U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, ARTESIA

FROM: Michael Aytes
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DATE: DEC 21 2006

SUBJECT: Delegation of Authority to Service Center Directors to Adjudicate Form I-829, Petition by Entrepreneur to Remove Conditions; Adjudication of Form N-400, Applications for Naturalization when a Form I-829 is Still Pending.

AFM Update: Chapter 25.2: Immigrant Investor (AD06-31 & AD06-04).

1. Purpose

This memorandum revises Chapter 25.2 of the *Adjudicator's Field Manual* (*AFM*) by amending previously published guidance on the adjudication of petitions on Form I-829, Petition by Entrepreneur to Remove the Conditions. This memorandum also supersedes the March 3, 2000 memorandum issued by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations entitled "EB-5 Field Memorandum Number 9: Form I-829 Processing."

This memorandum also delegates to USCIS Service Center Directors the authority to deny a Form I-829 where the Service Center Director determines that the petition is deniable because on its face, and based on evidence supporting the petition, the eligibility requirements for approving the petition have not been met. Currently, this authority resides solely with the USCIS District Directors.

Additionally, this memorandum provides guidance regarding the adjudication of the Form N-

400, Application for Naturalization, filed by a conditional resident (CR) who has a pending Form I-829.

This guidance is effective immediately. This amended *AFM* Chapter will be included in the next I-LINK release.

2. Contact Information

Questions regarding this memorandum and USCIS policy regarding EB-5 adjudication may be directed through appropriate supervisory channels to the Foreign Trader, Investor and Regional Center Program (FTIRCP), HQSCOPS.

3. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of Form I-829s and Form N-400s, Applications for Naturalization when a Form I-829 is pending adjudication. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

4. AFM Update

Accordingly, AFM Chapter 25.2 is revised in its entirety to read as follows:

25.2 Entrepreneurs

(a) Commitment to Trained and Experienced Officers. All USCIS offices must ensure that only officers who have been specially trained and certified by USCIS Headquarters EB-5 program management adjudicate EB-5 immigrant investor casework. In addition, all such offices must ensure that the officers adjudicating petitions on Form I-829 have received training in the Marriage Fraud Amendment System (MFAS).

Service center directors in Texas and California, regional directors and field office directors in offices with a high volume of Form I-829s shall designate an EB-5 trained and certified officer as an EB-5 point of contact (POC) to facilitate the review and management of Form I-829. For purposes of clarity in these instructions, references to service center management and field office management includes the appropriate EB-5 POC.

(b) Filing the Form I-829. These instructions provide procedures consistent with those provided for the adjudication of Form I-751, Petition to Remove Conditions on

Residence (for alien spouse) where possible. Under 8 CFR 216.6(a), immigrant investors in conditional resident status must file a Form I-829 at the appropriate service center within 90 days prior to the second anniversary of their admission to the United States as a conditional permanent resident.[1] Officers are reminded that, in accordance with the Notice in the Federal Register at 63 FR. 67135, published on, and in effect since, December 4, 1998, Form I-829 petitions are to be filed as followed:

> (1) The Texas Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously within the jurisdiction of the Vermont and Texas Service Centers, or
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> (2) The California Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously within the jurisdiction of the Nebraska and California Service Centers.

See paragraph (i)(1)(A) and (i)(2) below for procedures when a Form I-829 has not been timely filed.

(c) Receipt of Form I-829. Parallel to the procedures for processing Form I-751, Petition to Remove Conditions on Residence, upon receipt of Form I-829, the service center director shall issue the conditional resident a fee receipt notice on Form I-797 that includes the following paragraph:

> Your Permanent Resident Card (Form I-551), also known as a "green card," is extended one (1) year – employment and travel is authorized during this extension. Processing your petition for removal of conditions will require a minimum of one hundred and twenty (120) days. Thirty (30) days before the expiration of this extension, if you have not been notified by USCIS of a decision on your petition, please contact the field office nearest to where you are living for further documentation for employment and/or travel purposes.

(d) Notice. A receipt notice and any written notice of any decision, request for evidence (RFE) or interview appointment should be provided to the conditional resident if he or she is not represented. However, for other than receipt notices, if the conditional resident is represented as evidenced by a signed G-28, the notice should be sent to the attorney or representative of record and, in the case of a denial or termination of conditional resident status, to the conditional resident as well. Any transfer notice should state that as necessary the conditional resident may take his or her receipt notice to the nearest field office and receive evidence of status in

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[1] The instructions in this memorandum and AFM section update also apply to processing I-829s for spouses and dependent children pursuant to 8 CFR 216.6(a)(1) and (6) (i.e. derivatives, who subsequent to obtaining conditional resident status are: (1) children who are married, (2) former spouses who are divorced from the principal, and (3) widow or widowers of the principal alien investor).

accordance with procedures set forth in paragraph (k) below.

(e) Adjudication by a Service Center. With respect to a properly filed Form I-829, a service center may approve the petition or issue an RFE. Service center directors also have now been delegated the authority to deny[2] a Form I-829 if the eligibility requirements under section 216A and 8 CFR 216.6(c) have not been met or refer it to a field office for adjudication. There is no appeal of a denial of a Form I-829; however, a conditional resident may seek review of the decision in removal proceedings. 8 CFR 216.6(d)(2).

(1) Initial Review. The service center must initially review the petition in order to determine which course to take. The petition must be adjudicated with the A-file and normal procedures are to be followed for requesting the A-file (see paragraph (f) for procedures in the event of delay in receipt of a requested A-file). In addition, the service center is to follow normal procedures for consultation and referral to operational and investigative units such as the Office of Fraud Detection & National Security (FDNS) if the facts of the case warrant it and where appropriate. If necessary, such units may coordinate the referral of a Form I-829 to the Department of Treasury's Financial Crimes Enforcement Network (FINCEN) with a request for appropriate research.

(2) Request for Evidence. The service center may also issue an RFE based on a determination by the service center that in order to adjudicate the petition, the conditional resident must provide either: (A) required initial evidence and/or (B) additional evidence needed by the Service to assess whether the alien has met the requirements for removal of conditions. In the case of a request for additional evidence, service centers also may request that a conditional resident respond to questions related to the information on the petition and/or to documentation

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[2] Section 216A(d)(3) of the Act provides USCIS with authority to waive the deadline for an interview or the interview itself, if that is appropriate. Accordingly, an interview is not required to either approve or deny the petition. Under current regulations, both service center and district directors have authority in appropriate cases to waive the interview and adjudicate the petition. However, in the past, a service center director only had authority to waive an interview if the petition was approvable. A service center director could not waive the interview if the petition appeared to be deniable. With the issuance of this AFM Update, the authority to waive the interview and deny the Form I-829 has been delegated to Service Center Directors. Service Center Directors may waive the interview and deny the petition if they determine that, upon review of the petition supporting evidence, the conditional resident has not met the eligibility requirements for removal of the conditions.

NOTE: The guidance provided in this AFM Update does not pertain to the denial of Form I-829s for those aliens who may qualify for benefits based on the provisions of the 21st Century Department of Justice Appropriations Authorization Act of 2001, Public Law 107-273, 116 Stat. 1757 (Nov. 2, 2002). Until such time as regulations are promulgated implementing the procedures regarding the denial of Form I-829s affected by Public Law 107-273, such cases will be not be denied by service center or field office directors.

previously submitted in support of the petition. In such a case, any questions posed must be stated with specificity. Under 8 CFR 103.2(b)(8), a conditional resident is to be provided a specified period of time to respond to an RFE. Upon receipt of the conditional resident's response to the RFE, the service center must either approve or deny the petition, or refer the Form I-829 to the field office.

(3) Derogatory Information. In accordance with 8 CFR 216.6(c)(2), if the review of the petition, or the interview itself, reveals derogatory information concerning the requirements for removal of conditions, the service center shall provide the conditional resident with the opportunity to rebut such information pursuant to paragraph (h) of this instruction.

(4) Approval. The service center may approve a Form I-829 if USCIS is satisfied that the conditional resident has met all the requirements for the removal of the conditions as specified under Section 216A of the Act and 8 CFR 216.6(c)(1), namely that:

(i) a commercial enterprise was established by the conditional resident;

(ii) the conditional resident invested or was actively in the process of investing the requisite capital;

(iii) the conditional resident sustained the establishment and investment activities throughout the relevant period of his or her residence in the United States (i.e., the conditional resident, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence); and

(iv) the conditional resident created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees. (**Note**: in the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the conditional resident must establish that he or she maintained the number of existing employees at no less than the pre-investment for the previous two years.)

In addition, pursuant to section 216A(c)(3) of the Act, USCIS must also determine that the facts and information contained in the petition are true.

(5) Action upon Approval. If the petition is approved, the service center will remove the conditions on the conditional resident's status as of the second anniversary of his or her admission as a conditional permanent resident. 8 CFR 216.6(d). If biometrics have not already been collected at an Application Support Center (ASC),

the conditional resident must be notified to report for processing of a new permanent resident card (Form I-551). Normal procedures should be followed for entering the decision into MFAS and for card production.

(6) Denial. The service center may deny a petition if the initial review of the petition or review of a response to a request for initial and/or additional evidence reveals that the requirements for removal of conditions, as prescribed under Section 216A of the Act and the regulation at 8 CFR 216.6(c)(1), have not been met and the service center adjudicator determines that the case can be denied without an interview.

(i) Grounds for Denial. USCIS may deny a Form I-829 on the following grounds:

(A) Denial Due to Alien's Failure to Meet the Statutory and Regulatory Requirements as a Factual Matter. USCIS lacks authority to grant a Form I-829 if the petition does not meet the statutory and regulatory requirements. If the service center director determines that the conditional resident has not established eligibility to have the conditions removed under the statute and regulations, the petition must be denied.

