

“Material Change” in EB-5 Petitions: A Need to Return to the Drawing Board

By Carolyn S. Lee

INTRODUCTION

A U.S. Citizenship and Immigration Services (USCIS) memo dated December 11, 2009 (December Memo)¹ introduced two new rules regarding Form I-526 business plans and Form I-829 adjudication in EB-5 immigrant investor cases. First, the December Memo says:

[T]he capital investment project identified in the business plan in the approved Form I-526 must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment.²

Second, it states:

The business plan in the Form I-526 petition may not be materially changed after the petition has been filed.³

These rules have been understood as saying, in a nutshell, that if the business plan described in the Form I-526 petition (Immigrant Petition by Alien Entrepreneur) encounters a “material change,” a petitioner should file a new Form I-526 with a new business plan. Failure to do so risks denial of the Form I-829 (Petition by Entrepreneur to Remove Conditions).

Under the December Memo, filing a new Form I-526 following a material change carries harsh penalties, even if approved. If the petitioner and his or her dependents are already conditional residents, they should withdraw and file new adjustment applications,

re-starting the two-year conditional period upon approval of adjustment. Moreover, under the December Memo, children who have turned twenty-one years old since the first I-526 filing will be deemed to have aged out and may not re-adjust with the principal.⁴

The December Memo did not provide any guidance on what constitutes a “material change.” USCIS circulated a nonprecedent Administrative Appeals Office (AAO) decision (April 2010 AAO Decision)⁵ just before a June 16, 2010 USCIS EB-5 stakeholders conference call, suggesting that the decision would contain clarifying guidance.⁶ While the AAO concurred with the USCIS California Service Center (CSC) in its finding that this case is *not* about material change, USCIS offered the decision to “help stakeholders gain some insight on the Agency's perspective of what constitutes ‘material change.’”⁷ Indeed, the decision, affirming the denial of a Form I-829, sheds light on the Service's rationale “coupling” the I-526 business plan and I-829 adjudication. This article tests that rationale against the EB-5 law, regulations, and *Chang v. United States of America*,⁸ a leading EB-5 case. The author concludes that the December Memo's rules relating to material change and its effects lack support in these authorities.

⁴ *Id.* at 21.

⁵ *Matter of* [name redacted], slip op. at 12 (AAO Apr. 23, 2010), circulated by e-mail on June 16, 2010 from the USCIS Office of Public Engagement to participants of June 16, 2010 EB-5 Stakeholder Meeting [hereinafter April 2010 AAO Decision].

⁶ See USCIS EB-5 Stakeholder Meeting Agenda and PowerPoint Presentation, *published on* AILA InfoNet at Doc. No. 10061863 (*posted* June 18, 2010) [hereinafter USCIS June 16, 2010 Presentation].

⁷ See USCIS, Executive Summary: USCIS EB-5 (Immigrant Investor) Stakeholder Meeting 7 (Sept. 8, 2010), at http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/June%202010/EB-5%20Executive%20Summary_%20Stakeholder%20Meeting%2006162010%20Final%203.pdf [hereinafter USCIS Executive Summary].

⁸ *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

¹ Memorandum from Donald Neufeld, Acting Assoc. Director, Domestic Operations, Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38) (Dec. 11, 2009), *reprinted at* 15 Bender's Immigr. Bull. 120 (Jan. 15, 2010) [hereinafter December Memo].

² *Id.* at 5, 19.

³ *Id.*

**THE LAW AND REGULATIONS GOVERNING I-829
ADJUDICATION: SUSTAIN THE INVESTMENT, NOT
THE BUSINESS PLAN**

The December Memo asserts that “[t]he capital investment project identified in the business plan in the approved Form I-526 must serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien’s 2 year period of conditional residency[.]”⁹ The AAO adopted this view in its April 2010 AAO Decision, affirming the CSC’s interpretation of *Chang v. United States*¹⁰ as “consistent with the proposition that an alien cannot switch plans between the Form I-526 petition and Form I-829 petition.”¹¹ The AAO means the business plan here.

