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U.S. Citizenship and Immigration Services
Office of Domestic Operations
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U.S. Citizenship and Immigration Services

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Memorandum

To: SERVICE CENTER DIRECTORS
REGIONAL DIRECTORS
DISTRICT DIRECTORS
FIELD OFFICE DIRECTORS
NATIONAL BENEFIT CENTER DIRECTOR

From: Donald Neufeld /S/
Acting Associate Director, Domestic Operations

Date: June 17, 2009

Subject: EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (AFM Update AD 09-04)

1. **Purpose**

This AFM update provides United States Citizenship and Immigration Services (USCIS) personnel with instructions related to the timing of job creation and the meaning of "full-time" positions in the EB-5 program.

The AFM update clarifies that each petitioner must submit a business plan, along with their Form I-526, Immigrant Petition by Alien Entrepreneur, which provides an accounting of the required number of qualifying jobs that will be created within the two-year period of conditional residency. This AFM update also clarifies that there may be some flexibility with respect to the timing of job creation at the Form I-829, Petition by Entrepreneur to Remove Conditions, stage. Finally, this AFM update clarifies the meaning of full-time position as it relates to job creation.

The AFM update conforms the filing locations with the Federal Register Notice dated January 9, 2009, 74 Fed. Reg. 912-913.

2. **Relevant Laws**

INA § 203(b)(5) creates a class of immigrant visas (EB-5) for individuals who invest a specified amount of capital in the United States and who will "create full-time employment

for not fewer than 10" qualified employees. INA § 216A places conditions upon the permanent resident status of aliens admitted in the EB-5 classification that must be removed at the end of a two-year period of conditional residency. In order to have the conditions removed, EB-5 visa holders must file a Form I-829 that demonstrates that the petitioner is, among other requirements, "conforming to the requirements of INA § 203(b)(5)." INA § 216A(d)(1)(B).

Consistent with the two-year period of conditional residency, USCIS regulations generally require evidence to obtain approval of a Form I-526, including a business plan that demonstrates that jobs will be created within the two-year period of conditional residence. 8 C.F.R. § 204.6(j)(4)(i)(B).

USCIS regulations relating to the removal conditions from the lawful permanent resident status of alien entrepreneurs status provide that a petitioner must demonstrate that "the alien has created or can be expected to create within a reasonable period of time" the required jobs. 8 C.F.R. § 216.6(c)(1)(iv).

3. Field Guidance Summary

Effective immediately, USCIS personnel are directed to comply with the following instructions, as set forth in revisions to the *Adjudicator's Field Manual* (AFM) noted in section 5, as summarized below.

For purposes of the Form I-526 adjudication and the job creation requirements, USCIS will deem the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) to commence six months after the adjudication of the Form I-526. USCIS officers should ensure that the business plan filed with the Form I-526 reasonably demonstrates that the requisite number of jobs will be created by the end of this two-year period.

For Regional Center petitions and for purposes of indirect job creation, USCIS officers may consider economic models that rely on certain variables to show job creation and the amount of investment to determine whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.

USCIS also has concluded that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years may now count as permanent jobs for Form I-526 and I-829 purposes.

4. Use

This AFM update is intended solely for the guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other

form or manner. In addition, the instruction and guidance in this AFM update is in no way intended to and does not prohibit enforcement of the immigration laws of the United States.

5. **Contact Information**

Questions related to this memorandum should be directed to Joseph P. Whalen, USCIS Headquarters Office of Service Center Operations, through appropriate supervisory channels.

6. **Field Guidance and AFM Update**

Chapter 22.4(c)(4)(D) of the AFM is amended to number it as three subsections and include the new subsections (ii) and (iii) at the end of Paragraph (D) and prior to the Note.

(D) **Job Creation.**

(i) The petition must be supported with evidence the new commercial enterprise will create no fewer than 10 full-time positions (or the equivalent). ….

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(ii) **Clarification of the Two-Year Period for Job Creation.**

(a) Petitioners who are filing a Form I-526 must submit "a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two-years, and when each employee will be hired." 8 C.F.R. § 204.6(j)(4)(i)(B) (emphasis added). The requirement for a business plan that shows jobs will be created in two years applies to all Form I-526 petitions, including those filed under the Regional Center Program, that will rely on indirect job creation to satisfy the statutory employment creation requirement.

The regulations, however, do not clearly state when the two-year period commences for purposes of adjudicating the Form I-526. The reference to a two-year period relates to the two-year period of conditional residence, and the time requirement of 8 C.F.R. § 204.6(j)(4)(i)(B) is intended to ensure that aliens seeking to enter the United States on EB-5 visas have a legitimate and feasible plan to create jobs as required by the statute within that period of conditional residence. Nevertheless, at the time of adjudication of Form I-526, the alien entrepreneur will not have attained conditional permanent residence, and the officer adjudicating Form I-526 cannot be certain when the period of conditional residence will in fact commence.

USCIS has determined that the average processing times for EB-5 petitioners filing for immigrant visas via consular processing and EB-5 petitioners filing

for adjustment of status is approximately six months. Accordingly, in order to best approximate the two-year period of conditional residence, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) will be deemed to commence six months after the adjudication of Form I-526. USCIS officers should ensure that the business plan filed along with Form I-526 reasonably demonstrates that the requisite number of jobs will be created by the alien's investment by the end of the two-year period that commences six months after the adjudication of the petition. If, in the future, processing times significantly change, this paragraph may be amended.

(b) **Special considerations for Regional Center based I-526 petitions**:

(i) Aliens filing I-526 petitions for investments to be made through a regional center may use reasonable methodologies to establish the number of jobs created. 8 C.F.R. § 204.6(j)(4)(iii). However, some of the economic models may not expressly consider temporal aspects of job creation, and will not be able to conclusively state that indirect jobs will be created within two years. In such circumstances, officers should first explore whether there are reasonable and/or accepted temporal assumptions that can be attributed to the particular economic model and consider such assumptions in determining compliance with the two-year requirement.

For example, the RIMSII handbook states the following about the RIMSII economic model, which is often used to demonstrate indirect job creation:

> RIMS II, like all I-O models, is a "static equilibrium" model, so impacts calculated with RIMS II have no specific time dimension. However, because the model is based on annual data, it is customary to assume that the impacts occur in 1 year. For many situations, this assumption is reasonable.

This assumption supports the conclusion that the indirect jobs will be created within the requisite two-year period.

If, however, there are no reasonable and/or accepted temporal assumptions that can be made with respect to a particular economic model, USCIS may presume that the jobs will be created within the required period of time provided that the alien can demonstrate compliance with paragraph (ii) below.

(ii) Many economic models used to demonstrate indirect job creation rely on certain assumptions or variables to show the requisite job creation. For example, a model might demonstrate that the requisite jobs will be created

> if a Regional Center infuses $10 million into a particular industry. Similarly, a model might demonstrate that, using accepted multipliers, the creation of 100 direct jobs will result in a certain number of indirect jobs. Under such circumstances, the I-526 petition should demonstrate that the required infusion of capital or the creation of the direct jobs will occur within two years.

Nothing in this paragraph should be construed to alter in any way the current adjudication procedures. Officers may review the evidence required by the petitioner to demonstrate the number of jobs that will be created by the investment. For example, Form I-526s filed under the Regional Center Program which rely on indirect job creation must also comply with the evidentiary requirements of 8 C.F.R. § 204.6(j)(4)(iii) to demonstrate the number of jobs created. Officers may also continue to determine the reasonableness of a business plan to ensure that the jobs are likely to be created.

(iii) **Clarification of the Meaning of Full-Time Position.**

Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position." USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. See, e.g., Spencer Enterprises v. U.S., 229 F.Supp.2d 1025 (E.D.Cal. 2001). For example, historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent.

USCIS, however, now interprets that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years, inclusive of when the petitioner's I-829 is filed, may now count as permanent jobs. Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the position, as described in the petition, is continuous full-time employment rather than intermittent, temporary, seasonal or transient. For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if, for example, the same project called for electrical workers to provide services during three to four five week periods over the course of the project,

such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.

Generally, it is the position that is critical to the full-time employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment. For example, the positions described above would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week as long as the need for the position remains constant. This interpretation is consistent with 8 C.F.R. § 204.6(e), which, as part of the regulatory definition of full-time employment includes job sharing arrangements.

It is important to note, however, that this new interpretation does not override the regulatory definitions of employee and full time employment at 8 C.F.R. § 204.6(e). Thus, the positions must still be filled by qualifying employees, and such positions may not be filled by independent contractors. In addition, multiple part time positions may not be combined to create one full time position.

2. Chapter 25.2(e)(1) of the AFM is amended to include the following new paragraph at the beginning of Paragraph (1). The existing Paragraph (1) will now become Paragraph (2) and so on.

(1) **Initial Review.** Form I-829 petition is intended to examine whether the alien entrepreneur has satisfied the conditions of his admission to the United States. Primarily, USCIS is determining whether the alien has invested the requisite capital and created the requisite jobs through that investment. Form I-829 petition is to be filed within 90 days prior to the second anniversary of the alien's admission to the United States in conditional resident status.

3. Chapter 25.2(e)(4)(D) of the AFM is amended to include the following new paragraphs at the end of Paragraph (D).

Recognizing that circumstances may change after an alien secures admission to the United States, USCIS chose to implement INA § 216A with some "flexibility." See, 59 FR 1317-01, 1317-18 (Jan. 10, 1994) (proposed rule). Consistent with this flexibility, USCIS provides that Form I-829 must contain evidence that the petitioning alien "has created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees." 8 C.F.R. § 216.6(a)(4)(iv).

In making the "reasonable time" determination, officers should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526,

the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner.

If after considering the evidence, the officer determines that the jobs are more likely than not going to be created within a reasonable time, Form I-829 should be approved consistent with 8 C.F.R. § 216.6(d)(1) if the petitioner is otherwise eligible to have his or her conditions removed. If, however, the officer determines that the jobs will not be created within a reasonable period of time, Form I-829 should be denied consistent with 8 C.F.R. § 216.6(d)(2).

4. Chapters 22.4(b), 25.2(a), 25.2(b), 25.2(g)(1), and 25.2(i)(2)(C) of the AFM are revised to reference that all petitions and applications related EB-5 immigrant classifications and Regional Center proposals must be filed at the California Service Center (CSC).

Chapter 22.4(b) [fourth bullet]

- The petition must be filed with the California Service Center.

Chapter 25.2(a)

California Service Center director, regional directors and field office directors in offices with a high volume of Form I-829s shall designate an EB-5 trained and certified officer as an EB-5 point of contact (POC) to facilitate the review and management of Form I-829. For purposes of clarity in these instructions, references to service center management and field office management includes the appropriate EB-5 POC.

Chapter 25.2(b)

Officers are reminded that, in accordance with the Notice in the Federal Register at 74 Fed. Reg. 912-913, published on, and in effect since, January 9, 2009, Form I-829 petitions are to be filed with the California Service Center.

Chapter 25.2(g)(1)

All such Form I-829s shall be returned to the California Service Center.

Chapter 25.2(i)(2)(C)

The California Service Center shall generate weekly a printout from the MFAS to determine those conditional residents within its jurisdiction who have failed to file a timely Form I-829 to have the conditions on their status removed in accordance with section 216A(c) of the Act and will take the actions described above in this section to terminate the status of such conditional residents and their dependents.

5. The *AFM* **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD 09 -04 (02-xx-2009)	**Chapter 22.4(c)(4)(D)** **Chapter 22.4(b)** **Chapter 25.2(a)** **Chapter 25.2(b)** **Chapter 25.2(e)(1)** **Chapter 25.2(g)(1)** **Chapter 25.2(i)(2)(C)**	This memorandum adds five paragraphs at the end of **Chapter 22.4(c)(4)(D);** adds a new first paragraph to Chapter 25.2(e)(1); adds three new paragraphs at the end of Chapter 25.2(e)(1); and makes changes to both Chapter 22.4 and 25.2 to reference that all EB-5 petitions and applications are now filed with the California Service Center all in the AFM.