I-924 Pre-approval of Projects Filed at Same Time as an I-526 Petition

THE GOOD, THE BAD, and the Not-So-Ugly

by Edward C. Beshara

There are a number of positive reasons why filing an I-924 application for pre-approval of an actual EB-5 project will be beneficial with a concurrent filing of the I-526 petition. For instance, in processing the I-526 petition, the USCIS adjudicator may give deference to the pre-approved actual EB-5 project, which is the basis of the I-526 petition. On this basis, the marketing of the pre-approved EB-5 project to foreign national investors will be advantageous. However, is this concurrent filing process legally or practically necessary?

For the designation of a new regional center, one files the I-924 Application for Regional Center Under the Immigrant Investor Pilot Program with the U.S. Citizenship and Immigration Service, with the support of an actual or hypothetical EB-5 project with the required supporting documentation, such as a business plan, marketing plans, and letters of support. The I-924 application with the supporting EB-5 project will request a geographical area and industry classifications (NAICS Codes). The EB-5 project can be a hypothetical project with hypothetical business plans, or an actual project with a fully-compliant business plan, economic report, and other supporting documentation. As a result, the I-924 application may be approved. In addition, the concurrent submission of a request for pre-approval of an actual EB-5 project and I-526 Exemplar may also be approved by USCIS. Therefore, the regional center designation approval letter will specifically refer to, by name, the pre-approval of the actual EB-5 project and Exemplar I-526.


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One can file an I-924 application for pre-approval of an actual project and I-526 Exemplar at the following junctures:

a. When filing the original I-924 application and request for pre-approval of an actual project, which includes required supporting documentation; or

b. When filing a new I-924 application for pre-approval of additional, actual projects under a regional center already designated.

For this article, we will assume the regional center is already designated, based upon a hypothetical or actual project. Any subsequent reference to the I-924 application will only involve an application for pre-approval of an actual EB-5 project.

While it is the principals, developers, or operators of the actual project who may wish to file the I-924 application for pre-approval of projects, the I-526 petition is filed by a foreign national investor who will be investing into an actual EB-5 Regional Center project. This I-526 petition requires supporting documentation from the EB-5 Regional Center and the actual project, and the authentication of the investor's source of investment funds.

Therefore, the I-526 petition can be filed and continue to be adjudicated with an already-pre-approved actual project. Alternatively, an I-526 petition can be filed for an actual project without the actual project being pre-approved through the filing and approval of an I-924 application.

Current Realities Versus Laws, Regulations, and the Policy Memorandum

As stated above, there are a number of reasons why the regional center would file an I-924 application. For the purposes of this discussion, the I-924 application can be filed for pre-approval of an actual EB-5 project that is shovel-ready (ready to proceed with operations and development). The pre-approval will cover industry designation, geography, and the project documentation which includes a comprehensive business plan, economic report showing required job creation, marketing report, and securities/offering documents (private placement memorandum, subscription agreement, operating agreement, escrow agreement, etc.). Attaining pre-approval for an actual project is a lengthy process and the current reality is that the adjudication process of the I-924 application may take an estimated 12 months, more or less.

However, there is no legal requirement that an I-924 application has to be filed and approved before the filing of an I-526 petition. Furthermore, based upon the current EB-5 policy memorandum issued by USCIS, for a regional center designation that does not have the industrial NAICS codes or geography for a new, actual EB-5 project, there is no legal requirement for the regional center or developers of the EB-5 project to file an I-924 application to obtain pre-approval of this information (industry and geography) before an I-526 petition is filed.

The reality is that a successful EB-5 project is contingent upon the I-526 petitions being approved. Upon the I-526 approval, the EB-5 project can, or continues to, use the investment funds, whereas if denied, the investment funds may have to be returned to the investor. It may be impossible for a project to be successful if the lack of funds keeps it from coming to fruition.

To File or Not to File the I-924 Application, That is the Question

Without the I-924 pre-approval, USCIS will review the actual project documentation for the first time in the I-526 petition and determine whether to approve, issue a request for further evidence, or deny. Hopefully, an approval, and quickly!

One would assume that the I-526 petition should be reviewed quickly if the I-924 application has pre-approved the actual EB-5 project, as the adjudicator would not have to re-adjudicate a previously approved I-924 application for actual project documentation.

However, the EB-5 project principals may not want to file this I-924 application for pre- approval of the actual EB-5 project because of the lengthy processing time to adjudicate the I-924 application for pre-approval of the actual project. If they did file the I-924 application first, they would then have to wait an additional 12 months for adjudication of the I-526 petition, and the potential of a 24-month adjudication process is not a practical reality for EB-5 project principals or the EB-5 foreign national investor.

In any project, the principals' goals are to use the investment funds as soon as possible, and, in fact, a majority of EB-5 projects are now using the investment funds before I-526 approval. The certainty and predictability of pre-approval of actual EB-5 projects, by an I-924 approval, is something many EB-5 project principals are foregoing.

The Timing of Material Changes is Significant

Another concern of EB-5 project principals and foreign national investors is the possibility that the business plan may change after the filing of I-526 petitions. The main question is whether these changes to the actual EB-5 project business plan, economic report, legal and financial infrastructure, securities/offering documents, geography, or industry categories are material or not.

The most recent USCIS Policy Memorandum concerning EB-5 Adjudications Policy (PM-602-0083), dated May 30, 2013, speaks to the issue of changes to a business plan before the I-526 petition is approved.

Under the "Regional Center Amendments" section, a regional center may pursue an I-924 amendment if it seeks certainty in advance that changes to the actual project will be permissible to the USCIS before adjudication at the I-526 stage, but the regional center is not required to do so by the filing of an I-924 application for pre-approval of a project. Though filing an I-924 for pre-approval may initially seem advantageous, as the policy memorandum states that an EB-5 project that has received a favorable determination at the I-924 stage should generally be given deference at the I-526 process, it later states that a previously favorable I-924 decision may not be relied upon in the I-526 process if there is a material change to the underlying facts. Furthermore, after the filing of an I-526 petition, the effect of a changed business plan or material change to other supporting offering documents in the investor's petition will depend on whether the change is made before or after the investor has obtained conditional lawful permanent resident status. Hence, the I-526 petitioner investor must establish eligibility at the time of filing and the petition cannot be approved if there is a new set of facts or circumstances amounting to a material change, which would require, as in the Matter of Izummi, a re-filing of a new I-526 petition.

In other words, a deficient I-526 petition may not be cured by subsequent changes to the business plan or factual changes made to address any other deficiency that materially alters the factual basis on which the I-526 petition was filed. So, although a favorable I-924 outcome may positively influence the I-526 process, this may not be relied upon to cure material change.

Does the I-924 Concurrently Filed with the I-526 Cure Material Changes?

Based on the above language, if an I-924 seeking pre-approval of the project is filed concurrently with an I-526 petition, and if, after these filings, there is material change to the actual project, then a new I-526 may have to be filed. Based on current regulations and the policy memorandum, is this really the case?

After the concurrent filing of an I-526 petition and I-924 application, can subsequent material changes to the EB-5 project be cured before the adjudication of the I-526 petition, with the pre-approval of the I-924 application incorporating the material changes? Take, for example, a case where, in regard to the adjudication of the I-924 application (filed concurrently with an I-526 Petition) seeking pre-approval of the actual EB-5 project, the USCIS adjudicator issues and sends a request for further evidence (RFE) in regard to the I-924 application. The I-924 applicant

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responds to the RFE with new information and documentation showing the material changes to the original, actual EB-5 project. Please note that this EB-5 project is the basis of the I-526 petition filed concurrently with this I-924 application. In this example, the USCIS approves the I-924 application for pre-approval of the actual project, incorporating the material changes.

In the above circumstances, will this new I-924 pre-approval allow an approval of the original EB-5 project, as stated in the I-526 petition, by the EB-5 investor notifying the I-526 adjudicator of the I-924 pre-approval which is now incorporating the new material changes? Or, will a new I-526 petition still be required to be filed under these circumstances?

As a Business Reality, Would the Principals of the EB-5 Project Want to File an I-924?

Principals might want to file an I-924 because an approval of an I-924 application for pre-approval of an actual EB-5 project can be used for marketing purposes to attract foreign national investors. That is, the investors may think that the I-526 petition and the conditional permanent residency will be approved more quickly with the pre-approval. However, the I-526 petition can also be approved without pre-approval of the EB-5 project, which should allow subsequent I-526 petitions to be approved without re-adjudication. Furthermore, even with the I-924 application pre-approval, USCIS may still exercise discretion to re-adjudicate the I-526 project documentation, which may cause time delays. Despite commonly held beliefs, pre-approval does not necessarily mean an easier path to I-526 approval.

The EB-5 project principals may decide to immediately file I-526 petitions for funding, but also that they would like to concurrently file the I-924 application for pre-approval for marketing purposes. The principals may decide to do this in order to assure current and future investors that their actual EB-5 project will be pre-approved by USCIS and, therefore, the I-526 petitions will be quickly adjudicated and approved for investors.

With a concurrent filing of the I-924, USCIS may have issued an RFE and received a response, which led to an approval with specific details or specifications. For instance, before the I-924 approval, USCIS may have required changes to the business plan and/or economist report.

If this is the case, the EB-5 project principals should notify the investing I-526 petitioners to file additional information and documentation with the USCIS I-526 petition adjudicator of the I-924 approval so that their I-526 petitions may be updated before adjudication. However, even with the approval of an I-924 incorporating material changes, the question is whether the re-filing of the I-526 petition would still be required.

Under the above example, the EB-5 project principals should require the investors with a pending I-526 petition to notify the USCIS by an interfiling letter of the I-924 approval that incorporates the material changes to the actual project. If the changes are not material, the USCIS should give deference to the pre-approval of the I-924 in adjudicating the I-526 petition. However, if USCIS, in the adjudication of the I-924 application, makes a determination that changes are needed to the legal and financial infrastructure of the project and the language in the offering documents, including the PPM and Limited Partnership Agreement, then these changes may be considered material changes.

The question is whether this I-924 approval which reflects a material change and whether this interfiling with USCIS is going to allow the continuation of the adjudication and approval of the I-526 concurrently filed, so investors will not have to re-file a new I-526 petition. The final question is whether the filing of the I-924 has created further problematic issues or time delays in the adjudication of I-526 petitions. It may be more efficient and effective for the EB-5 project to not file the I-924 and simply rely on the USCIS adjudicating the I-526 petition and, hopefully, obtaining an approval.

Conclusion

Without doubt, the concurrent filing of the I-924 and the I-526 is not necessary and may cause more time delays and additional work, both for the EB-5 project principals and the foreign national investor. That is, it seems that the concurrent filing will lead to a duplication of USCIS adjudication; one adjudicator for the I-924 and another adjudicator for the I-526. One may conclude that the concurrent filing will lead to two opportunities for an RFE or denial, and contradictory and inconsistent decision-making, which will lead to unnecessary and inconvenient time delays for the EB-5 project and investors. ★

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