These positions raise the questions: What are the actual I-829 requirements? Do they anywhere look back, either explicitly or implicitly, to the I-526 business plan? What legal requirement does the business plan satisfy at the I-526 petition phase, and does the law relate this requirement to the petitioner’s investment requirement, as the December Memo asserts?

The Law

Immigration and Nationality Act (INA) § 216A(d) sets forth the details of I-829 petitions for EB-5 investors. INA § 216A(d)(1) provides that each I-829 petition “shall contain facts and information demonstrating that the alien (A)(i) invested, or is actively in the process of investing, the requisite capital; and (ii) *sustained the actions described in clause (i) throughout the period of the alien’s residence in the United States; and (B) is otherwise conforming to the requirements of section 203(b)(5).*”¹²

Note that INA § 216A(d)(1)(A)(ii) requires the investor to sustain the actions in clause (i) – namely, *investment of the requisite capital*. If an investor invests \$500,000 in a targeted employment area or \$1 million in a non-targeted employment area, clause (i) is satisfied. Under the statute, “investment” refers to investment in a new commercial enterprise.¹³ In the

regional center context, the new commercial enterprise is the pooling investment vehicle, usually a limited partnership or a limited liability company.

USCIS has never strayed from the view that petitioner’s investment requirement is satisfied by his or her investment into the new commercial enterprise. As recently as in its Executive Summary of the June 16, 2010 Stakeholder Meeting, USCIS states: “A new commercial enterprise is the vehicle where the immigrant investor initially makes the initial capital investment, whether through a Regional Center or a stand-alone commercial enterprise.”¹⁴ Accordingly, if the investor sustains his or her investment in the investment vehicle – i.e., refrains from withdrawing that investment from the investment vehicle – then the investor has sustained the investment and satisfied INA § 216A(d)(1)(A)(ii).

Thus, the December Memo’s assertion that the project identified in the I-526 business plan must serve as the basis for determining at the I-829 stage whether the investment has been sustained so far has no support in INA § 216A(d)(1)(A).

What about INA § 216A(d)(1)(B), which requires the investor to be “otherwise conforming to the requirements of [INA] section 203(b)(5)”? Does this language provide authority for USCIS to require sustaining the business plan? Let us look back to INA § 203(b)(5).

Some parts of INA § 203(b)(5) do not make sense to serve as a continuing requirement for the I-829. For example, the statute specifically says that a targeted employment area (“TEA”) must be a TEA “at the time of the investment.” So conforming to EB-5 requirements at the I-829 phase clearly does not require an area to still be a TEA at the time the I-829 is filed. Accordingly, it is appropriate to analyze what parts of INA § 203(b)(5) would make sense to serve as continuing requirements.

INA § 203(b)(5)(A) states:

Visas shall be made available...to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership) --

level to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including limited partnership) –

(i) in which such alien has invested[.]

¹⁴ USCIS Executive Summary, *supra* note 7, at 6.

⁹ December Memo, *supra* note 1, at 5.

¹⁰ *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

¹¹ April 2010 AAO Decision, *supra* note 5, slip op. at 12.

¹² INA § 216A(d)(1), 8 U.S.C. § 1186b(d)(1) (emphasis added).

¹³ INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A) states:

In general. Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990 [enacted Nov. 29, 1990]) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States[.]

In plain English, INA § 203(b)(5) requires an investor to have: (1) the *present* intent to engage in a commercial enterprise; (2) *already* invested, or be *now in the process of* investing in the commercial enterprise; and (3) for the commercial enterprise in which the investor has invested to *prospectively* create ten jobs.

So let us toggle back to INA § 216A(d)(1)(B) which requires an EB-5 conditional resident to be “otherwise conforming to the requirements of section 203(b)(5).” To meet this requirement then, the EB-5 investor must have at the time of I-829 filing: (1) the *present* intent to engage in a commercial enterprise; (2) *already* invested, or be *now in the process of* investing in the commercial enterprise; and (3) for the commercial enterprise in which the alien has invested to *prospectively* create ten jobs.

The first two elements are not a problem, since the engagement requirement is not burdensome to satisfy, and the investment requirement will already have been met in the vast majority of cases. USCIS is likely concerned about the third requirement, the job creation element, as the statute does not require job creation within any specified timeframe – it is indefinitely prospective. So how would one satisfy this seemingly amorphous requirement? The law’s requirement on job creation must amount to, in essence, a feasibility test answering the question: Is the commercial enterprise *likely* to benefit the United States economy and create the required full-time employment?

It is important to note the limited role, then, of the business plan, and its function in relation to the job creation – not investment -- requirement. Elsewhere, I have argued that USCIS must uphold the distinction between the investment requirement and the job creation requirement.¹⁵ Under the regulations, the

¹⁵ See generally Carolyn S. Lee, *The Meaning of “At Risk” in EB-5 Investment*, Immigration Options for Investors and Entrepreneurs 113 (AILA 2d ed. 2010).

business plan’s role is to support the feasibility of prospective job creation. The regulations state “[t]o show that a new commercial enterprise will create not fewer than ten (1) full-time positions for qualifying employees, the petition must be accompanied by: ... (B) a copy of a comprehensive business plan.”¹⁶ A June 17, 2009 USCIS Memorandum confirms the role and modest standard for a business plan: “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 the 2 year period.”¹⁷ Thus, the business plan required in the regulations has the function of establishing the feasibility of job creation, not “serv[ing] as the basis for determining ... whether the requisite capital investment has been sustained throughout the alien’s two-year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien’s capital investment.” Only the latter part of that sentence is true: the business plan serves to show whether the required jobs will be created within a reasonable period of time, and is entirely independent of the investment requirement.

Indeed, the requirement to otherwise conform to the requirements of INA § 203(b)(5) cannot mean that the original I-526 business plan must be sustained. INA § 216A(b)(1)(C) compels USCIS to *terminate* the residency status of an investor if the investor “was otherwise not conforming to the requirements of section 203(b)(5).” If USCIS is relying on the authority of § INA § 216A(d)(1)(B) to require the business plan to be sustained through the I-829 filing, then it must follow that in addition to jeopardizing the I-829, a failure to sustain the business plan should also compel terminating the green card and initiating removal. The Service has yet to assert that a failure to sustain the business plan carries these consequences.

To summarize, the statute governing I-829 adjudication, which incorporates portions of the I-526

¹⁶ 8 C.F.R. § 204.6(j)(4)(i)(B). Arguably, as has been argued by others elsewhere, the business plan should not be required for I-526 petitions filed under the Pilot Program, as its job creation requirements are covered in 8 C.F.R. § 204.6(j)(4)(iii), where no business plan is mentioned.

¹⁷ Memorandum from Donald Neufeld, Acting Assoc. Director, Domestic Operations, EB-5 Alien Entrepreneurs – Job Creation and Full-Time Positions (AFM Update AD 09-04) 2, 4 (Jun. 17, 2009), *reprinted at* 14 Bender’s Immigr. Bull. 874 (Jul. 15, 2009) (emphasis added). See generally Stephen Yale-Loehr, *USCIS Clarifies Key Aspects of EB-5 Program*, 14 Bender’s Immigr. Bull. 835 (Jul. 15, 2009). Let’s for now set aside the issue of whether the two-year period imposed in the regulations and affirmed in this Memorandum is appropriate.

law, requires the petitioner to have sustained the investment and to show that he or she will create ten full-time jobs. The I-526 regulations implementing the prospective job creation require a business plan that will prove feasibility of proposed prospective job creation. The two are separate, and should not be conflated.

The Regulations

Do the I-829 regulations require that the business plan be sustained? 8 C.F.R. § 216.6(a)(4) sets out the evidence required for removal of conditions as follows:

- (i) Evidence that a commercial enterprise was established by the alien. ...
- (ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. ... and
- (iii) Evidence that the alien *sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirements of the statute and continuously maintained his or her capital investment over the two years of conditional residence. ...*"
- (iv) Evidence that the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees. ...¹⁸

These regulations track INA § 216A(d), incorporating in clause (iv) the feasibility test for job creation imported into INA § 216A(d)(1)(B) from INA § 203(b)(5). The I-829 regulations confirm that the job creation requirement is prospective and subject to a showing that they will be created within a "reasonable period of time," if not already created. Again, the regulatory standard is modest and nowhere tied to the executing the I-526 business plan, despite what the December Memo asserts.

USCIS' Misinterpretation of *Chang v. United States*

USCIS appears to rely on *Chang v. United States*¹⁹ to support the view that the I-526 business plan is germane to adjudicating an I-829 petition.²⁰ However, USCIS starts from a faulty premise. From there, it goes on to fundamentally misconstrue *Chang*, a

decision that supports the law and regulations discussed above.

The faulty premise rests upon a failure to appreciate the legally distinct roles of the different elements of an EB-5 petition. USCIS's Executive Summary of the June 16, 2010 Stakeholder Meeting states:

Initial supporting evidence [for a Form I-526] includes a business plan and in the case of a petition filed by an immigrant investor whose commercial enterprise is affiliated with a Regional Center, an economic analysis. *These items describe how the investor is going to satisfy the requirements of the EB-5 program. If the immigrant investor fulfilled the EB-5 requirements as outlined in the business plan that accompanied the Form I-526 petition, then USCIS can generally remove the conditions and the immigrant investor can live and work permanently in the United States.*²¹

The business plan and economic analysis are relevant only to the job creation requirement. The Service in the above statement appears to hold the view that the business plan has a broader role in proving fulfillment of the EB-5 requirements writ large. This premise, unfounded in the law and regulations, sets USCIS up to misinterpret *Chang*. The agency reads *Chang* as supporting the view that deviation from the I-526 business plan impairs approvability of the I-829, as the *Chang* court disfavored "decoupling" the I-526 petition and the I-829 petition.

First, it is important to provide the proper context for *Chang's* rejection of "decoupling" the I-526 from the I-829. The court was responding to USCIS's argument that a "fresh demonstration of compliance with [I-526] statutory standards at the I-829 stage" was required,²² thus exposing the investor to fresh adjudication of the approved I-526 at the I-829 phase. The *Chang* court found such "decoupling" of the approved I-526 from the I-829 would raise "serious retroactivity concerns."²³ *Chang* does not, therefore, stand for the proposition that the I-526 business plan must serve as the basis for determining whether the investment has been sustained at the I-829 stage, a much more specific claim USCIS makes in the December Memo. In fact, USCIS's claim here that the I-526 business plan is germane to I-829 adjudication echoes the legacy INS's argument that the I-526's

¹⁸ 8 C.F.R. § 216.6(a)(4) (emphasis added).

¹⁹ *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

²⁰ See USCIS Executive Summary, *supra* note 7, at 7.

²¹ *Id.* at 6-7 (emphasis added).

²² *Chang*, 327 F.3d at 928.

²³ *Id.* at 927.

merits may be readjudicated at the I-829 phase, an argument that the *Chang* court specifically rejected.

Second, the *Chang* court identified the nexus, or the "coupling" point between the I-526 and the I-829, as the petitioner's sustaining the investment throughout the conditional period. That interpretation is fully consistent with the law. Quoting INA § 216A(d)(1), the *Chang* court clarified that the referenced I-526 "plan" is the petitioner's plan to sustain the investment:

I-526 approval does not guarantee I-829 approval -- the petitioner might not successfully "sustain the actions . . . throughout the period of . . . residence" -- but it certainly predicts it. No one obtains I-829 approval without prior I-526 approval. The government provides no reason to believe that the combination of I-526 approval, successful execution of the approved plan, and absence of material misrepresentation in the I-526 petition -- all characteristics that Appellants claim apply to them -- was not an excellent predictor of I-829 approval up until the precedent decisions appeared.²⁴

Thus in *Chang*, the operative plan was not the "business plan," a specific creature of I-526 regulations implementing the statutory job creation requirement. It was rather the plan to make the investment, the execution of which is tested at the I-829 phase under INA § 216A(d)(1), which requires the petition to have sustained the investment throughout the conditional period.

Chang confirms the wisdom of the statutory scheme. The coupling link between the I-526 and the I-829 is a matter over which the petitioner has control, and about which the statute is crystal clear: the petitioner must make and sustain the investment. If the EB-5 investor withdraws the investment and attempts to make himself or herself whole before removal of conditions, the I-829 will fall.

THE LAW AND REGULATIONS GOVERNING CHANGES

So what do the law and regulations provide if a project identified in the I-526 business plan fails or otherwise could not be completed during the two-year conditional residency period? We assume here that the I-526 business plan identified only one discrete project with no substitution or subsequent investment.²⁵

²⁴ *Id.*

²⁵ If the I-526 business plan contemplates multiple, serial, or substitution projects or targets, then arguably there should no issue of "material change," even applying the December Memo's standards, as long as the I-526 petition

If Jobs Created Despite Change, Test Nexus to Approve I-829

We must distinguish I-829 cases where the required jobs have been created from those without jobs or without all the required jobs. If the I-829 petition shows that the petitioner; (1) made the investment in the commercial enterprise (usually a limited partnership or a limited liability company pooling the investment); (2) sustained the investment in the commercial enterprise (i.e., did not withdraw from the limited partnership or the limited liability company); and (3) ten jobs have been created per investor, then we are done. The I-829 requirements have been satisfied. As we have seen, the law and regulations do not require that the "capital investment project identified in the I-526 business plan" be the basis for the jobs created at the I-829 phase.

Importantly, note that the petitioner is still best served by execution of the initial I-526 business plan. There is plenty of risk of I-829 petition denial when the project fails within the existing statutory and regulatory framework, without the additional hurdles imposed by the December Memo. If the project fails, the petitioner, or the general partner in the regional center context, has to scramble to recall the EB-5 money from the failed project, find a suitable substitute, redeploy the money, and create jobs -- all before the end of the initially planned two-year period. As USCIS has said on multiple occasions, it will not extend the conditional period in the event of business failure. Significantly, in this circumstance, the petitioner has to demonstrate a sufficient *nexus* between the redeployed funds and claimed job creation. This can be difficult, particularly given the truncated timeframe. Thus the I-829 would need to include persuasive evidence showing that due to the nature of activities undertaken and the level of capital deployed, the claimed job creation can be attributed to the redeployed EB-5 capital. Essentially this would require what amounts to a backward looking business plan, and perhaps also an economist's analysis in the regional center context. USCIS has plenty of discretion to find the evidence lacking, particularly relating to the nexus.

If Not Enough Jobs, Test Feasibility for Job Creation within "Reasonable Period of Time"

What if not all the jobs are created? Recall that job creation is not an enumerated requirement for condition removal under the statute. It comes in obliquely by INA § 216A(d)(1)'s requirement that the I-829 must otherwise conform to INA § 203(b)(5).

presents a persuasive nexus between the investment so structured and job creation.

Recall also that under INA § 203(b)(5), the petitioner's job creation requirement is indefinitely prospective. Under the greater rigor of the I-526 regulations, the petitioner must show prospective job creation within two years.²⁶ Under the I-829 regulations, if all the required jobs are not in place when the I-829 petition is filed, the petitioner must show that they will be within "a reasonable period of time".²⁷ Putting these requirements together, the petitioner must essentially provide a new business plan for job creation within a "reasonable period of time."

The regulations do not define reasonableness. Whether a USCIS adjudicator will find a proposed period of time to be reasonable probably depends on the facts presented. Again, here there is plenty of risk for the petitioner. If the new business plan is not feasible, or the proposed timeframe is not "reasonable," the I-829 may be denied. Feasibility and reasonableness are subjective determinations at the adjudicator's discretion. Again, the December Memo is not needed to give the USCIS new grounds for denial.

Optional New I-526 Properly Structured

In response to EB-5 stakeholder concerns raised at a September 2009 stakeholders meeting in Washington, DC, USCIS developed the "optional readjustment procedure" described in the December Memo.²⁸ The concerns related to potential adjudication risks if the business does not progress as projected in the I-526 business plan. As discussed above, indeed, the I-829 does encounter risk in those instances. For example, the petitioner may fail to prove that there is a sufficient nexus between the redeployed EB-5 money and claimed job creation. Rather than take that risk, USCIS says, the petitioners now have the *option* to file a new I-526 with a new business plan. It gives the petitioner greater assurance that his I-829 will be approved because the nexus will have been adjudicated already with the new I-526. It also gives USCIS greater comfort with the associated I-829 because the jobs match those described in the I-526 business plan.

²⁶ See 8 C.F.R. § 204.6(j)(4). Whether the two-year timeframe provided in the regulations at 8 C.F.R. § 204.6(j)(4)(i)(B) properly implements the statutory job creation requirement, and whether the two-year time frame provided in 8 C.F.R. § 204.6(j)(4)(i)(B) should be construed to apply to regional center-based petitions covered under 8 C.F.R. § 204.6(j)(4)(iii), are outside the scope of this article.

²⁷ 8 C.F.R. § 216.6(a)(4)(iv).

²⁸ See USCIS June 16, 2010 Presentation, *supra* note 6, PowerPoint Presentation at Slide 43.

The process as above described is not objectionable. However, the December Memo belies the description of the new I-526 as "optional." Rather, it is essentially required for I-829 approval. The December Memo states that "the capital investment project identified in the business plan in the approved Form I-526 *must* serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two-year period of conditional residency and that at least ten jobs have been or will be created within a reasonable period of time as a result of the alien's capital investment." This article has argued that such a view rests on faulty premises and is unlawful.

How might a truly optional process look? The risk-averse petitioner may *amend* the previously approved I-526 petition. This would provide the palliative solution USCIS probably wished to provide. The default process would rely on the existing framework, described above, putting the I-526 business plan in its proper place. The December Memo instead upends the existing statutory and regulatory framework.

An Alternative Solution

Senator Patrick Leahy (D-VT) is drafting a bill that proposes another solution. The draft bill would preserve the "material change" concept and peg material change to circumstances where *fewer* than ten jobs are estimated to be created within a reasonable time. These are the circumstances outside the I-829 regulatory framework for approval (though arguably still approvable under the bare statute). This is the situation that USCIS perhaps sought to provide an opportunity to cure through an amended I-526 filing, because without this opportunity, the I-829 would be denied. While this provision may undergo further changes, the approach at least provides another point of clarity on when it may be appropriate to revisit an approved I-526 petition.

CONCLUSION

The December Memo relating to material change and new I-526 petitions embodies a failed concept disconcertingly unmoored from both reality and the law. It will always be the case that a business – in the course of executing a business plan – will deviate from that plan in varying orders of magnitude. That is simply the nature of not having full control over innumerable variables necessarily at play. USCIS claims if such a deviation is "material," the petitioner must file a new I-526 or risk denial of the I-829. Failing to provide a materiality standard given the pronounced consequences is a serious problem, introducing uncertainty affecting all EB-5 petitions. But the greater flaw in the December Memo is its

disregard for the law. The December Memo as it relates to material change should be rescinded and reworked.

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