender."** Kindly consider this modification to be inclusive of all genders.
5. **Part 1, Q.25: Country of Last Foreign Residence.** "Foreign" may be ambiguous to foreign national petitioners. We suggest rephrasing this to read: "Country of Last Residence outside the United States."
6. **Part 1, Q.26: Date of Arrival.** Considering that many petitioners have visited the United States multiple times, we suggest that "date of arrival" be replaced with "date of last arrival" so the instruction is clear.
7. **Part 1, Q.27a, 27b: Place of Arrival or Port-of-Entry – City or Town and State.** Please add an option for people whose are admitted at a CBP Preclearance Office outside the United States.
8. **Part 1, Q.28g, 28h: Current Nonimmigrant Status (if applicable).** The term "nonimmigrant status" does not encompass those who are lawfully present in the United States in other classes (e.g., TPS, parole, etc.).
9. **Part 2, Q.4: "What is the receipt Number for the approved Regional Center application upon which your petition is based?"** Not every petition will be based on an I-924 application with an actual or exemplar project approval. Moreover, the meaning of the question as worded is unclear. Is an I-526 petition "based on" an approved Regional Center application when the only approved Regional Center application is the original designation based on an unrelated, hypothetical project? Or is it only important to have the receipt number of an I-924 application in which USCIS reviewed documents associated with the same investment project? This question should be rephrased to read: "If your petition is associated with an approved or pending Regional Center application, provide the receipt number of that application."

10. **Part 2, Q.5: “If applicable, provide the New Commercial Enterprise (NCE) Identification Number.”** It is unclear what the NCE Identification Number is. Will only NCEs associated with Regional Centers be assigned such numbers, excluding (for example) pooled investments not associated with Regional Centers? If all pooled NCEs will be assigned NCE numbers, this question would be better placed in Part 3 (“Information About the NCE”).

11. **Part 2, Q.6: Targeted Employment Area (TEA).** This portion of the draft form uses the phrase “principally doing business.” This phrase is vague and prone to confusion, especially for job creating entities (JCE) that operate in various locations. We note that the instructions to Form I-526 provide some guidance (“is principally doing business in the location where it regularly, systematically, and continuously provides goods or services that support job creation. Provide the address where the NCE or JCE (as applicable) is principally doing business and creating jobs”). However, to make it clear, we suggest changing this language to focus on “principal place of business.”

Q.6.b,c,f,g: “Is the area a rural area” and “Is the area a high unemployment area.” It seems unnecessary to require a clear Yes/No determination for both options – one should be permitted to petition by selecting a basis and not by asserting or eliminating all possible bases. Thus, we suggest removing this question.

Q.6d,h: “Address where the NCE (or JCE) is principally doing business.” The form should be amended to accommodate multiple addresses.

12. **Part 2, Q.6e: “Is the job-creating entity (JCE) principally doing business in a targeted employment area.”** The form does not ask whether there is a JCE distinct from the NCE, so it is unclear how one would answer this question if there is no separate JCE. Thus, this question should be rephrased to read: “If the JCE and NCE are different entities, is the principal place of business of the job-creating entity (JCE) principally doing business in a targeted employment area?”

13. **Part 2, Q.7: Upward Adjustment Area.** “Upward Adjustment Area” introduces a new concept to EB-5 that is undefined. An explanation of the capital investment amount and the definition of what constitutes an “Upward Adjustment Area” must be provided and should be disclosed to the public for comment before implementation through rules, forms, or otherwise. Until then, this question should be removed or replaced with “Other.”

14. **Part 2, Q.9-20: “Composition of Your Investment and Your Income.”** The questions about composition of investment, income, and net worth appear in the current version of Form I-526 under the heading “Additional Information about the Enterprise.” In the context of “information about the enterprise,” questions about income and net worth appear to relate to establishing eligibility as a “troubled business” under 8 CFR §204.6(e). The questions now relate to the income and net worth of the *investor*, without any discernable connection to the eligibility criteria under the EB-5 regulations. Thus the heading for Q.9-14 should be revised to read “**Composition of Your Investment in the New Commercial Enterprise,**” and a

new heading should precede Q.15-20 that reads “**Income and Net Worth of the New Commercial Enterprise.**”

Composition of Investment

15. Part 2, Q.9 “Total Amount Deposited or Committed To Deposit into U.S. Business Accounts for NCE.” Does “committed to deposit” include promissory notes, or does it only include escrow funds? Unless clarified, there will be considerable variety in how this question is answered.

It is also unclear whether this figure includes “administrative fees.” If the intent is to include only the amount that would be “for” the NCE as a capital contribution, that needs to be clarified. If it includes administrative fees, it is not clear they are “for the NCE.” If it does not include administrative fees, this would be inconsistent with USCIS policy which deems administrative fees part of the “investment” for purposes of documenting the lawful source. It is also unclear whether a contribution of cash in return for stock or an ownership interest in the company should be entered twice (under “Cash” or “Total Amount Deposited,” and also “Total Stock or Other Equity Purchases”). Some interpret “total stock or equity purchases” as referring to contributions of stock or equity holdings as capital. Others would complete this box to indicate a cash-for-equity investment.

Thus this question should be rephrased to read: “Total Capital (Excluding Administrative Fee) Invested in NCE (Deposited or in Escrow).”

16. Part 2, Q.10: “Total Value of Assets You Purchased for Use in NCE.” Because this question can be read to relate to full capitalization of the NCE, we suggest adding “you” to the question.

17. Part 2, Q.11: “Total Value of All Property Transferred from Abroad.” It is unclear why property would have to be transferred “from abroad” to be included in the investment. It would appear that property that is not newly purchased but is transferred to the NCE as a capital contribution would be included here. If property from abroad needs to be a separate line item, it should be clear where one would be expected to enter the value of other “transferred property.” In sum, given that there is no legal distinction between property to be transferred from abroad or in the U.S., we suggest deleting “from abroad.”

18. Part 2, Q.12: “Total of All Debt Financing.” Debt financing should not be included as a component of “Your Investment,” as this is inconsistent with the definition of “investment” under the EB-5 regulations. Please delete Q.12.

Your Income

19. Part 2, Q.15,16: “Your Gross (or Net) Income at Time of Investment.” Given that there are no income requirements for EB-5 investors, these questions are inappropriate. In addition, it is unclear whether the “Gross (or Net) Income” refers to annual income or some other period of time. “At time of investment” is also unclear as many investments are made

through multiple transactions, sometimes over a period of years. If USCIS seeks the investor's gross and net annual income for each year since the initial investment, it should clearly state so, as it does in Form I-829. Thus, these two questions should be removed. Alternatively, if these questions relate to the gross and net income *of the NCE* (as in the current Form I-526), the word "Your" should be deleted from heading of "Your Income," as well as in questions 15 and 16.

- 20. Part 2, Q.17,18: "Your Current Gross (or Net) Income."** Given that there are no income requirements for EB-5 investors, these questions are inappropriate. In addition, it is unclear whether this refers to estimated annual, year-to-date, or most recent tax year. Thus, we suggest removing these two questions.

Your Net Worth

- 21. Part 2, Q.19: "Your Net Worth at Time of Investment."** Given that there are no net worth requirements for EB-5 investors, these questions are inappropriate. This question seems to make more sense in connection with the net worth of the NCE for a "troubled business." "At time of investment" is also unclear, as many investments are made through multiple transactions, sometimes over a period of years.

In addition, preparing a current net worth statement is unnecessarily burdensome on investors, especially when they are already required under the regulations to provide extensive financial documentation. Requiring investors to go back in time to determine historical valuations and develop one or more snapshots of past net worth is not only burdensome, it serves no legal purpose. This question should be removed.

- 22. Part 2, Q.20: "Your Current Net Worth."** Given that there are no net worth requirements for EB-5 investors, this question is inappropriate. In addition, given market variations, a petitioner's net worth is subject to great fluctuation. This question should be removed.
- 23. Part 2, Q.21: "Your Sources of Investment Capital."** It is unclear whether this question seeks information about all historical sources of investment capital, or just the primary/immediate sources. For example, if a petitioner obtains gifted funds, the donor used loan proceeds to make the gift, and the loan proceeds derived from a mortgage on real property that was purchased with employment income, would the petitioner check all three boxes (income, indebtedness, gift)? We suggest rephrasing the question to read: "Please identify the primary/immediate sources (i.e. gift, savings, inheritance, investment proceeds, sale proceeds) of the capital you have invested or are actively in the process of investing into the NCE (Select all that apply)."

21.b: Indebtedness. It is inaccurate to characterize "loan proceeds" that are the "source" of the petitioner's capital as "indebtedness." This language suggests that the requirements for loan proceeds under the April 2015 indebtedness policy are extended to loans that are one step removed from the petitioner. In addition, a promissory note is not a "source of capital." If there is capital committed to the NCE via a promissory note, that capital will have a source

independent of the note. Thus we suggest replacing everything listed in item 21.b. with NCE as borrower without using assets of NCE as collateral.

21.f: “Describe documentation ...”: The request here is vague, and the 1-inch space provided is insufficient, given the complex task of documenting lawful source of funds. Petitioners will most likely respond with “see enclosed memorandum,” or a general statement such as “bank documents, company financial documents, loan documents, tax returns, personal declaration.” We suggest removing this question, as it is duplicative of the source of funds analysis included in I-526 petition filings and will not yield relevant information.

24. Part 3, Q.6,7: “Nature of Activity” and “Included Industries (NAICS).” These questions are confusing for an NCE that is not the same as the JCE. It is unclear whether USCIS wants information about the job-creating activity supported by the NCE or the actual business of the NCE (which might be “private lending” or “investment”). Thus the headings should be amended to read: “Nature of Job-Creating Activity Supported by NCE” and “Intended Industries (NAICS) of Job-Creating Activity Supported by NCE.”

25. Part 3, Q.8: “Have you invested or are you actively in the process of investing in a troubled business.” This is phrased as a question about “You” or “Your Investment” as opposed to “The NCE.” This question could be rephrased to read: “Is this petition based on the NCE’s qualification as a troubled business.”

26. Part 3, Q.9, 10: Dates of Formation and FEIN. These questions seem out of place and might make more sense immediately following Q.5.

27. Part 3, Q.11-14: Dates and Amounts of Your Investment and Percentage of Your Ownership of NCE. These are questions about “You” and “Your Investment,” and should be moved to the end of Part 2.

28. Part 3, Q.15-17: Multiple Investors: Name, percentage ownership and immigration plans of other investors. Except perhaps in the case of small pooled investments and investor-operated NCEs, it would be unusual at the time of I-526 filing for investors to have detailed information about the identity and status of other investors beyond those non-EB-5 owners disclosed in offering documents. Certainly, the investors would not have personal knowledge of any of the underlying facts, and it is inappropriate to require investors to attest to these facts under penalty of perjury. It would be preferred to ask investors to attach a statement signed by a duly authorized representative of the NCE providing the requested information.

29. Part 5, Q.2: “What are your duties, activities and responsibilities in the NCE?” There is insufficient space for the response to this question.

30. Part 5, Q.5,6: Number of...Employees in the NCE (at time of initial investment and current). These should read “employees *of* the NCE,” not “in” the NCE.

- 31. Part 5, Q.7: Difference in Number of Full-Time Direct and Qualifying Employees.** This question is incomplete and should be rephrased to read: “Difference in Projected Number of Full-Time Direct and Qualifying Employees between the Time of Your Initial Investment and the End of Your 2-Year Period of Conditional Residence.
- 32. Part 5, Q.8: “Number of Full-Time Direct and Indirect Positions That Will Be Created During the Relevant Time Period.”** It is inaccurate and misleading to refer to indirect jobs as “positions.” “During the Relevant Time Period” lacks meaning and should be omitted or rewritten to specify the period prior to the end of conditional residency. We suggest that this be rephrased to read: “Projected Number of Direct and Indirect Jobs That Will Be Created by the NCE and/or JCE Prior to the End of Your 2-Year Period of Conditional Residence.”
- 33. Part 5, Q.9: “If the new commercial enterprise is associated with a Regional Center, does this petition rely on indirect job creation? If you answered “yes” to Item Number 9, indicate the economic model used to estimate indirect job creation in Part 11, Additional Information.”** “Does this petition rely on” indirect job creation does not seem to account for the possibility that a petition that includes projections of both direct and indirect job creation may not necessarily “rely” on indirect job creation but would potentially benefit from its inclusion. This could be rephrased to ask whether the petition “includes projections of indirect job creation.”

“Indicate the model” is also very vague. It would be better to provide the options of “RIMS II,” “IMPLAN” and “Other (describe)” for the petitioner to choose.

- 34. Part 5, Q.11: “Total Amount of Capital Derived From Investors Who Have Not Sought and Are Not Seeking Classification as Alien Entrepreneurs.”** There are many circumstances where it would be unclear how to answer this question. Does this question contemplate only capital that is already contributed to the JCE or does it include all anticipated/projected capital? Does it include only equity contributions or is it intended to include debt financing? Is it asking only about funding provided by the NCE? We suggest the question be amended to read: “Total Amount of Funding to Be Provided to Job Creating Entity Other Than EB-5 Funds.”
- 35. Part 7, Information on Petitioner’s Spouse and Children.** As clear as this instruction may seem, it is not clear, especially when read in conjunction with the sentence which relates to the choice of visa processing or adjustment of status for each dependent. For clarification and to prevent omissions due to misunderstanding, the instruction should state “List your spouse and all of your children, whether or not they will apply for immigration benefits.”

We appreciate the adoption of a similar section in Form I-526 which permits USCIS to include dependent information in its transmittals to the National Visa Center (NVC) to facilitate dependent visa processing. It is suggested that the option of “follow to join” be added to Part 7, Information on Petitioner’s Spouse and Children, with answer choices, “Yes,” “No,” and “Not Yet Known.”

36. Part 8, Insert “G-1145 Related Party Information.” We suggest adding “G-1145 Related Party Information” under Part 8, to allow the Regional Center to be informed of each investor’s case status.

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 the proposed Form I-526 and look forward to a continuing dialogue with USCIS on these matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION