

EMPLOYMENT BASED FIFTH PREFERENCE (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

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

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.

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

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

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