EB-5 I-829 RFEs: What Does USCIS Look for?

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Introduction

In response to a Freedom of Information Act (FOIA) request filed by Invest In the USA (IIUSA), the trade association of EB-5 immigrant investor regional centers, U.S. Citizenship and Immigration Services (USCIS) delivered 895 pages of heavily redacted I-829 requests for evidence (RFEs) and denials. In total, USCIS released parts of 167 I-829 RFEs and denials ranging from 2008 to early 2011. Most of the responses are from 2009.

As background, assuming USCIS approves an immigrant investor's I-526 petition for classification in the EB-5 category, he or she becomes a conditional resident for two years following the approval of an adjustment of status application or admission under an immigrant visa.[2] The procedure to remove the conditions is analogous to that followed by people who obtain conditional residence through marriage to a U.S. citizen or lawful permanent resident.[3] An immigrant investor's petition to remove the conditions is filed on Form I-829 with the California Service Center.[4] It must be accompanied by evidence that the individual invested or was in the process of investing the required capital, and that the investment created or will create at least ten full-time jobs. These jobs may be filled by eligible U.S. workers with payroll records, relevant tax documentation, and Forms I-9.[5] The individual also must show that he or she "sustained the actions" required for removal of conditions during the person's residence in the United States. An entrepreneur will have met this requirement if he or she has "substantially met" the capital

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[2] INA § 216A, 8 U.S.C. § 1186b; 8 C.F.R. § 216.6. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ron Wada, Immigration Law and Procedure § 39.07 (2012).
[3] INA § 216, 8 U.S.C. § 1186a.
[4] 8 C.F.R. §§ 216.6, 1216.6; *see also* 74 Fed. Reg. 912 (Jan. 9, 2009).
[5] 8 C.F.R. § 216.6(a)(4)(iv).

investment requirement and has continuously maintained this investment during the conditional period.[6]

After reviewing a filing, a USCIS adjudicator who does not find the filing approvable as filed may send the filing party a "request for evidence," or "RFE," typically giving notice of some perceived deficiency that might be explained or overcome. We reviewed RFEs disclosed by USCIS apart from any responses to the RFEs or any final disposition by USCIS. Readers of the RFEs must recognize that the positions set forth by USCIS might have been overcome by the response. We know that some of the positions have changed since these RFEs were issued. Some of the volume of RFEs on particular issues results from USCIS' repetitive response to extremely similar filings of multiple investors in the same projects.

Methodology

We read all the I-829 RFEs and denials and tried to classify them by issue type. We primarily focused on six issues: (1) job creation; (2) sustaining the investment; (3) redemption; (4) pooled trust; (5) business plan; and (6) material change. USCIS headings often helped to identify issues, even though much of the actual text was redacted. Some responses contained issues that did not fall under any category; these responses were classified as miscellaneous. A few responses were so heavily redacted that it was impossible to discern any issue.

We then aggregated the 167 case responses and summarized them in a Word document entitled "EB-5 USCIS I-829 Issue Trend.docx." The results were also coded into an Excel document called "EB-5 USCIS I-829 Issue Trend.xlsx," where pivot-tables and pivot-charts (see Graph Appendix) were used to map the trends.

Results and Analysis

USCIS I-829 RFEs and denials typically identified one or more of four issues: job creation, sustaining the investment, redemption, and pooled trust. See Table 1 at the end of this article.

The most prevalent issue was job creation, occurring in sixty-five percent of all cases. Given the goals of the EB-5 program, it is not surprising that job creation was the number one issue. Nevertheless, this phenomenon has two likely explanations. First, most of the job creation issues seem to correspond to cases filed in 2008 and 2009, corresponding to the economic recession at the time. Second, there were three types of job creation issues in the RFEs and denials. The first was triggered when the petitioner did not create the required number of jobs.[7] The second was triggered based on a lack of evidence about whether the employees qualified as legal workers.[8]

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[6] 8 C.F.R. §§ 216.6(a)(4), 1216.6(a)(4).

[7] *See, e.g.*, Matter of [redacted], FOIA response at 167 (2008) ("[T]he evidence in the record does not clearly show that ninety (90) full-time jobs for qualifying employees were directly created at this location.").

[8] *See, e.g.*, Matter of [redacted], FOIA response at 803 (2008) ("The Service records indicate that at least 18 of the 23 employees appear to be illegally in the United States assuming some[one] else['s] identity[. If] this is an error noted on the I-9, please make the appropriate corrections.").

The third was triggered where USCIS noted a difference between full-time and part-time workers.[9]

It is instructive to see how USCIS approached job creation issues in the I-829 RFEs. For instance, the RFEs suggest the kinds of documents investors should submit to prove creation of direct jobs: I-9s and supporting documents; additional proof of each worker's citizenship, permanent residence, or asylum/refugee status; latest pay stubs; annual IRS Forms W-2 for individual workers; quarterly IRS Forms 941 for all of the entity's workers (with name, SSN, wages, number of weeks worked); and state quarterly wage statements. USCIS adjudicators scour those documents and company financial statements, tax returns, etc., to see if they are consistent with the claimed number of full-time jobs created. For example, adjudicators sometimes note that the total dollar numbers in W-2 forms or entity tax returns did not add up to what one would expect from employment of the claimed number of workers at 35 hours per week at the minimum or stated wages. Investors need to ensure that the numbers in the totality of documents "add up" or are explained, such as through showing that a position was created mid-year so that the worker's W-2 shows only half of what one might have expected, job sharing, unpaid leave, or replacement of one worker with another.

Some RFEs also seem to have suggested that the employer might have fabricated "make work" jobs that were not truly needed for operation of the employer's business.[10]

USCIS scrutinized and ran database checks behind I-9s and related documents to determine if the workers were in fact authorized. RFEs rejected workers for whom I-9s were not properly completed, for whom pay records were not provided, and independent USCIS records searches reflected lack of authorization (fraudulent card, or assumption of a lawful worker's identity). USCIS seems not to have provided investors with details supporting its claims that workers were not authorized and not to have provided how the petitioner should overcome this other than mentioning the E-Verify program.

Some of the RFEs reflect legal conclusions that are not clear in USCIS regulations or policy statements. For instance, some RFEs claimed that even if ten jobs were created during the period of conditional residence, they must continue to be employed through the time of I-829 adjudication. RFEs recite that facts occurring after the I-829 filing, such as hiring employees after I-829 filing, will not be credited, because the filing must be "approvable when filed." RFEs indicate that a properly completed I-9 form may not be sufficient, requiring investors to cause the

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[9] *See, e.g.*, Matter of [redacted], FOIA response at 567 (2009) (“This response fundamentally misunderstands the full-time job requirement. 100 part-time jobs could create payroll well in excess of the amount of the pay of 10 full-time jobs, but not one full-time job is created as a result. No amount of part-time positions is equal to a full-time position. The petitioner was not able to show he employed 10 people full-time.”).

[10] *See, e.g.*, Matter of [redacted], FOIA response at 456 (2009) ("It does not appear that the NCE has the work to keep the 10 qualifying employees employed.").

relevant entity arguably to violate IRCA rules by requiring "more or different documents" than minimally required for I-9 completion.[11]

Some RFEs used special approaches to job creation affiliated with regional centers. USCIS claimed that direct jobs upon which estimations of indirect jobs are based must be full-time jobs of lawful U.S. workers. Some RFEs clarified that investors cannot count the direct jobs and all of the jobs reflected in a RIMS II multiplier, requiring that the number of direct jobs be subtracted from the product of the multiplier.

Some RFEs required investors to document all investors in the enterprise and their respective shares in it, to show who is EB-5 and who not, to show any agreement for allocation of jobs among EB-5 investors, and to list direct and indirect jobs allocated to each investor in the project, to avoid double counting.

Some RFEs scrutinized claims of jobs created in companies locating in a building constructed with EB-5 capital. They refused to credit jobs of companies that relocated to the building, required an Employer Information Form for each tenant/occupant describing newly created jobs on site for that tenant/occupant, noticed that a tenant survey showed fewer new jobs than the base from which the multiplier was to be applied (so not enough to go around), and required proof that the building would be leased within a reasonable time (possibly reflecting a more flexible approach to regional center cases than "regular" cases).

The second most common issue was sustaining the investment. This issue arose in two situations. First, I-829 petitioners sometimes provided insufficient information as to the level of investment when multiple investors (EB-5 and non-EB-5) invested in a project.[12] Second, sometimes part of an investor's money was removed during the two-year conditional period.[13]

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[11] *See, e.g.*, Matter of [redacted], FOIA response at 415 (Apr. 23, 2010) ("Just as holders of counterfeit Permanent Resident cards cannot be Qualified Employees, employees that claim U.S. citizenship will not be counted unless a copy of their birth certificate, Certificate of Naturalization, or U.S. passport is provided. As noted above, a driver's license or Social Security card is not evidence of citizenship or immigration status for I-829 purposes.").

[12] *See, e.g.*, Matter of [redacted], FOIA response at 809 (2009) ("Submit evidence to clearly show how funds were distributed in terms of capital investment credit between the EB-5 immigrant investors and non EB-5 immigrant investors since the pooled investment includes capital contributions from both EB-5 immigrant investors and non EB-5 immigrant investors.").

[13] *See, e.g.*, Matter of [redacted], FOIA response at 103 (2009) ("According to the petitioner's 2004, 2005, 2006 and 2007 Schedule K-1s, a portion of the claimed $500,000 investment of the capital appears to have been withdrawn and distributed to the petitioner thereby decreasing his claimed capital investment by approximately $9,563 from $500,000 (2004) to $490,437 (2007). Capital withdrawals and distributions reducing the investor's capital investment below the minimum required threshold of $500,000 for a targeted area of employment does not constitute an investment of capital at risk as defined by the USCIS regulations governing the alien entrepreneur program. Further, capital withdrawn and distributed reduces the capital available for employment creation.").

Some RFEs noticed suspicious circumstances, such as a failure to have spent all the capital contributions, the absence of compensation to officers or employees shown in corporate tax returns, or a different address for a company in different documents. Some RFEs in 2008 and 2009 refused to accept a financial report for enterprises not audited or reviewed by an objective outside agency, but we know that USCIS has backed off of this policy. USCIS found a disqualifying "material change" when the project shown in the I-526 was for a home improvement business and the I-829 showed the funds now used in a restaurant. We know that USCIS Administrative Appeals Office (AAO) denied those cases on certification, but we understand that in litigation a federal court expressed concern about USCIS' position and that USCIS reopened and approved the petitions.

The third most common issue was redemption. This issue arose when a redemption clause in the investment agreement guaranteed the return of the initial investment if an I-829 were to be denied.[14] This policy was implemented in 2008 and 2009 without any prior announcement after years of approving petitions involving such promised redemptions, and many I-526 filers were required to submit amended documents removing those promises. Redemption clauses were held to not satisfy *Matter of Izummi*.[15]

A number of RFEs remarked that K-1 statements reflected distribution of capital, ostensibly because of reduction of capital account. We believe from anecdotal reports that these RFEs were resolved by clarifying the tax accounting conventions that resulted in such documents. Nevertheless, investment enterprises should be careful about distributions based on the entire base of capital rather than on each investor, since they may have had money in for longer or shorter and thus may get more shares of distributions that reduce capital account.

The fourth most common issue concerned what USCIS characterized as a pooled trust. This issue generally arose when investors channeled their funds through a mutual fund or other similar financial instrument.[16]

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[14] *See, e.g.*, Matter of [redacted], FOIA response at 157 (2009) ("Based on the redemption agreement analysis discussed in Izumii [sic], the record in this case reveals a debt arrangement exists. The case cannot be approved with the way the subscription agreement is currently worded. Therefore, please submit an amended Subscription Agreement signed and dated by the petitioner, which eliminates the refund of funds to the investor if the I-829 is denied."); Matter of [redacted], FOIA response at194 (2009) (same).

[15] Matter of Izummi, 22 I. & N. Dec. 169 (INS Assoc. Comm'r, Examinations 1998).

[16] *See, e.g.*, Matter of [redacted], FOIA response at 98 (2009) ("Since all of the partnership's funds are held in a pooled trust fund and notwithstanding evidence which indicates that the petitioner is not precluded from investing in other capital ventures, for the petitioner to make a qualifying investment, the evidence must establish either that all of the capital contribution held by the partnership has been made available for purchase and renovation of the building(s) in question, or that all of the petitioner's contribution has been made available for the purchase and renovation of the building(s) in question. Evidence submitted by the petitioner fails to satisfy the burden because the petitioner's investment is managed in a way that precludes determination of the date(s) on which and/or the amount(s) in which the petitioner's funds are to be made available to the limited partnership for the purchase and renovation [redacted]. Like a holding

Finally, we noted a few material change, business plan, and miscellaneous issues. Given that seventy percent of USCIS responses to the IIUSA FOIA request are from 2009, it is natural that there were few material change issues in the cases we reviewed. Material change only came to prominence as an issue in a December 2009 USCIS memo.[17]

The miscellaneous issues seemed to be the easiest to fix, and all came in RFEs. For example, USCIS asked for certificates of good conduct or confirmation of age of a dependent.

Conclusion

Despite cataloguing 167 USCIS responses, our findings are simply the tip of the iceberg. While it is highly likely that job creation was and continues to be the most important issue at the I-829 stage, we suspect some current trends differ from what we found in the data. In particular, material change is likely a more common reason for an I-829 RFE or denial now. Additionally, because of heavy redacting, it was often difficult to note both what issues USCIS saw and what the particular note of concern was.

IIUSA has filed another FOIA request for I-829 petitions filed in 2010 and 2011. It will be interesting to compare the trends in that FOIA response to the ones we found here. Stay tuned.

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company, monies held in a "blind pool trust" must be made fully available to the business(es) most closely responsible for creating the employment upon which the petition is based.").

[17] Memorandum from Donald Neufeld, Acting Assoc. Director, USCIS 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). *See generally* Carolyn S. Lee, *"Material Change" in EB-5 Petitions: A Need to Return to the Drawing Board*, 15 Bender's Immigr. Bull. 1505 (Nov. 1, 2010).

Tables Appendix

Table 1.0 – Types of Issues in I-829 Petitions

	Number of Cases	Percentage
Job Creation	108	64.67%
Sustaining the Investment	42	25.15%
Redemption	23	13.77%
Pooled Trust	15	8.98%
Miscellaneous	13	7.78%
Business Plan	4	2.40%
Material Change	4	2.40%
No Issue	2	1.20%
TOTAL[18]	167	100.00%

Table 2.0 – Types of Requests: RFEs v. Denials

	Number of Cases	Percentage
RFE	139	83.23%
Denial	28	16.77%
TOTAL	167	100.00%

Table 3.0 Number of I-829 RFES or Denials by Year

	Number of Cases	Percentage
2008	13	7.78%
2009	116	69.46%
2010	34	20.35%
2011	2	1.19%
TOTAL[19]	165	98.80%

[18] Some cases contained multiple issues.
[19] Two cases did not contain a legible date.

Graphs Appendix

Graph 1.0 Trend Tracker Graph