AMERICAN IMMIGRATION LAWYERS ASSOCIATION

January 4, 2019

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

Submitted via www.regulations.gov
Docket ID USCIS–2006–0009

Re: OMB Control Number 1615–0045
USCIS 60-Day Notice and Request for Comments: Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status
Extension, Without Change, of a Currently Approved Collection

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the 60-day Notice and Request for Comments on Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, published in the Federal Register on November 5, 2018.[1]

Founded in 1946, AILA is a voluntary bar association of more than 15,000 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 Form I-829 and its instructions and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views on this matter.

SUMMARY OF COMMENTS

The Form I-829 that is subject to the above-referenced notice and comment period contains no change from the current Form edition (4/21/17). AILA appreciates that DHS has already incorporated some of our previous recommendations in publishing the more recent version of Form I-829. Many of our proposed changes were not incorporated, however, and we respectfully request

[1] 83 Fed. Reg. 55391 (Nov. 5, 2018).

DHS to reconsider them as discussed below. Moreover, we wish to highlight some significant recent developments underlying Form I-829 preparation, submission, and adjudication, which we believe are appropriate to address in a revised Form I-829. We discuss these points at length in this comment:

- **USCIS appears to be requiring that funds be redeployed without sufficient regulatory or policy guidance**. Indeed, even the fundamental question of whether redeployment is required or optional is not answered in the current USCIS Policy Manual. While AILA appreciates that USCIS published guidance on June 14, 2017 and updated its USCIS Policy Manual, recent stakeholder calls have illustrated that significantly more detailed guidance is needed. Moreover, it is clear that as stakeholders are redeploying repaid funds now applying their best understanding of existing guidance, that any modified guidance in the future must not have a retroactive effect. We urge USCIS to codify clearer redeployment guidelines. Providing further clarity through Form I-829 and Form I-829 instructions is one way to achieve greater clarity. Sample language for your consideration is provided below.

- **Form I-829 Processing Continues to be Prohibitively Long**. As per the controlling statutory and regulatory provisions, the Form I-829 must be adjudicated expeditiously. However, recent published processing times estimate adjudication could take up to three years, far beyond Congressional mandate. AILA applauds USCIS's recent amendments to the Form I-829 receipt notice providing evidence of status for 18 months. Ideally, Form I-829 adjudication should take no longer than the validity period of the Form I-829 receipt as proof of residency.

- **Form I-829 Continues to Include Technical Incongruities Relating to 8 CFR §204.6 and §216.6**. Below we have highlighted language that is either ambiguous or inconsistent with the controlling regulations. We respectfully urge USCIS to review our suggestions to resolve these inconsistencies.

- **USCIS Continues to Underestimate the Burden of Preparing and Filing Form I-829**. DHS estimates that the Form requires only four hours of time to prepare and submit. However, as discussed below, the Form I-829 submission is typically the product of months of preparation reviewing data spanning years. DHS should therefore reconsider its estimation of this burden.

- **USCIS Should Consider Innovations to Form I-829 to Promote Efficiency and Consistency**. One such innovation of clear benefit to DHS and stakeholders would be the creation of an exemplar Form I-829 process, similar to the exemplar Form I-526 process. Specifically, an exemplar Form I-829 approval would allow USCIS examiners to accord deference to related Form I-829 petitions for the same project. Given that the Form I-829 typically reflects historical data, according deference to related petitions is manifestly sensible and should reduce the time burden on both DHS's adjudication of cases, as well as petitioners' preparation of the filing. In this vein, we urge DHS to also consider allowing electronic Form

I-829 filing with attestation confirming that project documents are unchanged from those uploaded to the project document library, or "deal documents" library as has been referenced in the past by USCIS. We believe that such innovations would enhance the quality and speed of Form I-829 adjudications.

AILA COMMENTS ON INSTRUCTIONS TO FORM I-829

Page 1 – What Is the Purpose of Form I-829?

The Instructions state: "The petitioner must submit this petition within the 90-day period immediately preceding the second anniversary of obtaining conditional permanent resident status."

Page 1 – What Happens When I File or Fail to File Form I-829? Effect of Not Filing

The Instructions state: "If you fail to file this petition within the 90-day period immediately preceding the second anniversary of obtaining your conditional permanent resident status, USCIS will terminate your conditional permanent resident status and you will become removable from the United States."

AILA Comments:

- Importantly, the instructions misstate current USCIS policy and should be corrected. USCIS has recently clarified USCIS's obligation to extend an EB-5 investor's evidence of conditional residency status until a final order of removal is entered against the investor by an immigration judge and/or the Board of Immigration Appeals.[2] The petitioner is therefore entitled to a receipt demonstrating conditional resident status until there is a final order of removal, and may use that receipt "as evidence of status for travel, employment, or other purposes."[3] Accordingly, the statement in the form instructions indicating that "USCIS will terminate your conditional permanent residency status and you will become removable from the United States" is erroneous as it is a contravention of USCIS policy, and should be corrected to be consistent with the USCIS Policy Manual.

- It is unclear from this language whether the 90-day filing period ends on the day before the second anniversary of obtaining conditional permanent resident status or it includes the day of the second anniversary. To avoid confusion, we suggest that the term "immediately preceding" be replaced with the word "before" in conformity with the language in 8 CFR §216.6(d)(2)(A).

[2] *See* USCIS Policy Manual, Vol. 6, Part G, Chapter 5.
[3] *Id*. *See also* USCIS Policy Alert, PA-2018-02 (May 2, 2018).

The Instructions state: "If your failure to file within that 90-day period was for good cause and due to extenuating circumstances, you may file your petition late with a written explanation and request that USCIS, in its discretion, excuse your late filing."

AILA Comments:

- The form instructions do not clarify when USCIS loses jurisdiction over a missed Form I-829 filing deadline. 8 CFR §216.6(a)(5) provides in pertinent part:

> The director may deem the petition to have been filed prior to the second anniversary of the alien's obtaining conditional permanent resident status and accept and consider a late petition if the alien demonstrates to the director's satisfaction that failure to file a timely petition was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge in deportation proceedings and the director excuses the late filing and approves the petition, he or she shall restore the alien's permanent resident status, remove the conditional basis of such status, and cancel any outstanding order to show cause in accordance with § 242.7 of this chapter. If the petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the Service.

Based on the regulatory text, it would appear that there exists joint jurisdiction with the Executive Office for Immigration Review (EOIR) after a Notice to Appear is issued. The instructions should clarify that USCIS may still consider a late filing even when jurisdiction has vested with an immigration judge.

Page 1 – What Happens When I File or Fail To File Form I-829: Effect of Filing

The Instructions state: "If U.S. Citizenship and Immigration Services (USCIS) accepts your petition before your conditional permanent resident status is terminated, your conditional permanent resident status will *automatically be extended for one year*." (Emphasis added)

AILA Comments:

- First, this text should clarify that the automatic extension of status is valid until a final decision is made on the petition. The regulatory provision at 8 CFR §216.6(d)(2)(A) provides in pertinent part that "Upon receipt of a properly filed Form I-829, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition." **The instructions conflict with the regulatory text by imposing a definite temporal limit**.

- Secondly, it is important to note that in light of recent USCIS' procedural changes, the Form I-829 receipt notice serves as documentary evidence of status for an initial period of 18 months from the date of expiration on the conditional permanent resident card.[4] If a decision is not made within that time, the petitioner may go to a local USCIS office to obtain a Form I-551 stamp evidencing continued lawful status. The form instructions should be revised to more closely track USCIS' procedures following receipt.

Page 1 – Who May File Form I-829?

The Instructions state: "You may include your conditional permanent resident spouse or former spouse and children in your petition. If your spouse and children are not included on this Form I-829 petition, each dependent must file his or her own petition separately. Your spouse and children cannot be included together on a Form I-829 petition if they are not filing with you, the principal entrepreneur, unless the principal entrepreneur has died."

AILA Comments:

- In the first sentence it is unclear whether the modifier "conditional permanent resident" applies to the spouse, the former spouse, and the children. It would be clearer to say "You may include your spouse or former spouse and children in your petition if they have been admitted as conditional permanent residents."

- Investors and their counsel are often confused as to whether the above statement is true even when one of the dependents has "followed to join" the principal and may have only been a conditional resident for a very short time. AILA strongly suggests clarifying this point by amending the first quoted sentence to read: "You may include your spouse or former spouse and children in your petition if they have been admitted as conditional permanent residents, even if their conditional residence period is different from yours."

- In the third quoted sentence, the language "included together" is confusing. It seems the primary point is communicated by the second quoted sentence. We suggest deleting the third sentence and revising the second sentence to read: "If your spouse and/or children are not included in the principal entrepreneur's petition, a separate Form I-829 must be filed by each dependent."

- We note, however, that there is no basis in the statute or regulations for requiring spouses, former spouses, or children to file separate I-829 petitions. In that vein, there are many

[4] *See Update to Form I-797 Receipt Notices for Form I-751 and Form I-829*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/news/alerts/update-form-i-797-receipt-notices-form-i-751-and-form-i-829 (last updated June 12, 2018).

situations in which it would be more appropriate for a former spouse and children to file together rather than separately or with the entrepreneur. For example, if the entrepreneur and spouse divorce but the former spouse retains custody of the minor child. In that instance, particularly if the divorce was not amicable, the former spouse may want to file separately from the entrepreneur but together with the minor child to (1) avoid contact with the entrepreneur but (2) ensure that the minor child will attend the same biometrics appointment as the former spouse.

The Instructions state: "**NOTE**: If you are filing a separate petition from the entrepreneur, you should attach a copy of the entrepreneur's Form I-797, Notice of Action, relating to his or her I-829 petition."

AILA Comments:

- This information should be mentioned in the evidence checklist that is featured on page 10 of the instructions ("What Evidence Must You Submit").

- There are at least two common circumstances where this might not be possible: (1) a former spouse may not have access to the principal's immigration documents or even have access to information about whether the principal has filed an I-829; and (2) I-829 filing receipts take time to issue and may not be readily available during the narrow window for timely filing a dependent's I-829 petition.

Page 2 – General Instructions

The Instructions state: "After USCIS receives your petition and ensures it is complete, we will inform you in writing if you need to attend a biometric services appointment. If an appointment is necessary, the notice will provide you the location of your local or designated USCIS Application Support Center (ASC), and the date and time of your appointment or, if you are currently overseas, instruct you to contact a U.S. Embassy, U.S. Consulate, or USCIS office outside the United States to set up an appointment."

AILA Comments:

- Per the regulations, a petitioner or his/her dependents are not required to be in the United States at the time of filing Form I-829.[5] As written, the instructions would mandate that a person abroad provide their biometrics outside of the U.S. when they may either provide biometrics outside of the U.S. or at an ASC within the U.S.

[5] *See* 8 CFR §216.6(a)(3).

Page 3 – Specific Instructions, Part 1, Basis for Petition

Item Number 1. Investment Type. Indicate whether the entrepreneur's investment is associated with a regional center that was *designated at the time the entrepreneur became a conditional permanent resident*. (Emphasis added).

AILA Comments:

- An EB-5 investment is not associated with a regional center. Under EB-5 law and regulations, it is only the new commercial enterprise that is affiliated or associated with a regional center. This instruction would be more accurate if it stated "Indicate whether the entrepreneur's investment is in a new commercial enterprise associated with a regional center …."

- The relevance of the italicized language is unclear. There is no basis in the law or regulations for distinguishing among regional center-affiliated investments based on whether the regional center designation date was before or after an investor's acquisition of conditional permanent residence.

- Similarly, there is no basis in law to approve or deny an immigration benefit based on whether a regional center has lost certification prior to acquisition of conditional permanent resident status. Accordingly, AILA recommends that this lanague be struck from the form instructions.

Item Numbers 3.a. and 3.b. Name and Identification Number of the New Commercial Enterprise (NCE). Provide the full legal name of the NCE in which the entrepreneur invested. (NOTE: This is a required field. Do not leave it blank.) Indicate the NCE Identification Number.

AILA Comments:

- The form should indicate what the NCE identification number looks like and where it can be found, especially if it is required. The introduction of NCE identification numbers is inappropriate to integrate into EB-5 practice through Form instructions and should be subject to full notice and comment rulemaking.

Page 4 – Specific Instructions, Part 2, Information About You

Item Number 11. Additional Form I-526 or I-829 Receipt Numbers. Provide the receipt numbers for any additional Form I-526, Immigrant Petition by Alien Entrepreneur, or Form I-829, Petition by Entrepreneur to Remove Conditions to Permanent Resident Status, filed by

the Entrepreneur.

AILA Comments:

- USCIS should provide further clarification regarding the information that is being requested. Does USCIS want case numbers for any and all I-526 or I-829 petitions ever filed by the entrepreneur? Or, only data on prior petitions related to the same investment or NCE? The instructions should be revised to provide additional clarity on this issue.

Item Numbers 16.a. – 16.h. Physical Address."Provide your physical addresses for the last five years. Provide your present address first. If you need extra space to complete this section, use the space provided in Part 12. Additional Information."

AILA Comments:

- The Form I-829 is for petitioners who are granted 2 years of conditional lawful permanent resident status. It furthers no purpose and is unreasonably burdensome to provide past residences beyond the date petitioners are granted conditional residency status, particularly as this information is already on record in connection with the immigrant visa or adjustment of status application. It would be more relevant to ask for physical addresses since the date the petitioner has become a conditional permanent resident. This section should also include a space for disclosing where the petitioner would like to obtain biometrics collection (i.e., a specific city in the U.S. or U.S. consulate abroad).

Item Numbers 17.- 18. Criminal History. Indicate whether you have ever been arrested, cited, charged, indicted, convicted, fined, or imprisoned for violating any law or ordinance.

AILA Comments:

- The instruction conflicts with the form itself, which requests an answer "since becoming a conditional permanent resident ….". The instructions should be modified to mirror the language listed on the Form.

Page 5 – Part 3, Information About Your Current or Former Conditional Permanent Resident Spouse

Item Numbers 8.a – 8.h, Physical Address. Provide your current spouse or former conditional permanent resident spouses' physical address, if it is different from the address that you provided in Part 2., Item Number 14.a-14.f.

AILA Comments:

- This section should include a space for disclosing where the spouse would like to obtain biometrics collection (i.e., a specific city in the U.S. or U.S. consulate abroad). This section should also include a country of birth field for the spouse, as USCIS has at times mistakenly listed the petitioner's country of birth as the spouse's, even when they may be different.

Page 6 – Part 4, Information About Your Children

The introductory sentence to Part 4. states "Provide information about ALL of your children including biological children, stepchildren, and adoptive children, regardless of age."

AILA Comments:

- Petitioners are frequently confused about the distinction between children being identified on the petition and those being included in the petition. For clarity, we suggest that USCIS add language to the end of the above sentence as follows: "Provide information about ALL of your children including biological children, stepchildren, and adoptive children, regardless of age and regardless of whether they are filing with you."

- This section should also include a space for disclosing where the children seeking removal of conditions would like to obtain biometrics collection (i.e. a specific city in the U.S. or U.S. consulate abroad).

- This section should also include a country of birth field as USCIS has at times mistakenly listed the petitioner's country or the spouse' country as the children's, even when they may be different.

Page 7 – Part 6, Additional Information About the Regional Center and the New Commercial Enterprise (NCE)

Item Numbers 1. – 2. Additional Information About the Regional Center (if applicable). Provide the receipt number for the approved Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program, either for the initial designation of the regional center or a subsequent amendment, upon which the Form I-526, Immigrant Petition by Alien Entrepreneur, was based. In addition, indicate whether the regional center associated with the entrepreneur's investment has been terminated.

AILA Comments:

- Now that regional center terminations are occurring with more frequency, and given that it is reasonably probable that NCEs impacted by regional center terminations will seek to protect their investors by affiliating with different regional centers, it seems that this question does not allow for the possibility that the regional center that was affiliated with the NCE at the time of the I-526 filing might be a different regional center from the one that is affiliated at the time of the I-829 petition filing. We suggest modifying the questions and instructions to allow stakeholders to provide information about regional centers that may currently be associated with the new commercial enterprise, even if different from the regional center with which the NCE was initially affiliated. We note that a change in affiliation after petitioners are admitted in LPR status is not deemed a "material change" under current USCIS policy.

Page 8 – Item Numbers 11.a. – 11.c. Subsequent Investments in the NCE.

The list of examples of "types of investments" in this item includes "qualifying indebtedness as described in 8 Code of Federal Regulations (CFR) section 204.6(e)."

AILA Comments:

- "Indebtedness" is not "invested" unless the investment is a secured promissory note. USCIS's interpretation of "indebtedness" in the regulations now appears to include borrowed funds, but as borrowed funds are still "cash" when they are invested, it would still be accurate to answer the question "cash," so it is unclear how investors should answer these questions.[6] A suggested revision is provided below regarding the related question on the Form I-829.

- Further, there is no regulatory requirement to provide a source of funds or disclose additional investments beyond the minimum investment amount as per 8 CFR §204.6 or 216.6, thus this question should be omitted.

Page 8 – Item Number 13. Changes in Assets of the NCE.

[6] *See, e.g., Zhang v. USCIS*, Case No. 15-cv-995 (U.S.D.C., Mem. Op. Nov. 30, 2019).

AILA Comments:

- The form language helpfully references "other *capital* distributions or withdrawals" (emphasis added).

- USCIS not infrequently issues requests for evidence ("RFEs") where IRS Forms K-1 indicate distributions to investors, notwithstanding the fact that the distributions are characterized on the tax returns and the K-1 as distributions of profit rather than distributions of capital. We suggest making this distinction explicit by adding a new sentence in this instruction: "Do not include distributions of profit."

- This question is too broad as currently written. The question requires disclosure as to when an NCE has sold "any of its assets." In the Direct (i.e. non-regional center) context, an NCE usually will hold significant inventory as assets and accordingly be selling its assets on a daily basis. The question should be narrowed to require disclosure of sale of assets "outside the course of normal business."

Page 8 – Item Number 16. Changes to NCE.

AILA Comments:

- The instructions include the following language that also appears in previous versions: "or had any changes in its business organization or ownership since the date of the entrepreneur's initial investment." In the context of pooled investments of EB-5 capital from multiple EB-5 investors, the answer to this question is always going to be yes, because each of the EB-5 investors (including the petitioner) becomes a new owner and changes the ownership of the NCE after the date of the initial investment. It is also true that many or most investors' counsel construe this question as intended to speak to other types of ownership changes not related to the rolling admissions of EB-5 investors as contemplated by the offering, and consequently many investors' counsel recommend responding "no." This form revision presents an opportunity to clear up the confusion inherent in this question by explicitly stating an exception, or including the EB-5 investors' acquisition of ownership as "changes in ownership."

- The instruction also requires disclosure of proceedings against the NCE "or any of its owners, officers, directors, … involving fraud or other unlawful activity." As drafted, this wording is far too broad. Individual petitioners would not necessarily be in a position of knowing whether actions have been brought against other investors (i.e. owners) or officers. Further, the question is not limited to the scope of EB-5. For instance, if another EB-5 investor in the NCE, who is in a sense an "owner" of the NCE, were accused of shoplifting, the answer to all Form I-829 petitioners' filings (made under penalty of

perjury) would necessarily be "yes." This section should be omitted as it involves knowledge that investors in the normal course of immigration would have no realistic method of knowing. Alternatively, an exception similar to the one discussed above to omit petitioners, should be made express.

Page 8 – Part 8. Information About Job Creation

Item Numbers 1.a. – 1.d. Direct Job Creation

The form instructions makes reference throughout to "in the NCE," "the NCE employed," "for the NCE," and "from the NCE."

AILA Comments:

- Under current USCIS policy, direct jobs include employees of the NCE *or the NCE's wholly-owned subsidiary*. This should be clarified by including a parenthetical reference "(or its wholly owned subsidiary)" after each mention of the NCE.

- The second paragraph of this item includes more information about the individuals who may be counted as "qualifying employees." We recommend similar information be provided with respect to the regulatory requirements for establishing "full-time employment."

Page 9 – Item Numbers 2.a. – 2.c. Indirect Job Creation

The instructions include reference to "full-time economically direct jobs." The same section states "it is necessary to indicate the reasonable methodology used to calculate job creation."

AILA Comments:

- Economic modeling does not distinguish between part-time and full-time employment, but instead utilizes the concept of economic impact that is equivalent to a specified level of employment (in terms of the number of man-hours or full-time workers that would be required to accommodate a specified change in demand). USCIS has acknowledged this point in past public stakeholder calls. Further, the term "economically direct" has no meaning in the law or the economic literature, and there is no meaningful distinction to be made between a "full-time economically direct job" and a "part-time economically direct job." We suggest that USCIS avoid creating additional confusion by adding meaningless terminology to the instructions. Rather, language in the statute and regulations should be adopted in the Form I-829 and instructions.

- We submit that when "direct jobs" are derived from a reasonable economic model, the FTE concept is statistically already built into the model. Adding the additional qualifier of "full-time" suggests the additional requirement of statistical evidence that is above and beyond standard economic modeling and may be impossible to provide. We recommend the reference to "full-time" in connection with indirect job creation be omitted.

- We submit that while "economically direct" is not meaningfully descriptive, it would be accurate, plain English usage to describe the economist-projected "direct jobs" as "model-derived direct jobs" or "economic model-derived direct jobs." We recommend replacing the terminology used in the current Form I-829 with the plain English terminology.

Page 9 – Item Number 6. Changes to Business Plan.

The Instructions state: "Indicate whether the entrepreneur made an investment and created jobs in the United States according to the business plan presented with the Form I-526. If you answered "No" to Item Number 6., use the space provided in Part 12. Additional Information to provide an explanation of the changes made to the original business plan submitted with the approved Form I-526."

AILA Comments:

- The language "created jobs … according to the business plan" is vague. Given the lengthy time frames between I-526 filing and I-829 filing resulting from extended USCIS processing times and visa backlogs for China, Vietnam, and potentially other countries, it is inconceivable that any project will proceed to completion without any change. USCIS should, consistent with its Policy Manual, indicate that job creation is expected to proceed "*generally* according to the business plan." (Emphasis added)

- In many cases, there are updates to a business plan that are submitted with an interfiling while the I-526 remains pending. In these cases, the record of adjudication of the I-526 would include the updated business plan, and yet by virtue of having been updated it is necessarily not the same as the "original business plan." We suggest that the word "original" be deleted, as USCIS would have already reviewed an updated business plan during the I-526 adjudication to determine whether it reflected changes that should be deemed material, so as to require the filing of a new I-526 petition.

- Comprehensive instructions on how to answer questions regarding EB-5 capital redeployment should also be included in this section. We respectfully request that USCIS take this opportunity to clarify its redeployment policy as long-awaited by industry stakeholders. We are pleased to provide sample text below:

Redeployment: Further deployment of capital that occurred before the immigrant investor became a conditional permanent resident should be adequately described in the Form I-829 Petition. Adequate description in the Form I-829 Petition will satisfy any requirement to describe further deployment occurring after the filing of the associated Form I-526.

Page 11 – What Evidence Must You Submit?

Question 3. Evidence for Petitioners Filing as a Former Spouse or as a Spouse or Child Whose Entrepreneur Spouse or Parent has Died.

The instructions require submission of, among other things, "Your former spouse's, current spouse's, or parent's Permanent Resident Card (Green Card)."

AILA Comments:

- This implies that the original permanent resident card of the former or deceased principal must be submitted as required initial evidence. In the case of a deceased principal, this may be possible and USCIS would want it returned, but there will be many circumstances where the decedent's Permanent Resident Card (or even a copy thereof) will be unavailable or inaccessible to the decedent's dependents. With respect to a former spouse, production of the decedent former spouse's Permanent Resident Card, or even a copy thereof, may simply be infeasible. In many cases when marriages dissolve, the parties may be antagonistic, and a divorced spouse may not only be unable to get a copy of a card; he or she may not even have access to information about whether the principal entrepreneur has filed or will file an I-829 petition. Additionally, this requirement has the potential to contribute to a dynamic of abuse. We strongly recommend that if USCIS desires the return of the original Permanent Resident Card of a deceased principal, the requirement be qualified by "if available" and limited to current spouses/children of deceased principals. In all cases, we suggest that copies of these documents are unnecessary as the names and file identifiers necessary to identify the deceased or former spouse principal should be readily available to USCIS in the petitioners' A-files.

- As noted earlier in these comments, the instructions at the bottom of page 1 include a note in bold suggesting submission of the principal entrepreneur's I-829 petition if dependents are filing separately. We reiterate that this should be required only "if available," and that if this is required, it should be stated as a requirement in this section. We suggest, since this evidence would not necessarily be applicable to former spouses or spouses/children of deceased principals, it warrants a new or separate category of evidence.

Page 11 – What Is the Filing Fee?

The Instruction state: "A biometrics services fee of $85 is also required for the petitioners, as well as any current spouse, former conditional permanent resident spouse, […]. That means you must submit a separate biometric services fee of $85 for each conditional permanent resident who is applying with you to remove the conditions on their permanent resident status."

AILA Comments:

- The word "petitioners" should be amended to "petitioner".

- In the second sentence above, we suggest adding the words "between 14 and 79 years of age" after "each conditional permanent resident" to make it clear that only conditional permanent residents of certain ages are required to submit a biometric services fee.

- AILA members report the rejection by USCIS of timely filed petitions where there is an overpayment of the biometrics fee. Where there is overpayment, the matter may be easily remedied. A rejection jeopardizing an otherwise timely filing is unwarranted. We respectfully request that where there is overpayment of Form I-829-related fees, that USCIS receipt the case as timely filed and provide the petitioner with reasonable time to submit the correct fee.

- This section should further be revised to discuss how a credit card may be used to pay for Form I-829 filings.[7]

Page 13 – Processing Information

The instructions relating to processing information discuss requests for an interview and the decision, however, there is no estimated time frame given. Under section 216A(c)(3)(A)(ii) of the INA, Congress has mandated that USCIS make a decision on an I-829 petition within 90 days of the filing or the interview, whichever is later. Further, 8 CFR §216.6(b)(1) provides in pertinent part that "The director must either waive the requirement for an interview and adjudicate the petition or arrange for an interview within 90 days of the date on which the petition was properly filed." Current Form I-829 processing times are listed on the USIS website as 27.5 Months to 35.5 Months[8]. These processing times are in serious contravention of the relevant statute and regulations.

Page 14 – Paperwork Reduction Act

[7] *See Filing Location Change for Form I-829*, , U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/unassigned/filing-location-change-form-i-829 (last accessed Nov. 24, 2018).
[8] https://egov.uscis.gov/processing-times/ (last accessed Jan. 2, 2019).

The Instructions state: The public reporting burden, "including the time for reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition," is estimated at 4 hours per response.

AILA Comments:

- USCIS indicates that the average time per response for petitioners to complete Form Form I-829 is four hours. The estimated average time per response of four hours greatly undercounts the preparation time involved for the Form I-829. This process typically involves the extensive and time consuming collection and review of thousands of pages of documents, which involves searching existing data sources, tracing deployment of funds, gathering tax documentation, verifying employment creation, documenting redeployment (where applicable) and reviewing the final collection. We recommend the estimated burden be adjusted to more accurately reflect the significant time involved. We estimate this time to be on average, around 30 hours.

AILA COMMENTS ON FORM I-829

Page 1 – Part 1. Basis for Petition

Question 1: "Is the investment associated with a Regional Center?"

AILA Comments:

- Investments are not associated with regional centers; only new commercial enterprises are associated/affiliated with regional centers. The question would accurately reflect the law if modified to read: "Is the investment in an NCE associated with a Regional Center?" or "Is the New Commercial Enterprise (NCE) associated with a Regional Center?"

Page 2 – Part 2. Information About You (continued)

Question 11: Any Additional Form I-526 or Form I-829 Receipt Numbers for Other Petitions Filed by Entrepreneur

AILA Comments:

- The wording of the question is unclear. It would be better to state "Receipt Numbers for Prior Form I-526 or Form I-829 Petitions Filed by Entrepreneur Based on Investment in Enterprise(s) Other Than the One Provided in This Form"

Question 15: Is your Mailing address the same as your physical address?

The instructions state: If you answered "No" to Item Number 15., you MUST provide your current physical address in the Item Numbers 16.a. – 16.h. If you need extra space to complete this section, use the space provided in Part 12. Additional Information.

AILA Comments:

- Since the form asks for physical addresses for the last five years, it would be better to ask "Is your Mailing address the same as your PRESENT physical address?"

Page 2 - Physical Address: Provide your physical addresses for the last five years. Provide your present address first. If you need extra space to complete this section, use the space provided in Part 12. Additional Information.

AILA Comments:

- The Form I-829 is for petitioners who are granted 2 years of conditional lawful permanent resident ("LPR) status. It furthers no purpose and is unreasonably burdensome to provide past residences beyond the date petitioners are granted conditional residency status, particularly as this information is already on record in connection with the immigrant visa or adjustment of status application. It would be more relevant to ask for physical addresses since the date petitioner has become a conditional permanent resident.
- This section should also include a space for disclosing where the petitioner would like to obtain biometrics collection (i.e. a specific city in the U.S. or at a consulate abroad).

Page 5 – Part 5. Biographic Information.

This section is comprised of Questions 1- 6 requesting personal identifying characteristics (ethnicity, race, height, weight, eye color, hair color) of the Petitioner.

AILA Comments:

- These questions appear to relate exclusively to the Petitioner, yet the heading "Biographic Information" does not specify "About You." Confusion could be eliminated by incorporating the questions into "Part 2. Information About You" or moving the placement of this Part to immediately follow Part 2.

Page 6 – Part 6. Additional Information About the Regional Center and the New Commercial Enterprise (NCE)

Question 1: Receipt Number for the Approved Form I-924, Application For Regional Center Designation Under the Immigrant Investor Program, Upon Which the Related Form I- 526, Immigrant Petition by Alien Entrepreneur Was Based.

AILA Comments:

- Note that not every case involves a regional center. We suggest the heading for Part 6. should insert the words "(if applicable)" following "Regional Center."

- Please see previous comments relating to the Form I-829 Instructions in connection with this question.

- The instructions suggest one can answer this question by providing the I-924 receipt number for the initial regional center designation application or for a subsequent amendment application, however:

    - Many regional centers were designated prior to the introduction of Form I-924.

    - The Regional Center ID number is requested in Part 1, Question 2, so the question may be duplicative, and USCIS should have this information in its records.

    - This question appears to presume that a project-specific Form I-924 will have been both filed and approved prior to the filing of Form I-526, whereas such filings (and approvals) are not required by law or regulation. It is quite common for there to be no Form I-924 relating to the new commercial enterprise into which an entrepreneur has invested, and when there is a related Form I-924, it is decidedly uncommon for it to have been approved prior to the filing of the entrepreneur's I-526 petition, so it would be unusual for an I-526 petition to have been "based on" an approved Form I-924.

    - If USCIS wants petitioners to specify the receipt number of any approved Form I- 924 relating to the NCE, it could request it more directly: "If a Form I-924 relating to the New Commercial Enterprise has been approved, provide the Receipt Number."

Page 6 – Question 2: Was the Regional Center associated with the entrepreneur terminated?

AILA Comments:

- Regional centers are not associated with entrepreneurs; they are associated with NCEs. Please see above comments relating to the Form I-829 Instructions.

- As previously noted, now that regional center terminations are occurring with more frequency, and given that it is reasonably probable that NCEs impacted by regional center terminations will seek to protect their investors by affiliating with different regional centers, it seems that this question does not allow for the possibility that the regional center that was affiliated with the NCE at the time of I-526 filing might be a different regional center from the one that is affiliated at the time of the I-829 petition filing. We suggest modifying the questions and instructions on this point accordingly, consistent with our comment above.

Page 6 – Questions 9 & 10: Date and Amount of Entrepreneur's Initial Investment

AILA Comments:

- "Investment" is defined as the required capital contributed to the new commercial enterprise. It does not include administrative fees or other fees the petitioner may contribute to the new commercial enterprise or other parties. Since USCIS in adjudications at times confuses "capital" with capital plus administrative fees, we suggest a helpful clarification by amending the questions to refer to "Entrepreneur's Initial Capital Investment".

- That said, it is not clear as to how "initial" is defined. Prior to filing Form I-526, investors can structure their transfer of capital to the NCE (or its attendant escrow account) in multiple transactions over several days. Further, INA secction 203(b)(5) and the associated regulations allow investors to be in the process of investing and still obtain conditional permanent residency. We believe this question should be clarified to refer to all investments made prior to the filing of Form I-829.

Page 6 – Question 11.c.: Type of Subsequent Investment (for example, cash, equipment, inventory, other tangible property, cash equivalents, or qualifying indebtedness as described in 8 CFR §204.6(e)).

NOTE: If multiple investments have been made since the entrepreneur's initial investment in the commercial enterprise, use the space provided in Part 12.

AILA Comments:

- Please see above comments relating to the Form I-829 Instructions for this question. We suggest this question could avoid the interpretive problems associated with characterizing investments as cash vs. indebtedness (and also provide more useful data) by providing a "check all that apply" list such as the one below. In addition, a line could be added next to each item allowing submission of the dollar amount claimed for each specific class:

- ❑ Cash
- ❑ Equipment
- ❑ Inventory
- ❑ Other tangible property
- ❑ Cash equivalents
- ❑ Qualifying Loan Proceeds
- ❑ Qualifying Promissory Note
- ❑ Other

- The "NOTE" associated with this question is overbroad, as it would seem to require the entrepreneur to provide detail and source of funds information for investments made by other investors as well as his own, if they occurred after the date of the initial investment. The question should be clarified to read "If the Entrepreneur has made additional investments subsequent to the initial investment …."
- In any event, there is no regulatory authority to require a source of funds analysis on investments made after Form I-526 is approved. There is also no authority that any subsequent investment be made in accordance with 8 CFR §204.6(e). The question is ultra vires.

Page 6 – Question 12: Amount of Capital Investment Sustained in the NCE

AILA Comments:

- The wording of this question is ambiguous and overbroad, as it could be construed to ask for the total amount of capital investment in the NCE by all investors, as opposed to the amount of the entrepreneur's own capital investment sustained in the NCE. There is no basis in applicable law or regulations to require an I-829 petitioner to address any investment other than his or her own. To clarify and narrow the question the words "Entrepreneur" or "Your" should be inserted prior to "Capital Investment"

Page 6 – Questions 12 and 16: Questions about capital distributions and changes in ownership

AILA Comments:

- Please see above comments regarding the Form I-829 Instructions that relate to these questions for important issues requiring clarification.

Page 7 – Part 7. Information About the Job Creating Entity (JCE)

AILA Comments:

- Not every I-829 petition will have a JCE distinct from the NCE. The heading should include the words "(if applicable)," and begin with an instruction: "If there is no JCE associated with the NCE, move to Part 8."

Page 7 – Question 7: Has any of the JCEs filed for bankruptcy, cased business operations, materially changed the nature of the business, or made any changes in its organization or ownership since the date of your initial investment, or have any criminal or civil proceedings been filed against any of the JCEs or any of their owners, officers, directors, general partners, managers or other persons with a similar interest or in a similar position of authority for any of the JCEs involving fraud or other unlawful activity?

AILA Comments:

- There is no basis in law or regulation to require individual investors to make this kind of representation about an entity over which they have no control. There is similarly no requirement in law or regulation for JCE entities utilizing EB-5 financing to make these disclosures or certifications to investors on a rolling basis, covering investor-specific time periods. This question imposes a grossly unreasonable burden on immigrant investors and threatens to hold them responsible for the misdeeds of others. We question whether USCIS has authority under current statute and regulations to request this information. Accordingly, we request the legal basis for requesting this information be provided in the Form I-829 or instructions; otherwise, we request that this question be eliminated.

Page 7 – Part 8. Information About Job Creation

Questions 1.a. – 1.d.: Information about direct job creation at the NCE

AILA Comments:

- Qualifying direct job creation includes direct jobs in a wholly-owned subsidiary of the NCE. We suggest adding "(or its wholly-owned subsidiary)."

Page 7 – Question 2 Heading: Information about indirect job creation outside of the NCE (if applicable)

AILA Comments:

- The words "outside of the NCE" are not meaningful in this context; it would be sufficient to say "indirect job creation (if applicable)".

Page 7 – Question 2.a.: Number of Full-Time Economically Direct, Indirect and Induced Jobs Created as a Result of EB-5 Investment

AILA Comments:

- Please see above comments relating to the Form I-829 Instructions. For the reasons stated previously, we suggest deleting the words "Full-Time Economically Direct" from the question and substituting the words "Model-Derived Direct" or "Economic Model-Derived Direct."

- Further, the wording of the question, requiring disclosure of jobs "Created as a Result of EB-5 Investment" should be clarified to confirm with regulations at 8 CFR §204.6(g)(2) which provides parties other than immigrant investors investors may contribute capital that also creates jobs allocated only to immigrant investors:

  > The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic.

Accordingly, we recommend that the question be clarified to request jobs "Created as a Result of NCE activity".

Page 7 – Question 2.b.: Amount of Capital From EB-5 Investors That Was Transferred to the JCE

AILA Comments:

- This question is ambiguous and overbroad. It is not uncommon to have multiple NCEs contribute capital to a JCE. An I-829 petitioner should not be required to provide information regarding the business transactions conducted by NCEs other than the one in which the entrepreneur has invested. The words "From the NCE" should be inserted after the word "Transferred" for clarification if USCIS wants to know how much EB-5 funding was actually transferred by the NCE. If the question is intended instead to speak more broadly to the composition of the capital stack (i.e. EB-5 funding vs. non-EB-5 funding), the question needs to be clarified and should not ask specifically about "transfers."

Page 7 – Question 2.c.: Amount of Capital Invested in the JCE That Was Not Funded by Investors Who Received or are Seeking Classification as Alien Entrepreneurs

AILA Comments:

- This question suffers from the same kind of ambiguity that affects the previous Question 2.b.: Is it seeking general information about the non-EB-5 funding in the capital stack? By using the word "invested," is it looking only for aggregate equity investment, not including debt financing? To the extent there are multiple NCEs, clarification is required as to whether EB-5 funding from other NCEs should be included here or in Question 2.b.

Page 7 – Question 3: Are you investing in a troubled business?

AILA Comments:

- This wording is ambiguous. By using the gerund, this implies that the petitioner is continuing to inject capital. Further, an NCE that was a "troubled business" at the time of Form I-526 submission may no longer qualify as a "troubled business" by the time of Form I-829 adjudication. This question should instead be worded to state "Was your I-526 approved following your investment in a troubled business?"

Page 8 – Question 5.: If ten full-time jobs for qualifying employees have not yet been created, please indicate the number of jobs expected to be created within a reasonable time.

AILA Comments:

- This question appears to require petitioners to concede that job creation has been insufficient for their own petition in order to include information about jobs that will be created within a reasonable time. This is unfair and unnecessary. No such qualification or concession can be supported by the law or regulations. Furthermore, when there are multiple investors filing I-829 petitions to claim credit for a limited number of jobs, it is often impossible to determine at the time of filing which jobs will be allocated to a specific petitioner and whether USCIS will deem the job creation to be sufficient and/or qualifying. As a practical matter, where a pooled investment has created at least 10 total jobs, every investor would likely leave this question blank but would also provide documentary evidence that additional job creation within a reasonable time is expected. So it seems the wording of the question would frustrate the intention of USCIS to use the form to yield more useful data. We suggest the question be rewritten as follows: "How many additional jobs are expected to be created within a reasonable time after filing this petition?"

Page 8 – Question 6.: Changes to Business Plan. Have you made an investment and created jobs in the United States according to the plan presented in the Form I-526?

AILA Comments:

- Please see above comments relating to the Form I-829 Instructions. It is unclear what is meant by "created jobs in the United States according to the plan." More guidance is needed. Further, as stated above, this section should include comprehensive data collection regarding redeployment of funds. We have provided sample instructive language above, for your consideration.

Page 8 - Part 9. Petitioner's Statement, Contact Information, Declaration, Certification, and Signature

Petitioner's Declaration and Certification: I certify, under the penalty of perjury, that all of the information in my petition and any document submitted with it were provided or authorized by me, that I reviewed and understand all of the information contained in, and submitted with, my petition and that all of this information is complete, true, and correct.

AILA Comments:

- The Immigrant Investor Program is structured in a way that makes most EB-5 investors, as limited partners (or equivalent) in a funding entity, highly reliant and dependent on information and business activities conducted by NCE managers and other business entities (developers, borrowers, JCEs) over which they have no control. Moreover, the NCEs do not have control over the JCEs. Therefore, it is not reasonable to require a good faith investor to attest to the accuracy and completeness of other businesses' representations as if they were their own. It would be more reasonable to require the investors to attest that "all of this information was, *to the best of my information and knowledge*, complete, true, and correct at the time of filing." (Emphasis added)

- It is unreasonable to require EB-5 investors to attest to their understanding of all information submitted with the petition. Indirect job creation, for example, is based on economic modeling which is complex and very difficult for persons without professional training in economics to understand; the complexity of the task is intensified when there are language barriers. With the exception of a copy of the Permanent Resident Card, biographical data, and investment evidence, all of the information submitted with an I-829 petition is prepared and provided to the petitioner by third parties. The Petitioner's Declaration and Certification should be revised to reflect only certification as to those facts and circumstances about which an individual petitioner/investor can reasonably be expected to have personal knowledge.

CONCLUSION

We appreciate the opportunity to comment on Form I-829 and its instructions and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION