



U.S. Department of Justice
Immigration and Naturalization Service

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Washington, DC 20536

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MEMORANDUM FOR: SERVICE CENTER DIRECTORS
BCIS FIELD OFFICE DIRECTORS
DIRECTOR, NATIONAL BENEFITS CENTER

FROM: William R. Yates /s/ by Janis Sposato
Acting Associate Director for Operations
Bureau of Citizenship and Immigration Services
Department of Homeland Security

SUBJECT: Amendments Affecting Adjudication of Petitions for Alien Entrepreneur
(EB-5)

The purpose of this memorandum is to provide interim guidance on certain changes affecting the adjudication of Form I-526, Immigrant Petition by Alien Entrepreneur, and Form I-829, Petition by Alien Entrepreneur to Remove Conditions, that were pending or filed on or after November 2, 2002. On November 2, 2002, the President signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273), which, among other things, mandated a review of cases in which the alien entrepreneur filed a Form I-526 petition that was approved after January 1, 1995 and prior to August 31, 1998, and timely filed an I-829 petition prior to November 2, 2002.

In addition to cases described above, the new law also affects the adjudication of Form I-526 petitions pending or filed on or after November 2, 2002, the date on which the law was enacted. Changes brought about by the new law include the following:

1. Chapter 2, section 11036 of Public Law 107-273, (Subtitle B) amends the law at sections 203(b)(5) and 216A of the Immigration and Nationality Act (INA) so that an alien entrepreneur is no longer required to establish a commercial enterprise.

This modifies 8 CFR § 204.6(h)(1), regarding the creation of an original business. Adjudicators, however, should still inquire as to whether the petitioner personally established the commercial enterprise because if not, then the adjudicator must inquire as to the number of jobs at the time the petitioner acquired the business since petitioner still has to create 10 new jobs.

2. In addition, the new law did not remove the requirement that the commercial enterprise be “new,” as defined in 8 CFR § 204.6(e). Under this definition, an enterprise must have been established after November 29, 1990 in order to be “new”. The regulations at 8 CFR 204.6(h)(3), which describe “the establishment of a new commercial enterprise”, have been superceded in part by Public Law 107-273 due to the removal of the requirement that the alien entrepreneur establish the commercial enterprise. Nonetheless, this section is still relevant in that it describes under what circumstances a commercial enterprise in existence prior to November 29, 1990 will be considered to be “new” for the purposes of this law. Specifically, enterprises that have been expanded or substantially reorganized continue to meet the definition of “new” regardless of when the commercial enterprise was actually created. Accordingly:
 - A business established prior to November 29, 1990 may be considered a new commercial enterprise under 8 C.F.R. § 204.6(e) and (h) if since that date it has been expanded so that a substantial change in the net worth or number of employees has occurred. Substantial change means a 40 percent increase in either the net worth or the number of employees.
 - In addition, a commercial enterprise established prior to November 29, 1990 will be considered to be new under 8 C.F.R. § 204.6(e) and (h) if since that date it has been restructured or reorganized so that a new commercial enterprise results .
3. With respect to cases where the alien entrepreneur filed a Form I-526 petition after August 31, 1998 , the new law does not permit such an alien entrepreneur to meet the requirements for the removal of conditions by combining investments in multiple commercial enterprises. The investment of capital in only one commercial enterprise remains a requirement for these cases.
4. Section 11035 of Chapter 2 amends section 203(b)(5) of the INA to include a definition of “full-time” employment, which is defined as a position that requires at least 35 hours of service per week at any time.

5. Public Law 107-273 has not changed the definitions of qualifying employee under 8 C.F.R. § 204.6(e), which continues to mean United States citizens, aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States, not including members of the alien entrepreneur's immediate family or household employees.
6. Section 11036 of Chapter 2 amends section 216A of the INA to include "limited partnership" within the term "commercial enterprise."

Form I-526 and I-829 petitions pending or filed on or after November 2, 2002 should be adjudicated in accordance with the changes specified in this memorandum. Previous EB-5 field guidance memorandums and regulations remain in effect, barring any changes specified above. Questions regarding this memorandum may be directed through appropriate channels to Morrie Berez or Joseph Holliday in BCIS Operations.

BCIS:HQOPS:M.BEREZ