(B) Denial due to fraud or other criminal grounds. When it is determined that a petition may be deniable for fraud or other criminal grounds, the Form I-829 must first be referred to the FDNS POC in the service center in accordance with the Fraud Detection Standard Operating Procedures. The processing site may also coordinate the referral of a Form I-829 to FINCEN with a request for appropriate research. USCIS shall not make a final decision on the petition until a report of the results of the referral or investigation is obtained. In most instances, if the decision to deny the petition is based on derogatory information considered by the service center of which the petitioner is unaware, he or she shall be advised of this fact and offered an opportunity to rebut the information and present evidence in his or her own behalf prior to a final decision being rendered by USCIS. (See with 8 CFR 103.2(b)(16)(i))

(ii) Action upon Denial. The service center director shall provide written notice in accordance with 8 CFR 216.6(d)(2) if the petition is denied and shall follow established procedures for the issuance of an NTA to initiate removal proceedings. No appeal shall lie from this decision. The conditional resident may seek review of the decision to deny the petition in removal proceedings. In issuing this denial notice, the service center director shall:

(A) Advise the conditional resident of the specific reasons for the denial and that:

(1) the conditional resident's status, and that of his or her spouse or children, is terminated as of the date of the decision;

(2) the conditional resident must surrender to the field office any permanent resident card, Form I-551, previously issued by legacy INS or USCIS; and

(3) there is no appeal from the decision, although the conditional resident may seek review of the decision in removal proceedings;

(B) Follow established procedures for the issuance of an NTA to initiate removal proceedings.

(C) Enter the denial information into MFAS.

(D) Ensure that the A-file includes all relevant documents and is forwarded to the appropriate office.

(7) Referral to Field Office. The service center director may refer a Form I-829 to a field office if he or she determines that referral is appropriate and that an interview is necessary to adjudicate the petition and render a decision in the case. When transferring a Form I-829 to a field office, the service center should indicate the basis for referral in a memorandum to the field office. In that memorandum, the service center also may specifically recommend that an interview be conducted as part of the field office's review and adjudication. Such a recommendation must: (i) be clearly identified in the memorandum, (ii) detail the reasons for the interview recommendation, and (iii) include specifics as to questions the service center recommends the field office ask the conditional resident during the interview. After coordination with the regional EB-5 POC, service centers shall transfer the referred cases to the assigned field office by express mail, flagging it in red marker "**to the attention of the EB-5 POC**." The service center must record the referral of the case in MFAS in accordance with routine procedures and update the Central Index System (CIS) accordingly.

(f) Regional Office Coordination. Each regional director shall designate an officer in their regional office to coordinate the management of Form I-829s within each region's jurisdiction. The responsibilities of the regional EB-5 POCs include:

(1) Determining appropriate field offices to receive Form I-829s;
(2) Coordinating referral procedures;
(3) Ensuring that Form I-829s referred to field offices are adjudicated by EB-5 trained and certified field office adjudicators;
(4) Facilitating the return of petitions to service centers as appropriate; and

(5) Keeping track of Form I-829 processing and cases within the jurisdiction of the region.

The regional EB-5 POC is also responsible for assisting when a requested A-file has not been received within the appropriate period of time and for requesting A-files according to established procedures.

The regional EB-5 POC shall keep a list of field offices with trained EB-5 adjudicators, and shall coordinate service center referrals of Form I-829s to the field offices. The regional EB-5 POCs shall direct the referral in accordance with the availability of trained EB-5 adjudicators at the appropriate field office, and may direct the referral of a Form I-829 to another office as necessary or to coordinate the detail of trained EB-5 adjudicators as required.

In a specific case, field management may determine and recommend to the regional EB-5 POC that, due to the limited availability of EB-5 trained adjudicators in a particular area, the field office director should delegate his or her authority to another field office director to complete the interview and adjudication of the case. Such delegation of authority must be clear and in writing. In such cases, the regional EB-5 POC is responsible for ensuring that a written delegation of authority from the field office director with jurisdiction is transmitted by fax, mail, or e-mail (with hard-copy of e-mail placed in the file) to the field office director under whose authority the interview and adjudication will be performed.

(g) Adjudication by a Field Office. With respect to a properly filed Form I-829, a field office may approve the petition, issue a request for further evidence, conduct an interview, or deny the petition[3] if the petition is deniable because the eligibility requirements have not been met. A field office may also refer a Form I-829 back to the appropriate service center for processing if the case has not been previously reviewed by a trained and certified service center EB-5 adjudicator.

(1) Procedures for a Form I-829 Not Referred According to Instructions. Field offices that receive Form I-829s transmitted in a manner that is NOT consistent with the procedures outlined herein should return those files to the service center, with the A-file, marked to the attention of the service center EB-5 POC and, in red, "Form I-829 return". The field office must update CIS accordingly.

All such Form I-829s shall be returned to the service centers as follows:

(A) to the Texas Service Center, if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Vermont and Texas Service Centers; or

[3]Field offices may not deny Form I-829s that are covered by Pub. L. 107-273. *See* footnote 1 *supra*.

(B) to the California Service Center, if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Nebraska and California Service Centers.

Field offices receiving a Form I-829 that does not contain the recommendation required under paragraph (e)(7) should return the I-829 to the sending service center. Upon receipt of a returned file, the service centers are instructed to prepare and transmit the file with the required recommendation directly to the field office while simultaneously notifying the regional office EB-5 POC of the file transfer in accordance with these instructions.

When a Form I-829 file is returned to the service center, the field office must notify the conditional resident or representative pursuant to section (1) of this paragraph. The notice of file transfer should state that as necessary, the conditional resident may take the receipt notice to the nearest field office and receive evidence of status in accordance with the procedures set forth in paragraph (k).

(2) Initial Review. Field offices may approve or deny the petition with or without an interview. A field office director, or his or her delegate, must initially review the petition in order to determine whether or not an interview will be conducted. In adjudicating the petition, the field office may accept or reject the service center director's recommendation for interview and/or for suggested questions to ask the conditional resident during the interview to establish eligibility when the district director determines upon review of the record that the petition is approvable.

Pursuant to 8 CFR 216.6(b)(1), a field office may waive the interview on the Form I-829 and adjudicate the case. If the interview is waived, the petition must be annotated and MFAS updated in accordance with routine procedures. The field office director may also schedule the applicant for an interview, within 90 days of the date on which the petition was properly filed. 8 CFR 216.6(b)(2).

Instead of proceeding to approve or deny a case based on a determination that an interview is not essential to the adjudication and thus should be waived, a field office director may return a Form I-829 to a service center for adjudication if the initial review reveals that: (1) the case was not reviewed by a trained and certified service center EB-5 adjudicator; (2) an interview is not necessary; or (3) the petition is deniable because the eligibility requirements for approving the petition have not been met. All such returns must be made in coordination with the appropriate regional EB-5 POC. When a Form I-829 file is returned to the service center, the field office must manually send the petitioner, or the attorney or representative of record if the petitioner is represented, a notice of the file transfer.

(3) Interview. If an interview is necessary to approve or deny the petition, the field office director will notify the conditional resident of the location and date of the scheduled interview. The interviewing officer shall create a record of the interview, placing a memorandum in the file that responds to the issues raised in the service center director's referral memorandum as well as sets forth any new or additional information or issues arising from the interview. The officer who conducts the interview shall render a final adjudication of the Form I-829 and recommend a decision to the field office director. If a conditional resident fails to appear for an interview, the alien's permanent resident status shall be terminated automatically in accordance with the procedures outlined at 8 CFR 216.6(b)(3).

(4) Request for Evidence. A field office may issue a request for initial evidence or additional evidence (RFE). An RFE must be based on a determination that initial evidence, additional evidence or explanations are necessary to the adjudication of the petition. Any questions posed must be stated with specificity. If the questions cannot be answered in writing, the petition must be referred for an interview. An RFE is not required if there is evidence of ineligibility in the record and the petition is clearly deniable. 8 CFR 103.2(b)(8). If the conditional resident was issued an RFE for initial evidence by the field office and failed to respond to the request, the petition will be considered abandoned and denied in accordance with 8 CFR 103.2(b)(13). Under 8 CFR 103.2(b)(8), field offices should provide the conditional resident the specified period of time for response to an RFE.

(5) Derogatory Information. In accordance with 8 CFR 216.6(c)(2), if the review of the petition, or the interview itself, reveals derogatory information concerning the requirements for removal of conditions, the field office shall provide the conditional resident with the opportunity to rebut such information. See paragraph (h) below.

(6) Approval. A field office director may approve a Form I-829 if satisfied that the conditional resident has met all the requirements for the removal of the conditions as specified under Section 216A of the Act and 8 CFR 216.6(c)(1), namely that:

(i) a commercial enterprise was established by the conditional resident;

(ii) the conditional resident invested or was actively in the process of investing the requisite capital;

(iii) the conditional resident sustained the establishment and investment activities throughout the relevant period of his or her residence in the United States (i.e., the conditional resident, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence); and

(iv) the conditional resident created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees. (**Note**: in the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the conditional resident must establish that he or she maintained the number of existing employees at no less than the pre-investment for the previous two years.)

In addition, pursuant to section 216A(c)(3) of the Act, the field office director must also determine that the facts and information contained in the petition are true.

(7) Action upon Approval. If the petition is approved, the field office will remove the conditions on the conditional resident's status as of the second anniversary of the alien entrepreneur's admission as a conditional permanent resident. If the conditional resident's biometrics have not already been collected at an ASC, the conditional resident must be notified to report for processing of a new permanent resident card. The field office shall ensure that the file, including all relevant documents, is returned to the appropriate service center director. Normal procedures should be followed for entering the decision into MFAS and for card production.

(8) Denial. A field office director may deny a petition if the initial review of the petition, the information obtained during the interview, or review of a response to a request for initial and/or additional evidence reveals that the requirements for removal of conditions, as prescribed under Section 216A of the Act and the regulation at 8 CFR 216.6(c)(1), have not been met. The decision to deny a petition will be issued and signed by the appropriate district office director or his or her designee in accordance with standard field office practice.

(i) Grounds for Denial. USCIS may deny a Form I-829 on the following grounds:

(A) Denial Due to Alien's Failure to Meet the Statutory and Regulatory Requirements as a Factual Matter. USCIS lacks authority to grant a Form I-829 if the petition does not meet the statutory and regulatory requirements. If the field office director determines that the conditional resident has not established eligibility to have the conditions removed under the statute and regulations, the petition must be denied.

(B) Denial due to fraud or other criminal grounds. When it is determined that a petition may be deniable for fraud or other criminal grounds, the Form I-829 must first be referred to the FDNS POC in the field office in accordance with the Fraud Detection Standard Operating Procedures. The processing site may also coordinate the referral of a Form I-829 to

FINCEN with a request for appropriate research. USCIS shall not make a final decision on the petition until a report of the results of the referral or investigation is obtained. In most instances, if the decision to deny the petition is based on derogatory information considered by the field office director of which the petitioner is unaware, he or she shall be advised of this fact and offered an opportunity to rebut the information and present evidence in his or her own behalf prior to a final decision being rendered by USCIS. (See with 8 CFR 103.2(b)(16)(i))

(ii) Action upon Denial. The field office director shall provide written notice in accordance with 8 CFR 216.6(d)(2) if the petition is denied and shall follow established procedures for the issuance of an NTA to initiate removal proceedings. No appeal shall lie from this decision. The conditional resident may seek review of the decision to deny the petition in removal proceedings. In issuing this denial notice, the field office director shall:

(A) Advise the conditional resident of the specific reasons for the denial and that:

(1) the conditional resident's status, and that of his or her spouse or children, is terminated as of the date of the decision and, in the case of a conditional resident that is not represented;

(2) the conditional resident must surrender to the field office any permanent resident card, Form I-551, previously issued by legacy INS or USCIS; and

(3) there is no appeal from the decision, although the conditional resident may seek review of the decision in removal proceedings;

(B) Follow established procedures for the issuance of an NTA to initiate removal proceedings;

(C) Enter the denial information into MFAS.

(D) Ensure that the A-file includes all relevant documents and is forwarded to the appropriate office.

(h) Derogatory Information. If, in accordance with 8 CFR 216.6(c)(2), derogatory information is revealed during the adjudication of the Form I-829, USCIS shall provide the conditional resident with an opportunity to rebut such information through issuance of an RFE or a Notice of Intent to Deny (NOID). The field office shall issue a Form I-72, Form Letter for Returning Deficient Applications/Petitions or the service center shall

issue a Form I-797 notice, with a short explanation of the derogatory information, requesting that the conditional resident respond to the derogatory information and other issued identified in the RFE or NOID noting the date the response is due. Derogatory information should be limited to information that the alien has not previously had an opportunity to address and the opportunity to rebut should not reopen the entire case. The opportunity to rebut shall also be provided if it is determined that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs).

Depending on the response to a Form I-72, Form I-797 or NOID, a conditional resident may or may not be able to overcome the derogatory information.

Example 1:

An interview may reveal that a conditional resident has created positions for only seven full-time employees. If, in rebuttal, the conditional resident (CR) states that he or she intends to create three additional positions at an indefinite time in the future, the CR has not met the requirements of the regulations and the petition should be denied. If, in rebuttal, the CR provides credible evidence that demonstrates recruitment for the three remaining full-time positions, that the positions are in the process of being posted and actively recruited, and that they clearly will be filled, approval may be considered.

Example 2:

An interview may reveal that while a CR claims to have created positions for ten full-time employees, only nine are actually working. The CR may present rebuttal information by demonstrating that he or she actively recruited the tenth employee, and the tenth employee is expected to be hired and begin employment. USCIS may determine, after considering this information as well as all of the evidence supporting the petition as a whole, that such a petition is approvable.

If the conditional resident fails to overcome the derogatory information or evidence that the investment funds were obtained through other than legal means, USCIS may deny the petition in accordance with 8 CFR 216.6(d), terminate the conditional resident's status, and follow established procedures relating to the issuance of an NTA to initiate removal proceedings.

If derogatory information unrelated to any of the requirements for removal of conditions is identified during the course of an interview or review of the petition (for example, an arrest or criminal conviction or other egregious public safety issue), such information

shall be referred to the Office of Fraud Detection and National Security (FDNS) in accordance with Fraud Detection Standard Operating Procedures for appropriate action. Any action on the petition should be held until FDNS determines whether a referral for investigation should be made to Immigration and Border Enforcement (ICE) or no further action is required based on the information provided.

(i) Termination of Conditional Resident Status.

(1) Grounds for Termination. USCIS may automatically terminate an alien's conditional resident status in the following instances:

(A) Failure to Timely File a Form I-829. Generally, when a conditional resident fails to properly file a Form I-829 within the 90-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence, the alien's status will automatically terminate. USCIS will issue a notice of termination and follow established procedures for the issuance of an NTA to initiate removal proceedings. There is no appeal from an automatic termination on this ground but the alien can seek review of the decision in removal proceedings. See 8 CFR 216.6(a)(5).

(B) Failure to Appear for Interview on a Form I-829. Generally, if a conditional resident fails to appear for interview on a Form I-829, his or her conditional resident status will be automatically terminated as of the second anniversary of the date on which the alien obtained lawful permanent residence. USCIS will issue a notice of termination and follow established procedures for the issuance of an NTA to initiate removal proceedings. The field office director may reschedule or waive the interview requirement if the alien establishes good cause for the failure to appear. See 8 CFR 216.6(b)(3).

(2) Action on Termination for Failure to Timely File. Where it is determined that Form I-829 has not been timely filed, the appropriate service center or field office shall:

(i) Issue a notice which states that the failure to file has resulted in the automatic termination of the alien's status;
(ii) Update the alien's MFAS file to reflect "Automatic Termination" and the notice of automatic termination shall be generated and mailed to the alien's last known address; and
(iii) Follow established procedures for the issuance of an NTA to initiate removal proceedings, ensure that the A-file includes all relevant documents and is forwarded to the appropriate office with jurisdiction over the alien's last known address.

The California Service Center and the Texas Service Center shall each generate weekly a printout from the MFAS to determine those conditional residents within their respective jurisdictions who have failed to file a timely Form I-829 to have the conditions on their status removed in accordance with Section 216A(c) of the Act and will take the actions described above in this section to terminate the status of such conditional residents and their dependents.

(j) Form I-829 Withdrawal Requests. Pursuant to 8 CFR 103.2(b)(6), a petitioner may withdraw a Form I-829 at any time until a decision is issued by USCIS. However, a withdrawal may not be retracted. The petitioner must request the withdrawal of the Form I-829 in writing. The written request may be executed by the petitioner and/or his or her attorney or representative of record. The petitioner's conditional lawful permanent resident status and that of his or her spouse and any children shall be terminated as of the second anniversary of the date on which the alien obtained this status. In such cases, USCIS shall follow established procedures for the issuance of an NTA to initiate removal proceedings.

(k) Extension of Status for Conditional Residents with a Pending or Denied Form I-829. Officers are advised that no extension of status can be given to an alien who has not timely filed a Form I-829, unless USCIS accepts a late petition based upon the alien's showing of good cause in accordance with 8 CFR 216.6(a)(5).

Upon receipt of a properly filed Form I-829, USCIS is authorized by 8 CFR 216.6(a)(1) to extend automatically a conditional resident's status, if necessary, until such time as USCIS has adjudicated the petition. Therefore, if necessary, a field immigration information officer (IIO) in receipt of a request for documentation for travel or employment purposes from a petitioner who requires an extension of status based on a filed Form I-829 shall check the status of the petitioner in MFAS. If the Form I-829 has been denied, the IIO should check DACS to determine if an NTA has been issued and follow established procedures for the issuance of an NTA to initiate removal proceedings.

If the Form I-829 is still pending or has been denied but no final order of removal has been entered, the IIO must collect the expired Permanent Resident Card and follow established procedures for providing a temporary extension of the alien's conditional resident status. Documentation of conditional resident status must be issued until a final order of removal is issued. An order of removal is administratively final if a decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals.

Where the Form I-829 has been denied for failure to properly file a timely Form I-829 or for failure to appear for an interview, the alien's permanent resident status will be automatically terminated. Temporary evidence of permanent resident status as stated

above should only be issued if the conditional resident's status is restored as described in 8 CFR 216.6(a)(5) and (b)(3).

(l) Lawful Permanent Residents Whose Conditions have been Removed. Officers are reminded that, as stated in the field memorandum of June 26, 1998, absent a finding of fraud or other improper acts, USCIS will not initiate rescission proceedings in the cases of aliens who have obtained lawful permanent resident status (without conditions) based on petitions that may have not complied with the statute and regulations, as discussed in the General Counsel's memorandum of December 19, 1997.

(m) Adjudication of Form N-400, Applications for Naturalization when a Form I-829 is Pending with the Service Center or Field Office.

(1) General. The procedures for adjudicating a Form N-400 for a conditional resident (CR) who still has a Form I-829 pending at a service center or field office differ depending on whether the Form I-829 is subject to Pub. L. 107-273 or standard EB-5 procedures under Section 216A of the Act and 8 CFR 216.6. Before taking any final action on a Form N-400, the naturalization adjudicator should confirm whether the case is subject to Pub. L. 107-273 by contacting the Chief Adjudications Officer, Foreign Trader, Investor, and Regional Center Program (FTIRCP), Headquarters for further instructions. The FTIRCP will coordinate any action with the relevant service center or regional office EB-5 POC.

(2) Public Law Cases. Form I-829s filed by conditional residents are subject to Pub. L. 107-273 if the Form I-526 was approved after January 1, 1995 and prior to August 31, 1998, and the Form I-829 was timely filed prior to November 2, 2002. Even if the Form I-829 was denied before November 2, 2002, the Form I-829 falls under the Pub. L. provisions if a motion to reopen was filed before January 2, 2003. Section 11033 of Pub. L. 107-273 states that USCIS cannot deny any of these applications until implementing regulations have been published. As a result, these cases generally must remain pending until the regulations are published and USCIS commences its review of them pursuant to such regulations.

(3) Identifying EB-5 Cases Prior to Adjudication of the Form N-400. Generally, EB-5 CRs will have one of the following EB-5 classification codes: N51-N58, T51-T53, T56-T58, I51-I53, I56-I58, C51-C53, C56-C58, R51-R53, or R56-R58.

If a CR has a status in the "N" series, the service center or field office adjudicator should first check the U.S. Department of Justice Executive Office for Immigration Review (EOIR) system to see if the person has been ordered removed by the IJ and then follow the March 3, 2000 EB-5 Field Memo Number 9: Form I-829 Processing and the January 18, 2005 Memo on Extension of Status for Conditional Residents

with Pending or Denied Form I-829s Subject to Public Law 107-273.

The E51- E58 classification codes are given only once the conditions are removed. If an adjudicator checks the Central Index System (CIS) history and only sees an E51-E58 classification without the alien previously having a conditional classification (i.e. C51-C58, T51-T58, I51-I58, R51-R58), the adjudicator should then check the A-file to determine if there was a classification error at the time of admission or adjustment or if the error was in updating CIS. This issue must be resolved before moving forward on the adjudication of the N-400.

(4) Eligibility to File for Naturalization While a Form I-829 is Pending. A conditional resident who has timely filed a Form I-829 may submit a Form N-400 prior to the adjudication of the I-829. Section 216A(e) and the regulations at 8 CFR 216.1 allow a conditional resident to apply for naturalization and the conditional resident may file a Form N-400 whether or not the Form I-829 filed by the CR has been adjudicated.

(5) Scheduling of the Naturalization Interviews for EB-5 Cases.

(A) Non-Public Law Cases. Field offices or service centers may schedule for interview Form N-400s for non-Public Law cases as provided in subparagraph 6(ii)(C) below.

(B) Public Law Cases. Except as provided in subparagraph 6(i) below, field offices or service centers will not schedule for interview any Public Law cases where a Form N-400 has been filed and the Form I-829 is still pending. If a case has already been scheduled for interview, but the applicant has not yet appeared, the field office or service center with the Form N-400 should de-schedule the interview. The California Service Center (CSC) also will de-schedule in Claims 4 the examination of any naturalization applicant who has not had his or her conditional resident status removed and whose Form I-829 is subject to Pub. L. 107-273. Field offices or other service centers should forward any such Form N-400s to the California Service Center to the EB-5 POC for consolidation with the A-file containing the Form I-829. USCIS will not permit a Pub. L. 107-273 case with a pending Form N-400 to proceed to initial interview (even after all required background checks have been completed) until the conditions have been removed.

(6) Adjudicating the Form N-400 if the Form I-829 is Pending. For Form N-400s that are pending adjudication prior to the effective date of this memorandum, service centers and field offices should ascertain the current status of the Form I-829 prior to proceeding with a final adjudication of the N-400.

NOTE: An N-400 shall not be approved under any circumstances prior to the adjudication of a pending Form I-829 and the removal of conditions on the CR's status, unless the applicant has obtained lawful permanent resident status (LPR) through another avenue or is eligible to naturalize based on military service under section 329 of the Act.

(i) N-400 filed with a pending I-829 where the applicant has since obtained LPR status on other grounds (applies to all EB-5 cases, including Pub. L. 107-273 cases). An alien who is already a CR cannot seek to obtain LPR status, based on other grounds, through filing of an application for adjustment of status while in the United States. Section 245(d) of the Act; 8 CFR 245.1(c)(5). However, if the alien's CR status is properly terminated prior to filing of a subsequent application for adjustment of status, USCIS may, in its discretion, adjust the alien to LPR status again, if the alien remains admissible, has an immigrant visa immediately available, and favorable exercise of discretion to adjust is warranted. If the alien's CR status has not been terminated or rescinded, the alien may only obtain LPR status again via consular processing and admission to the United States on a new immigrant visa.

A CR is eligible for naturalization and may be interviewed, notwithstanding a currently pending I-829, if he or she visa processed abroad and reentered on a new immigrant visa, or subsequently adjusted status on other grounds (e.g., marriage to a U.S. citizen) after termination of the original CR status. The naturalization adjudicator should refer the pending Form I-829 to their supervisor for further instructions on how to close out the original Form I-829 and document that the CR status on which it was based was either terminated, rescinded, or superseded by a subsequent admission on an immigrant visa.

(ii) N-400 filed with a pending Form I-829 where the applicant has not obtained LPR status on other grounds.

(A) Public Law Cases Where Form N-400 Interview has Already Occurred. If prior to the effective date of this AFM update, an applicant has appeared for examination on his or her Form N-400 but is still a CR, the field adjudicator must ensure that the Form I-829 is adjudicated prior to a final decision on the Form N-400. If the Form I-829 cannot be approved and, because the Form I-829 is subject to Pub. L. 107-273, also cannot be denied, the Form N-400 may still be denied under Section 318 of the Act (along with any other applicable ground that may be the basis for a finding of ineligibility for naturalization), when review of the A-file by a fully trained EB-5 adjudicator reveals that the applicant did not properly obtain EB-5 status or that the Form I-829 would not be approvable due to the applicant's failure to comply with the EB-5 requirements. A report of the analyses and findings made by the EB-5

service center adjudicator who reviewed the entire case file will be forwarded to the field office adjudicator to support the Form N-400 denial.

(B) Sample Denial Language for Applications Subject to Pub. L. 107-273. When the field adjudicator determines that the Form N-400 must be denied, the field adjudicator may use the following language to address the issue of ineligibility under section 318 of the Act.

* * * *

Except as otherwise specifically provided, no person shall be naturalized unless he or she has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Immigration and Nationality Act (INA). See INA § 318. The term "lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed". INA § 101(a)(20).

A person may only be naturalized if he or she was granted resident status in accordance with the immigration laws, and not if status was obtained by mistake, fraud, or otherwise not in compliance with the law. Matter of Koloamatangi, 23 I & N Dec 548, 550 (2003) (holding that "the term 'lawfully admitted for permanent residence' did not apply to aliens who had obtained their permanent residence by fraud, or had otherwise not been entitled to it"); see also, Arellano-Garcia v. Gonzales, 429 F.3d 1183 (8th Cir. 2005) (holding that an alien who received permanent residency status by a mistake could not be considered an alien "lawfully admitted for permanent residence"); Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir. 1973) (same).

You were accorded conditional resident status pursuant to the Employment Creation immigrant visa category under INA § 203(b)(5). To qualify under this immigrant visa category, an alien must invest $1,000,000 (or $500,000 in certain targeted areas) of lawfully obtained capital such as cash, inventory or other tangible property. In addition, the alien's investment must create at least ten full-time jobs for United States citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. A review of your file reflects that you did not make the required investment and/or create the required number of full-time jobs. Thus, your admission to the United States was not in accordance with all applicable provisions of the INA and you are therefore ineligible for naturalization.

* * * *

The language suggested above should be modified to address the specific circumstances in each case (for example, to account for N-400 applicants who were EB-5 derivatives).

(C) Applications not subject to Pub. L. 107-273. The field adjudicator may conduct the naturalization examination, but must immediately contact the service center with jurisdiction over the Form I-829 before taking any final action.

Only officers fully trained and certified in EB-5 law, procedures, and the relevant precedent decisions may adjudicate Form I-829s. As a result, the field adjudicator conducting the naturalization examination shall not attempt to adjudicate the Form I-829, but instead must contact the appropriate service center or regional office EB-5 POC to obtain adjudication of the Form I-829 before proceeding with a determination on the N-400.

Once the Form I-829 is adjudicated, including the appropriate update in MFAS, the field adjudicator may proceed with the adjudication of the Form N-400. If the service center approves the Form I-829, the service center will update MFAS. If the Form I-829 is approved, the Form N-400 may be granted if the applicant is otherwise eligible for naturalization.

If the Form I-829 is denied, the Form N-400 must be denied based on Section 318 of the Act because the applicant no longer has the required lawful permanent resident status.

Because 8 CFR 336.1(a) requires that "the Service shall serve a written notice of denial upon an applicant for naturalization no later than 120 days after the date of the applicant's first examination on the application...", it is imperative that the service center or field office with jurisdiction over the Form I-829 adjudicate it expeditiously so that if the Form I-829 is denied, denial of the Form N-400 can occur within the 120-day timeframe.

5. AFM Transmittal Memoranda

The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD 06-31 & AD06-04 [INSERT	Chapter 25.2	Updates guidance on the adjudication of Form I-829s for the removal of conditions for

SIGNATURE DATE]		conditional permanent residents under the immigrant investor visa categories and for N-400s filed by EB-5 conditional residents with pending Form I-829s.

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection