

EMPLOYMENT BASED FIFTH PREFERNCE (EB-5)

By Ira J. Kurzban

- Mr. Kurzban has been involved in litigating EB-5 cases since 1998 and was counsel of record in *Chang v. U.S.* He is currently litigating I-829 denials for clients of several regional centers, as well as whether conditional residents may naturalize

BASIC REQUIREMENTS

- INVESTED OR ACTIVELY IN PROCESS OF INVESTING
 - \$1,000,000
 - \$ 500,000 IF TEA
 - Funds “at risk”—E-2 standards
 - Management—day to day or policy formulation-ULPA
 - Capital Investment Project
- NEW COMMERCIAL ENTERPRISE
 - Created after Nov. 29, 1990 --
 - If Before Nov. 29, 1990, then: (a) restructuring; or (b) expanding (40% net worth/# of employees)
- JOB CREATION
 - 10 jobs created for each investor
 - Troubled Business/20% of Net Worth—10 jobs saved
 - Regional Centers: 10 Direct and/or Indirect

BASIC PROCEDURE

- I-526 Petition
 - Initial Petition to establish investor status
- I-485/IV
 - If I-526 approved apply to be conditional resident
- I-829
 - Within 90 day period of second anniversary of CR status apply to lift the condition on residency
- Revocation During Two Year Period
 - INA 216A(b)—FDNS Now Active

BASIC LAW

- LAW GOVERNING I-526
 - INA 203(B)(5)
 - 8 CFR 204.6
 - *Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 643 (9th Cir. 200)
 - Precedent Decisions of:
 - *Matter of Izummi*, 22 I&N Dec. 169 (1998)
 - *Matter of Ho*, 22 I&N Dec. 206 (1998)
 - *Matter of Soffici*, 22 I&N Dec. 158 (1998)
 - *Matter of Hsiung*, 22 I&N Dec. 201 (1998)
- LAW GOVERNING I-829
 - INA 216A
 - 8 CFR 216.6
 - *Chang v. U.S.*, 327 F.3d 911 (9th Cir. 2003)
 - *Abghari v. Gonzales*, 596 F.Supp.2d 1336 (C.D. Cal. 2009)

BASIC GUIDANCE

- Adjudicator's Field Manual
 - Chapter 22.4 Regarding I-526 Process
 - Chapter 25.2 Regarding I-829 Process
- USCIS/Legacy INS Memos—AILA InfoNet
 - Pearson, Legacy INS “EB-5 Field Memo No. 9 Form I-829 Processing (Mar. 3, 2000);
 - Yates, USCIS “Amendments Affecting Adjudication of Petitions for Alien Entrepreneur (June 10, 2003)
 - Yates, USCIS “Establishment of an Investor and Regional Center Unit” (Jan. 19, 2005)
 - Neufeld, USCIS, “EB-5 Entrepreneurs—Job Creation and Full Time Positions (June 17, 2009)
 - Neufeld, USCIS “Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 (Dec. 11, 2009)
- Stakeholders Meetings
 - Period Telephonic and In-Person Meetings

ISSUES RE INVESTMENT

- Source of Funds/Capital Obtained Through Lawful Means
 - Tax Returns Filed Within 5 years; foreign business records or other evidence—Foreign Accounting Firms 204.6(j)(3)
 - Judgments Against the Client (e.g. fraud)
 - Foreign Docs Must Be Translated 103.2(b)(3)
 - Transfer of Funds Not the Same as Source
 - Declaration of Client
 - Transfer of Funds Directly From Owned Business Problematic
 - Undistributed Retained Earnings
 - Loans Secured By Assets Other Than Enterprise
 - Gift-How Was Gift-funds obtained?
 - Currency Restriction Laws—10 families procedure

INVESTMENT “AT RISK”

- INVESTMENT DEFINED
 - Not a Loan: Accountant’s Improper Characterization
 - Promissory Note: Unsecured/FMV not Face Value
- At Risk: Funds Not at Risk If
 - Redemption Agreements: Fixed Price
 - Guaranteed Payments>Returns
 - Loan with Investment as Security
 - Sole Owner: Not Put Money in Account/How much activity is enough
- Investment In Job Creating Business
 - Partnership Expenses, attorney’s fee don’t count

- Full Time—35 hours (sharing); but indirect assumed full time
- Employee Not Independent Contractor 204.6(c)
 - Regional Center Issue—Indirect
- Employed Elsewhere—Moved from One Job to Another
- Position Not Person Defines Job--AFM 22.4(c)(4)(D)(ii)
- Business Plan must show job creation within 2 ½ years of I-526 approval—
 - But I-829 is “created or can be expected to create within a reasonable period”—216.6(c)(1)(iv)
- Regional Center: Direct and Indirect/Induced
 - Indirect: Employees of industry spend elsewhere
 - Induced: Goods and Services Purchased by money generated through direct and indirect employment
 - RIMS II, IMPLAN
 - Where Jobs Created—within regional center
 - No Time for Job Creation—204.6(j)(4)(iii)

TEN JOB REQUIREMENT

PROVING JOB CREATION

- Who Employed
 - USC, LPR, Other immigrant lawfully authorized to be employed including CR, TR, asylee, refugee, suspension 204.6(c)
 - TPS?
- Type of Documents
 - I-526: tax records, I-9s or similar documents; business plan; or if regional center different standard –proof of direct or indirect job creation through “reasonable methodologies” 204.6(j)(4)(iii)
 - I-829: Payroll Records, Relevant Tax Documents and I-9s 216.6(a)(4)(iv).
 - I-9 vs Unfair Immigration Employment Practices
 - E-Verify Issue: Legal employee or position

OTHER ISSUES

- Material Change AFM 25.2(e)(4)(E)
 - Change to Business Plan
 - Change in capital investment structure, job creation methodologies or eligibility requirements of I-526
 - Post-I-526 Approval
 - New Petition or Amended Petition
- Change in TEA Status
 - No second look after I-526 approval?
 - Not fatal if during CR period AFM 22.4(c)(4)(F)
 - Jobs Must Be Created in TEA if relying on \$500,000 investment
- Dependents
 - Procedural—Under 21 months at time of I-829 separate petition; but 216.6(a)(1)
 - Substantive—Removal if death, divorced or over 21 216.6(a)(1), (5)
 - CSPA Issues—under 21 at time of filing I-526 (time I-526 pending deducted from age)

ADDITIONAL ISSUES

- Denial of I-829
 - Benefits Remain
 - Motions to Reopen
 - No AAO appeal unless certified
 - Removal Proceedings– Burden of Proof On Gov. INA 216A(c)(3)(D); except late-filing 216.6(a)(5)
 - Court Challenges
- Late Filed I-829 May Be Considered—“good cause and extenuating circumstances” 216.6(a)(5)
- Meaning of *Chang*
 - Cannot Readjudicate Issues
 - Can Make Changes
- Naturalization INA 216A(e); 216.1 --CR treated as LPR for Natz/ “rights, privileges, responsibilities and duties” are the same

CONFLICTS AND OTHER ISSUES

- Securities , Money Laundering, OFAC, Conflicts Issues
 - Broker-Dealer if Accept Fee ? “Performing due diligence, negotiating terms of the offering, soliciting the investors, and handling investor fund” –broker-dealer instead of finder
 - Conflicts of Interest --Failure to disclose longstanding business relationship—*Serova v. Teplen*, (S.D.N.Y Feb 16, 2006)
 - Investing With “Dirty” Money 18 USC 1956, 1957 (conscious avoidance/willful blindness test)
 - False Statements 18 USC 1001
 - OFAC Iranian Banks

