Out With The Old, In With The *Distinguished*

AAO Reform and I-924 Appellate Review Considerations

Introduction:

The Board of Immigration Appeals (BIA) and various federal courts have set precedents and later discarded, revised, narrowed or otherwise distinguished the holdings in certain lines of cases along a similar and often evolving topic. This is nothing new, it has happened since the common law began. It is how the common law came to be. Although we in the United States rely primarily on statutory law, certain common law principles remain in our legal system, at least the few that have survived since 1789. The judicial branch adheres quite rigidly to the principle of "*stare decisis"* which is Latin for "to stand by that which is decided." It is the principal that the precedent decisions[1] are to be followed until such time that they are overturned either by the court that set it or a higher authority.

Background:

In the U.S. Constitution, the Congress has the highest authority over matters of immigration and naturalization[2]. Congress has over the years codified decisions of the courts and the administrative agencies and has also nullified prior statutes, administrative branch regulations, and both judicial and administrative precedents by new legislation. The new legislation then becomes amenable to interpretation by the executive branch agency that is empowered to enforce it and the courts who can review the executive interpretations or the underlying constitutionality of the statutes. It's a wonder that anyone can keep track of what the law actually is at any given moment, let alone make a career out of it. Oh, that's right, merely trying to keep track of it, is itself, the career and that keeps things interesting.

Administrative agencies with adjudicative authority have statutes and regulations as well as both judicial and administrative precedents to deal with, collectively "rules". The IRAC method is employed in most, if not all, agency or judicial adjudicative decisions. IRAC stands for: Issue, Rule, Analysis and Conclusion. That is the method by which the controlling law is applied to the facts of the case to reach a decision on the matter at hand. Decisions of Appellate Bodies may be case specific, of limited scope and thereby "unpublished" and non-precedent or if of particular use in clarifying an issue of first impression or novelty or complexity, they may become "published" as binding "precedent" to guide the decisions in future similar cases. So then certain holdings of particular adjudicative decision become rules themselves.

[1] See 8 CFR § 103.3(c) on page 4 of this document.
[2] The U.S. Supreme Court begrudgingly acknowledges that the Executive Branch shares almost equally this authority as the enforcer of the laws.

Under the Administrative Procedures Act (APA) the executive agencies of which United States Citizenship and Immigration Services (USCIS) is one, rules are made by various means. There is the formal "rule making" through notice in the Federal Register with comment and revisions as needed. There may be a very specific "order" issued through "adjudication" as a result of an "agency proceeding". Particular orders may become precedents on a topic. The BIA had been the highest administrative appellate body over matters involving immigration law. As an arm of Executive Office of Immigration Review (EOIR) which is under the Attorney General (AG), the BIA appears to remain the generally accepted final arbiter of immigration law interpretation for most such matters within the executive branch of government. The BIA used to be a part of the Immigration and Naturalization Service (INS) within the Department of Justice (DOJ) then was spun off into the EOIR also within DOJ, the INS also had the Administrative Appeals Unit (AAU) (later the Administrative Appeals Office (AAO)).

Following the creation of the Department of Homeland Security (DHS), there was a shift in authority and the AAO became part of USCIS within DHS while the BIA within EOIR remained a part of DOJ. Now the AAO, *through consultation with* the BIA and AG can have its precedents published in the I&N Decisions, officially known as the "*Administrative Decisions Under Immigration and Nationality Laws of the United States*." The publication of those decisions is controlled by the Attorney General via EOIR and the BIA. DHS via the USCIS' AAO can contribute to those decisions. The AAO has just recently published two precedents[3] as of October 20, 2010, but had not contributed anything since 1998, when it issued four precedents[4] all on the controversial EB-5 Immigrant Investor Program in the context of immigrant petitions for those visas amid a hailstorm of litigation.

Relevant Sections of the APA:

5 USC § 551. Definitions

For the purpose of this subchapter--

(4) ``**rule**'' means the **whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency** and includes the *approval or prescription for the future* of rates, wages, *corporate or financial structures or reorganizations thereof*, prices, facilities, appliances, *services or allowances therefor* or of valuations, costs, or *accounting, or practices bearing on any of the foregoing*;

[3] http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf and http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf

[4] In 1998, the AAO (attributed to The Associate Commissioner, Examinations) through the BIA, issued four EB-5 Precedent Decisions, but they are for the Immigrant Investors, Not Regional Centers.
Matter of Ho http://www.justice.gov/eoir/vll/intdec/vol22/3362.pdf
Matter of Hsuing http://www.justice.gov/eoir/vll/intdec/vol22/3361.pdf
Matter of Izummi http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf For the I-924, the most pertinent part of the 15 part holding is number "(9) The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits." However, the AAO inappropriately applies number "(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements."
Matter of Soffici http://www.justice.gov/eoir/vll/intdec/vol22/3359.pdf

(6) ``**order''** means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter **other than rule making** but ***including licensing***;

(12) ``**agency proceeding**" means an agency process as defined by paragraphs (**5**), (**7**), and (**9**) of this section;

(**5**) ``**rule making''** means agency process for formulating, amending, or repealing a rule;

(**7**) ``**adjudication''** means agency process for the formulation of an order;

(8) ``**license''** includes the whole or a part of an *agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission*;

(**9**) ``**licensing**[5]**"** includes *agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, **limitation**, amendment, modification, or **conditioning** of a license*;

(10) ``**sanction''** includes the whole or a part of an agency--

(F) requirement, revocation, or suspension of a **license**; or

(11) ``**relief''** includes the whole or a part of an agency--

(A) **grant of** money, assistance, **license**, **authority**, exemption, **exception**, **privilege**, or remedy;

(B) **recognition of a** claim, **right**, immunity, **privilege**, exemption, or **exception**; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

Can the USCIS Designation as a Regional Center under the Immigrant Investor Pilot Program[6] be considered licensing? USCIS can bestow[7] this designation and USCIS can take it away[8]. The Regional Center Application is not a "visa petition[9]", it is not "work authorization[10]", it is not a "travel authorization or document[11]" it is does not change the applicant's legal immigration[12] or nationality[13] status within the United States. What does it entail?

Once the applicant is recognized as a Regional Center, it can make specific assertions to individual alien investors that can affect the alien investors' immigration status and helps them obtain **rights** and **privileges** by taking advantage of **exceptions** and **exemptions** not afforded to others who are not **affiliated with a Regional Center**. The Regional Centers therefore, are in a sense, **licensed** by USCIS to advertise those exceptions and exemption **within limits and conditions** set by USCIS in accordance with the governing statute and regulations. USCIS reviews, possibly modifies or causes the modification of, then approves particular overall business plans and job creation and economic impact prediction methodologies to be used to support future individual immigrant visa petitions.

[5] Does designation as a Regional Center constitute licensing?
[6] See Pub. L. 102-395, title VI, § 610, Oct. 6, 1992, as amended. Codifies at 8 USC § 1153 Note.
[7] See 8 CFR § 204.6(m)(3) and (5).
[8] See 8 CFR § 204.6(m)(6).
[9] See INA §§ 201, 203, 204, and 205.
[10] See 8 CFR 274a.
[11] See INA § 223.
[12] See generally, INA §§ 207, 201, 245, 249, etc…
[13] See generally, INA §§ 310, 316, 319, 322, 341 etc…

5 USC § 557 Initial decisions; conclusiveness; *review by agency*; submissions by parties; contents of decisions; record

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or
(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--
(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 USC § 554 Adjudications.

(e) The **agency**, with like effect as in the case of other orders, and in its sound discretion, **may issue a *declaratory order* to terminate a controversy or remove uncertainty**.

USCIS has a specific regulatory provision similar to this section of the APA.

8 CFR § 103.3 Denials, appeals, and precedent decisions.

> (c) *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in §1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). **Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act.** Precedent decisions must be published and made available to the public as described in §103.9(a) of this part.

The remainder of this discussion will examine the interplay between the various existing precedents, regulations, statutory provisions and the new USCIS Form I-924, Application For Regional Center Under the Immigrant Investor Pilot Program. It will also draw from non-precedent AAO Decisions on topic and examine the inapplicability of certain past precedents in a

new context. The new form has added new dimensions to a pre-existing "benefit" for which there was previously no form or fee and which enjoyed a looser unofficial adjudication framework amid a controversial and blemished history. The new formalized process, still in its infancy, is not flying totally blind. There are existing frameworks for similar situations under the INA and other statutory schemes to draw from.

What is a Regional Center, *really*?

You will read later the actual statutory and regulatory definitions of what a Regional Center is but they merely provide a broad legalistic description that leaves you thinking "Huh?" The definitions provide a vague description of the role of the Regional Center. The statutorily defined purpose of a Regional Center is **"concentrating pooled investment in defined economic zones". T**he regulatory definition dictates the role of the Regional Center as being **"involved with the promotion of economic growth, including increased export sales[14], improved regional productivity, job creation[15], [or] increased domestic capital investment."**

The statutory and regulatory **role** of a Regional Center is loosely (and poorly) defined. The Regional Center **does** have a much more extensive and practical role to play than at first is clear to those who seek the designation and only see ($$$) foreign investment capital. The Regional Centers have a **clear, tangible, obligatory responsibility to their alien investors**. USCIS has not spelled out that role very well. Even though *efforts have been made*[16] in that direction, questions remain.

The Regional Center is supposed to be *a welcoming benevolent agent of the U.S.* that draws foreign investors into the U.S. economy. Regional Centers are supposed to be partners to USCIS. They are unofficial ambassadors of the U.S. and their **primary responsibility to their alien investors** is to *make the attainment of immigration benefits* (immigrant visas for the investor and family) *easier* by doing the hard work of project planning and coordinating multiple investors (foreign and domestic), providing sound investment strategies designed to create sufficient jobs which are supported by reasonable and valid economic predictions.

USCIS Role in the Immigrant Investor Pilot Program:

USCIS' strategic goals include:

- "Providing effective customer-oriented immigration benefit and information services."
- "Promoting flexible and sound immigration policies and programs.

[14] "Export sales" were the original mandate of the investor visa program but the issue was dropped to an "optional" potential benefit.
[15] Employment creation was emphasized drastically and is the main purpose now of the "employment creation visa" under INA § 203(b)(5) with definitions of full time employment, qualifying employees, and a minimum number of new (or preserved) jobs required and no loss of employment allowed under *Matter of Hsuing*.
[16] June 2007, the Chief Adjudications Officer for the USCIS Foreign Trader, Investor & Regional Center Program, sent a letter to the Metropolitan Milwaukee Association of Commerce (MMAC), a regional center in Wisconsin. The letter outlines 17 types of information that approved regional centers must track to keep their regional center designation. Recently, the I-924A was introduced and 8 CFR § 204.6(m)(6) was revised.

The number one core value that USCIS promotes is:

"**Integrity:** We shall always strive for the highest level of integrity in our dealings with our customers, our fellow employees and the citizens of the United States of America. We shall be ever mindful of the importance of the trust the American people have placed in us to administer the nation's immigration system fairly, honestly and correctly."

Regional Centers are not alone in their responsibility to alien investors, *USCIS has a specific role as well but it is not spelled out in the statutes and regulations*, it is merely expected in the natural course of events. Guidance can be gleaned from the APA. In the realm of Regional Center Designation it is the overarching responsibility of USCIS to do all it can to make the whole process function as well as it can for all concerned. Proofreading, editing and causing material changes to standard business documents to be used in actual investor transactions, overall business plans, and associated economic models and the methodologies employed are all well within the scope of USCIS adjudications in evaluating the evidence submitted with an I-924. It is not in the best interest of USCIS to accept documentation at the I-924 stage that will not be acceptable later at the I-526[17] stage of the immigration process.

It is in the best interest of USCIS, the Regional Centers, the immigrant investors and most especially the U.S. economy and the U.S. workers, *to help perfect I-924 applications and do it most expeditiously*. This part of its role is the one that USCIS has not defined completely. The most difficult aspect is in the realm of Appeals and Motions. Other benefit categories have much longer histories and commensurate experience in this area of adjudication. EB-5 is not new to the administrative appeals process or court litigation. INS and USCIS have been sued numerous times by individual investors. Certain Regional Center sponsors have tried and failed to join in those cases and have been denied standing as a party with anything before INS/USCIS. The I-924 gives them a new role as a potential party to litigation.

The EB-5 Visa Process:

"Obtaining LPR status under the EB–5 immigrant classification is a three step process, as follows[18]:

> (1) The alien must first be classified as an alien entrepreneur. This step requires the alien to obtain an approval of a Form I–526, ''Immigrant Petition by Alien Entrepreneur.'' *See* 8 CFR 204.6(a).
>
> (2) The alien then applies to become a conditional resident on the basis of the approved Form I–526 petition. If the alien resides in the United States, he or she must obtain a grant of a Form I–485, ''Application to Register Permanent Residence or Adjust Status'' from USCIS to become a conditional resident. *See* 8 CFR 245.1(a). If the alien resides outside of the United States, he or she must obtain an immigrant visa issued by the Department of State (DOS) and gain admission to the United States on this basis. Foreign Affairs Manual 9 FAM 42.32(e) N12. After completing one of these steps, the alien will obtain conditional resident status. INA section 216A(f)(1), 8 U.S.C. 1186b(f)(1).

17 *I-526, Immigrant Petition by Alien Entrepreneur*. This is the petition filed by the actual alien investor seeking a visa for self and family.
18 74 FR 912, (01/09/2009) http://www.justice.gov/eoir/vll/fedreg/2008_2009/fr09jan09.pdf

(3) The last step to obtaining LPR status is triggered 90 days before the second anniversary of the alien entrepreneur's conditional resident status. INA section 216A(d)(2), 8 U.S.C. 1186b(d)(2). During this 90-day period, the alien entrepreneur must submit to USCIS a Form I–829, ''Petition by Entrepreneur to Remove Conditions.'' 8 CFR 216.6(a)(1). Failure to timely submit Form I–829 or to obtain a removal of conditions may result in termination of conditional resident status and USCIS taking action to place the alien and accompanying dependents in removal proceedings. 8 CFR 216.6(a)(5)."

The next part of this discussion will delve into the various lines of precedent decisions on determining eligibility for visas in a variety of contexts. The EB-5 visa is codified among the employment based preference visas. It is different from the others in that the alien is coming to the U.S. to create jobs rather than work at one. The underlying principles embodied in these decisions will be compared and contrasted to each other and will be evaluated as to their applicability to the various EB-5 applications and petitions. **The I-526 is a preference visa petition and is subject to a showing of eligibility at time of filing.** The alien investor has a process in place already to reinitiate the visa petitioning process at even the worst time in that process. There are potential detrimental consequences for a child to age-out of a dependent EB-5 visa so it is not a foolproof process. There are pitfalls. The *underlying validity* of the initial I-924 application and any subsequent I-924 amendments *is critical to the petitions that follow*.

In contrast to an I-526 or I-829, an I-924 invites material changes and it is a major function of USCIS to do all it can to help the Regional Centers get all their ducks in a row. USCIS would not have to view itself as being altruistic. Instead, this approach can rightfully be seen as a self-serving function. The better the quality of initial submissions by immigrant investors, the easier the adjudication of the subsequent petitions. The underlying Congressional intent in creating the pilot program and its Regional Centers was to facilitate immigrant investment. Congress sought to attract foreign capital in order to infuse the U.S. economy with needed capital investments and promote regional economic benefits and stimulate job creation. Hence, the immigrant visa is known as the employment creation visa.

The AAO clearly points out that USCIS is strongly encouraged to accept assertions made during the Regional Center preliminaries later on at the I-526 stage of the process. This is a desirable outcome for USCIS because to be able to do so makes the subsequent I-526 adjudication easier. In order to fulfill such a request, the initial Regional Center evidence must be worthy of consideration later on. This is akin to *Chevron*[19] deference, except by an administrative agency towards a private sector entity in this case, the particular Regional Center. A Regional Center bears the burden of proof in laying the foundation upon which the future immigrant investor petition cases will be built. In order to serve its primary purposes of promoting economic growth,

[19] ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984), was a case in which the .S. Supreme Court set forth the legal test for determining whether to grant deference to a government agency's interpretation of a statute which it administers. *Chevron* is the Court's clearest articulation of the doctrine of "administrative deference," to the point that the Court itself has used the phrase "Chevron deference" in more recent cases

improved regional productivity, job creation, and increased domestic capital investment it must put forth the required evidence. Such evidence establishes a sound basis upon which to build. Such evidence necessarily will include a sufficiently detailed and comprehensive business plan supported by reasonable assumptions based in the current economic reality. It needs to be further supported by statistically valid forecasting tools, including, but not limited to, feasibility studies, market forecasts, and economic analyses. As stated earlier the distinction that comes will the attainment of the moniker of ***"USCIS Designated Regional Center under the Immigrant Investor Pilot Program"*** has advantages. That designation allows for the marketing of a variety of business ventures to a wider audience with the inducement of an easier immigration visa process and perhaps the only avenue for U.S. immigration available to the immigrant investor.

Sample "Lines of Cases[20]" from the I&N Decisions:

"Beneficiary Qualified At Time Of Filing" or "Cannot Consider Facts That Come Into Being Only Subsequent To The Filing Of A Petition":

Pazandeh distinguished the line of cases that followed *Bardouille* on a precise point because the differences between the statutes involved in the cases were dispositive of the issue at hand. There are two other lines of cases that needs attention and which will be discussed following the obligatory listing of the various holdings and excerpts. The issues in two of the lines of cases are similar and really might be considered as just one line of cases with branches. *Pazandeh* involved a spousal visa petition that seemed to be subject to a presumption that would have to be overcome. However, the need to overcome it *"lapsed with the passage of time" and became irrelevant to the case at the time of adjudication*. The BIA found at the time if its decision that the point at issued was then moot and did not determine if that earlier presumption had been overcome because there was no longer a need to decide that question.

***Matter of Pazandeh,* 19 I&N Dec. 884 (BIA 1989) held:**

> (1) In visa petition appeals involving section 204(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(2)(A) (Supp. IV 1986), the Board will not review the issue of the bona fides of the petitioner's prior marriage if 5 years have elapsed since the petitioner obtained her lawful permanent residence.
>
> (2) Where the visa petition was *initially approvable subject to the petitioner's meeting a burden which has lapsed with the passage of time*, the majority finds the rationale expressed in Matter of Bardouille , 18 I&N Dec. 114 (BIA 1981), not applicable. Matter of Atembe , 19 I&N Dec. 427 (BIA 1986); and Matter of Drigo , 18 I&N Dec. 223 (BIA 1982), ***distinguished.***

The crux of the matter is summed up by the BIA in this paragraph.

[20] *Matters of Katigbak (*employment based visas*), Bardouille* (family based visas*)* and *Soriano (*evidence submitted on appeal*).* 8 CFR § 103.2 through § 103.5 contain certain basic rules pertaining to evidence but are NOT the exclusive rules for ALL evidence under the various benefits and proceedings encompassed by the INA. Naturalization, recognition of Citizenship, Adjustment of Status, Asylum/Refugees, Extreme Hardship and other waivers and other provisions have specific requirements, exceptions, precedents, and court rules that inform if not govern evidence.

"We note that in previous visa petition cases involving section 203(a)(2) of the Act we have held that a petition would not be approved unless the ***beneficiary was qualified for preference status at the time the petition was filed, to prevent the beneficiary from obtaining a priority date to which he or she was not entitled***. Matter of Atembe , 19 I&N Dec. (BIA 1986); Matter of Drigo , 18 I&N Dec. 223 (BIA 1982); Matter of Bardouille , 18 I&N Dec. 114 (BIA 1981). ***In each of the foregoing cases, however, the beneficiaries were indisputably ineligible for preference status when the petitions were filed on their behalf.*** Matter of Atembe , supra (beneficiary had not been "legitimated" and did not qualify as a "child" within the meaning of section 101(b)(1)(C) of the Act, 8 U.S.C. § 1101(b)(1)(C) (1982)); Matter of Drigo , supra (beneficiary did not qualify as an adopted "child" under section 101(b)(1)(E) of the Act); Matter of Bardouille , supra ("legitimation" of the beneficiaries occurred after the visa petitions were filed). ***By contrast, there was no bar to the approval of the instant visa petition when it was filed by the petitioner; the Service had the authority pursuant to section 204(a)(2)(A) to approve the second-preference petition if the petitioner disproved fraud with respect to her prior marriage or if she had been a lawful permanent resident for 5 years. Under these circumstances, where the petition was initially approvable subject to the petitioner's meeting a burden which has lapsed with the passage of time, we do not find the rationale expressed in the Bardouille line of cases to be applicable.***"

***Matter of Atembe,* 19 I&N Dec. 427 (BIA 1986) held:**

Notwithstanding the fact that an illegitimate child may qualify for immigration purposes as the "child" of his or her natural father following the amendment on November 6, 1986, of section 101(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(D) (1982), provided paternity is established and the father "has or had a bona fide parent-child relationship" with the child, a *visa petition filed prior to* the effective date of the amendment *may not be used to obtain preference status* for the beneficiary under section 203(a) of the Act, 8 U.S.C. § 1153(a) (1982), *because approval of the visa petition would give the beneficiary a priority date to which he or she was not entitled at the time the visa petition was filed.* Matter of Drigo, 18 I&N Dec. 223 (BIA 1982); and Matter of Bardouille, 18 I&N Dec. 114 (BIA 1981), followed.

***Matter of Drigo,* 18 I&N Dec. 223 (BIA 1982) held:**

(1) A visa petition filed on behalf of a beneficiary whose adoption occurred after his fourteenth birthday, but before his sixteenth birthday, was properly denied by the District Director of the Immigration and Naturalization Service *because the beneficiary was not eligible* for preference status as an adopted child under section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(E), *at the time the application was filed*.

(2) Notwithstanding a recent amendment to section 101(b)(1)(E) which changes the age limitation of an adopted child from fourteen to sixteen years and the fact that the adoption was timely executed under the amended language of the statute, the *beneficiary does not qualify* for immigration benefits under section 203(a)(2) of the Act, 8 U.S.C. 1153(a)(2), *because a visa petition approval would result in giving a priority date to which the beneficiary was not entitled at the time of the filing of the visa petition*.

***Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) held:**

(1) In order to be eligible for relative preference classification under section 203(a) of the Immigration and Nationality Act, 8 U.S.C. 1153(a), the *alien beneficiary must be fully qualified at the time the visa petition is filed*.

(2) Visa petitions to classify the beneficiaries as "unmarried sons" under section 203(a)(2) of the Act are denied where the beneficiaries' alleged *legitimation* by their petitioner father *occurred only after he filed the petitions* and, therefore, they were *not fully qualified* as the petitioner's legitimated children under section 101(b)(1)(C) of the Act, 8 U.S.C. 1101(b)(1)(C), at *the time the visa petitions were filed*.

Changing With The Times:

When departure from a line of thinking is warranted, it is appropriate to do so. It is the major cornerstone of the development of the common law and statutory law as well. Overarching concepts of fairness and justice in legal interpretations necessarily change along with the society in which they reside.

"Must Establish Eligibility At Time Of Filing" and "Approvable When Filed" and "A Petitioner May Not Make Material Changes To A Petition That Has Already Been Filed In An Effort To Make An Apparently Deficient Petition Conform To USCIS Requirements":

"Our major concern with the favorable findings by the director is that they are in contravention of binding regulations and longstanding precedent and federal court decisions holding that a petition must be approvable when filed. *See* 8 C.F.R. §§ 103.2(b)(l), (12); *Matter* of *Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. 45,49 (Reg'l. Comm'r. 1971). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey, 541* F.3d 257, 261 (4th Cir. 2008)."[21]

***Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971), held:**

To be eligible for preference classification under 203(a) (3) of the Immigration and Nationality Act, as amended, **the beneficiary must be a qualified member of the**

[21] From a non-precedent AAO Decision of an I-526 (Immigrant Investor Petition) at: http://www.uscis.gov/err/B7%20-%20Form%20I-526%20and%20I-829/Decisions_Issued_in_2010/Sep212010_01B7203.pdf

professions <u>at the time of the filing</u> of the visa petition. *Education or experience acquired subsequent to the filing date of such visa petition may not be considered in support thereof* since to do so would result in according the beneficiary a priority date for visa issuance at a time when not qualified for the preference status sought. **[<u>emphases added</u>]**

***Matter* of *Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977) held:**

(1) To be eligible for preference classification under section 203(a)(6) of the Immigration and Nationality Act, the *beneficiary must possess all of the qualifications* specified by the petitioner on the Job Offer for Alien Employment *as of the filing date* of the petition which is the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor, See 8 CFR 204.1(c)(2).

(2) *Experience acquired subsequent to the filing date of the petition may not be considered* in support of the petition because to do so would accord the beneficiary a priority date for the issuance of a visa as of a date when he was not qualified for the preference sought.

(3) *Matter of Katigbak*, 14 I&N DEC 45 (R.C. 1971), followed.

***Matter of Izummi*, 22 I&N Dec. 169 (BIA[22] 1998) holds, in pertinent part,**

(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.

The *Izummi* case involved a petition for an immigrant investor visa (form I-526). That petition was denied by the Director of the Texas Service Center and the appeal was dismissed by AAO.

"….The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5), and section 610 of the Appropriations Act of 1993. …"

The AAO through the *Izummi* decision goes on to further explain the underlying requirement in part (3) of the holding, thus:

"A petitioner **must establish eligibility at the time of filing**; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements." **[emphasis added]**

[22] Although the decision as noted on the EOIR website lists this as a BIA precedent and the actual I&N Decision credits it to the, then INS, Regional Commissioner, it was actually rendered by the AAU, of what was INS (now AAO of USCIS).

Katigbak, is often cited with regard to the general principle as restated in *Izummi* that one "must establish eligibility at the time of filing[23]" and as expanded upon in the 3rd prong of the 13 prong holding in *Izummi*, prohibiting the making of material changes subsequent to filing to remedy deficiencies. This is not to be confused with a mere matter of supplying further evidence in response to a Request for Evidence (RFE) or the rebuttal to a Notice of Intent to Deny NOID). The prohibition is against creating new circumstances for which no evidence previously existed in the absence of a material change made subsequent to filing. It should be remembered that both of these Precedent Decisions as well as *Wing's Tea House* and the *Bardouille* line of cases, all involve visa petitions that are tied inextricably to the filing date as the priority date for purposes of obtaining a place in a potentially very long line for an immigrant visa. Such immigrant visas being among the visa preference categories for which there are worldwide numerical limitations and country of origin quotas.

This concept of *disallowing a material change after filing* which has also been expressed as requiring that a beneficiary be *fully qualified at time of filing* and as *approvable when filed* do have proper application to **certain** benefit petitions and application but not everything under the INA. The two main lines of cases, the *Katigbak* line in the realm of employment based petitions and the *Bardouille* line dealing with family based petitions *both deal primarily with preference visa petitions.*

The EB-5 investor or entrepreneur petition also fall into a preference visa category, however they have been "current" and immediately available since day one and see no sign of ever having a backlog. USCIS has a mechanism in place for individual investors to simply re-file a new I-526 petition to overcome a significant material change. If worse comes to worst, an investor who has already obtained conditional lawful resident status can both re-file a new I-526 and can subsequently file an I-407[24] to give up status simultaneously with an I-485 and re-adjust to a new conditional status. An I-526 lays the foundation for the immigrant's case, it must be solid or it may need to be torn down and rebuilt. The business plan put forth at this stage is the one against which the results will be gauged and measured later at the I-829 stage when seeking to lift conditions on lawful permanent resident status.

Nowadays, the vast majority of I-526 petitioners are filing under the umbrella of a USCIS Designated Regional Center under the Immigrant Investor Pilot Program (95% or more). The Regional Center can file an I-924 for an amendment to their underlying operations and supporting documentation to include: the comprehensive business plan, economic analysis or model (to include changes to methodology and to address changes in the economy), investment

[23] On April 17, 2007, 72 FR at 19105 added 8 CFR **§ 103.2 Applications, petitions, and other documents.** (b)(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. http://edocket.access.gpo.gov/2007/pdf/E7-7228.pdf

[24] *I-407, Abandonment of Lawful Permanent Resident Status* This form is not currently approved by OMB and is only available at various Consular websites as an unofficial form.

related legal business documents (subscription agreements, operating agreements, partnership agreements, confidential offering memoranda), and financial strategies (direct investment vs. leveraged financing vs. direct loans, etc…) and instruments (escrow agreements, escrow agents, OFAC licenses etc…). *The interplay between the different actors in this play is critical as to timing. The Regional Center is the most appropriate party to make material changes to a Regional Center sponsored investment project*.

The individual investors are at the mercy of their Regional Center to make the legally required components of the overall plan come together in a coherent manner and at the right time. Individual immigrant investors usually pay an additional fee to the Regional Center for the purpose of coordinating pooled investment of numerous immigrant investors. The individual investors may pay anywhere from $20,000 to $75,000 as a "management fee" or "subscription fee". Each RC can offer a variety of services. They may just supply a business plan and economic model and follow up with information about jobs that have been created. Others may provide help with the immigration filings as well as the investment end of things. Since it is self-serving, the RC will usually vet the investor's lawful source of funds to USCIS standards of scrutiny. *The Regional Center is obligated to coordinate the necessary details to make the investment qualify the investor for the EB-5 visa to justify fees. Of course, the individual investor must still be "otherwise eligible" and "admissible as an immigrant"*.

***Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998) holds, in pertinent part,**

> (9) The Service *does not pre-adjudicate* immigrant-investor petitions; each petition must be adjudicated on its own merits.

The AAO through the *Izummi* decision goes on to further explain the underlying principle in part (9) of the holding, thus:

> "In his brief, the **petitioner states that in 1992 a Service official had delivered to counsel a model EB-5 investor petition that had been approved**; at oral argument, counsel added that he was assured that if he followed this model petition, his petitions would also be approved. According to the petitioner, the one million dollars in capital invested in that case "would create reserves for inventory, working capital, expansion, and other partnership expenses, in the sum of $450,000 . Thus, the model petition established that $450,000 of the $1,000,000 to be invested, or 45%, would be set aside as bank reserves."
>
> **The record does not contain a copy of this "model petition,"** and the AAU cannot ascertain whether the cash reserves in that case were mandatory or inadvertent, temporary or long-term. The ***opinions of one Service official*, moreover, cannot work to remove from the AAU's jurisdiction the authority to review** individual cases. *See* 8 C.F.R. §

103.1(f)(3)(iii) . **The Service *does not pre-adjudicate* investor petitions; each petition must be adjudicated on its own merits.** The fact that a particular petition (which did not result in a precedent decision) was **considered qualifying *in 1992*, when the Service was *less experienced with these types of cases*, has no bearing** on whether the reserve provisions in question here should also be considered qualifying."

***Ogundipe v. Mukasey*, 541 F.3d (4th Cir. 2008) held, in part:**

(1) "…a visa petition is meritorious in fact for purposes of grandfathering under 8 C.F.R. § 1245.10 if, based on the circumstances that existed at the time the petition was filed, the beneficiary of the petition qualified for the requested classification."

(2) "An alien seeking to adjust his status may prove that a previously denied visa application was meritorious in fact by making an appropriate factual showing in removal proceedings, *subject to any applicable evidentiary and procedural rules*."

(3) "We find nothing in the applicable statutes or regulations that prevents an IJ in removal proceedings from considering other evidence that a petition was approvable when filed, even if that evidence was never submitted in conjunction with the original petition." [As noted by dissent on review of the majority opinion, but this would be *qualified* by the last phrase of (2) above.]

Synopsis of Ogundipe:

In *Ogundipe,* the Fourth Circuit performed a review of a BIA Decision that upheld an IJ Decision that denied the beneficiary the right to file for adjustment as a "grandfathered alien" under INA § 245(i). The adjustment application was based on an earlier petition to support the filing of a new petition because the earlier petition was filed prior to April 31, 2001, but the first petition was found to be not "approvable when filed".

The original immigration case involved an I-360 petition filed by *He Cares Fellowship* (HCF) for classification of appellant (beneficiary) as a religious worker, in which:

"...INS requested… [specific evidence to address seven (7) specific point of eligibility pertaining to both the petitioner and the beneficiary]… HCF failed to respond fully to the INS's requests, and the INS denied the petition. HCF appealed but failed to submit a brief; consequently, the appeal was dismissed."
"Ark of Salvation International Church of Christ ("AS")….. submitted a second I-360 petition (the "AS Petition") on Ogundipe's behalf. [after the § 245(i) sunset date] Like the HCF Petition, the AS Petition sought a visa for Ogundipe on the basis that he qualified as a special immigrant religious worker, specifically, the Senior Pastor of AS. The AS Petition was granted in 2002."

"In 2004, the INS initiated removal proceedings against Ogundipe for remaining in the United States longer than permitted. Ogundipe then filed an Application to Register Permanent Residence or Adjust Status, based on § 245(i)…"

"The IJ [found] that the HCF Petition was not "meritorious in fact" because there had never been a prima facie showing that Ogundipe was eligible for classification as a special immigrant….. Accordingly, the IJ denied Ogundipe's application for adjustment of status, but granted his alternative request for voluntary departure."

"Ogundipe appealed to the BIA, which dismissed his appeal…Ogundipe then filed a motion for reconsideration, which the BIA denied."

"Because the parties agree that the HCF Petition was properly filed and non-frivolous, the only issue presented in this appeal is whether it was meritorious in fact. …….

The government [argued] that only the evidence on record at the time of the initial filing may be considered, and thus the actual denial of the HCF petition by the INS forecloses any finding that it was meritorious in fact and therefore approvable when filed."

"…**We find nothing in the applicable statutes or regulations that prevents an IJ in removal proceedings from considering other evidence that a petition was approvable when filed, even if that evidence was never submitted in conjunction with the original petition**. This conclusion flows from the text of § 1245.10(a)(3). "Meritorious" means "meriting a legal victory" or "having legal worth," Black's Law Dictionary (8th ed.2004), but does not require actual legal success. Moreover, § 1245.10(a)(3) requires that the determination of whether a petition is meritorious in fact "be made based on the circumstances that existed at the time the qualifying petition or application was filed." **This provision contemplates that evidence other than that actually submitted in support of the petition might be considered for purposes of determining whether an alien is grandfathered**." **[Emphasis added.]**

Again it must be recognized that this case ultimately pertained to a preference visa petition and determining if both the petitioner and beneficiary were "eligible at the time of filing" the I-360. In *dicta*, the Fourth Circuit noted further in *Ogundipe* with regard to his meritless Motion to Reconsider: "Ogundipe's motion for reconsideration repeated his original appellate contention that the BIA and IJ failed to consider the totality of the circumstances that existed at the time the HCF Petition was filed. As the BIA explained in its first decision and in its order denying reconsideration, however, **the IJ and the BIA did not treat the ultimate denial of the HCF Petition as dispositive.** *Rather, the IJ determined that "based on the circumstances that existed at the time the qualifying petition or application was filed, the respondent failed to demonstrate that the original petition was 'approvable when filed' within the meaning of 8 C.F.R. §*

1245.10(a)(3)" (quotation omitted). J.A. 24; *see also* J.A. 2. Accordingly, Ogundipe *did not demonstrate* *legal or factual error warranting reconsideration*. *See* 8 U.S.C. § 1229a(c)(6) (motions to reconsider "shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority")." ***[Emphases added.]***

[End Synopsis.]

Discussion:

In a preference visa petition, both the petitioner and the beneficiary must establish eligibility at time of filing but nothing is found in the applicable statutes or regulations that prevents an [Appellate Authority in its *de novo review*] from considering other evidence that a petition was approvable when filed, even if that evidence was never submitted in conjunction with the original petition. **When it is dispositive that a particular petition is subject to showing eligibility at time of filing this is a very important consideration and should be dispositive of the ultimate decision on appeal.** The additional evidence offered on appeal or motion is *subject to any applicable evidentiary and procedural rules*.

The BIA and AAO as well as various courts are not in sync when it comes to ***what*** *evidence will be reviewed, and* ***when***. Often it boils down to matters of: When does the law require something to be established? When does that fact have to be proven? Is something a *prerequisite* **or** does *fulfillment of an evidentiary showing* result in attainment of the benefit sought under the INA?

From the one known Regional Center AAO Appeal, (a Dismissal), Nov182008_01K1610.pdf:

> "The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. US. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g., *Dor v. INS*, 89 1 F.2d 997, 1002 n. 9 (2d Cir. 1989)."

What do you do when a **new application** for an immigration benefit comes into existence? Is it not logical to set the **ground rules** for eligibility requirements and evidentiary rules? Is it not practical to set down in writing the applicable ground rules in the filing of the application, what prerequisites are mandatory for the filing, the initial evidence, the overall eligibility requirements and the method of adjudication and appellate review? When dealing with something new and trying to work within an **existing framework** that was developed for other applications and petitions that were **created under different statutes**, is it not proper to take a step back and look at the big picture? *Where does the new application fit in? Does it have special needs and*

considerations? Is ***eligibility at time of filing*** *the appropriate framework or is* ***eligibility at time of adjudication*** *more important?*

A visa petition must be approvable when filed. The petitioner and beneficiary must both be eligible at the time of filing the petition. The familial or employment relationship must already legally exist at time of filing. However, that merely sets a priority date for later issuance of an immigrant visa. *The applicant/beneficiary must still prove eligibility for issuance of that visa*. (S)he may not apply for an immigrant visa or file for adjustment of status until the priority date is current and *must be otherwise eligible to file for adjustment or apply for a visa and admissible as an immigrant*. When a visa's priority date becomes "current" on the Visa Bulletin, the beneficiary may file for adjustment of status or apply for an immigrant visa. If the Visa Bulletin rolls back the priority dates, then the Immigrant Visa may not be issued until it becomes "current" once again. Likewise, the beneficiary with a pending adjustment cannot be adjusted to lawful permanent resident until the priority date becomes "current" once again. The ultimate issuance of an immigrant visa or adjustment of status is *decided at the last moment with all things considered*.

The above considerations are realities that we know. When something new comes along, there is always an adjustment period, a time for development of policies and procedures, in other words "growing pains" or a "learning curve". Such is the case with the USCIS Form *I-924, Application For Regional Center Under the Immigrant Investor Pilot Program*.

Birth of a Form:

The I-924 is primarily used to request designation as a Regional Center. A Regional Center (RC) has a specific role to play in the EB-5 immigrant process. The RC is a partner to both USCIS and to the individual alien investors who are seeking EB-5 immigrant visas for themselves and qualified family members. The form is new as of November 23, 2010, but the Regional Center has been around for nearly two decades. Prior to creation of the form, someone desiring designation as a Regional Center submitted a Proposal. The Proposal was supposed to conform to the regulations at 8 CFR 204.6(m)(3)(i-v). Good Luck!

Although the regulations have always allowed applicants, when their Proposals were denied, to seek an appeal from AAO, since there was no fee to submit a new Proposal but there was and still is a fee to file an appeal, only one ***known*** actual appeal, with fee, was ever was filed, in 2008. Two ***known*** subsequent Proposal Denials were submitted to the AAO *on certification* by the Director of the California Service Center in 2009[25].

[25] http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/?vgnextoid=0609b8a04e812210VgnVCM1000006539190aRCRD&vgnextchannel=0609b8a04e812210VgnVCM1000006539190aRCRD&path=%2FK1+-+Request+for+Participation+as+Regional+Center

The only concrete prerequisite to filing an I-924 is to *actually exist as* **the entity that applies**[26], i.e., incorporated or organized as a legally recognized company or partnership or if a government agency or public-private cooperative that it is authorized to pursue Regional Center Designation. Even that basic requirement is not spelled out in the regulations. It is spelled out in the form instructions that the "form may be filed by an individual on behalf of a State or local government agency, partnership, or any other business *entity*" but is drawn from the non-precedent AAO Decision noted and linked below. A nonexistent entity cannot be designated as a regional center.

From the one actual Appeal, which resulted in a Dismissal, Nov182008_01K1610.pdf, we can glean a few additional points:

> "The AAO further notes that *ex parte communications* are prohibited by the Administrative Procedure Act (APA), 5 U.S.C. § 706. According to § 551 (14) of the APA, "*ex parte communication*" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."…. Significantly, *ex parte communications* are not part of the record of proceeding and cannot be considered in future proceedings, such as the appeal before us. Thus, Service Center Operations did not err when it declined to meet with the appellant."
>
> "A nonexistent entity cannot be designated as a regional center. ……
> The regulation at 8 C.F.R. § 103.2(b)(l)[27] provides that an applicant or petitioner must establish eligibility "at the time of filing the application or petition." The regulation at 8 C.F.R. § 103.2(b)(12) provides that an application or petition "shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed." *See also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971); *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Regl. Commr. 1977); *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Regl. Commr. 1977); *Matter* of *lzummi,* 22 I&N Dec. 169, 175-76 (Commr. 1998) (citing *Matter of Bardouille, 18* I&N Dec. 114 (BIA 1981), for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") **While the above cases involved immigrant petitions with priority dates, we note that this reasoning has been extended to nonimmigrant visa petitions, which do not have priority dates. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248,249 (Regl. Commr. 1978).**

<u>On this last point, I strongly disagree. The holding in *Michelin* is inapplicable to an I-924.</u>

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[26] The regulation at 8 C.F.R. § 204.6(j) notes that additional evidence other than that specified in the regulations may be required. Clearly, only an entity that exists can be designated as a regional center. Thus, it is reasonable to require evidence of the proposed regional center's existence. From a non-precedent AAO Decision at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2008/Nov182008_01K1610.pdf at page 5.

[27] On April 17, 2007, 72 FR at 19105 added 8 CFR **§ 103.2 Applications, petitions, and other documents.** (b)(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. This was a codification of *Matter of Katigbak*. http://edocket.access.gpo.gov/2007/pdf/E7-7228.pdf

***Matter of Michelin Tire Corp.*, 17 I&N Dec. 248,249 (Regl. Commr. 1978) held:**

> (1) In order to be eligible for nonimmigrant classification under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L), the beneficiary must have been employed continuously for 1 year by the petitioner at the time the petition is filed with the Service. Having worked for the company for only 9 months, beneficiary failed to meet this time requirement.
>
> (2) Where a beneficiary seeks to qualify for "L" classification on the basis of specialized knowledge, that knowledge must be relevant to the business itself and directly concerned with the expansion of commerce or it must allow an American business to become competitive in overseas markets. In this case beneficiary's specialized knowledge was of the French Educational System. The petition sought to allow her to enter this country to teach the children of the French employees who would be coming here to start the plant, so their children's educational development would not suffer. This was not the specialized knowledge contemplated by the statute but was related to the provision of a fringe benefit for the company's employees. For that reason it does not qualify the beneficiary for admission under section 101(a)(15)(L) of the Act.

Although the L nonimmigrant visa does not have a "priority date" at issue, it does **have specific eligibility *prerequisites***. The L visa is for an "intra-company transferee" who was *already an employee for at least one year* and who will be *employed in a capacity that is managerial, or executive or involves specialized knowledge* therefore they are reliant on a *specific pre-existing employer-employee relationship* that must have been in existence *for a minimum prescribed period of time and in a certain role*. The nonimmigrant petitions like the immigrant petitions do get adjudicated in a first-in, first-out processing queue. While there is no priority date, there are still the general qualifications as to the pre-existing relationship as defined by statute, and perhaps clarified through implementing regulations.

A *Regional Center* applicant does not have a pre-existing relationship, only its own existence as a legally recognized entity need be shown, and **does not involve *any* visa**. There are **no numerical limits** in the INA as to the number of Regional Centers that may be designated. Indeed, they can overlap or even exist right on top of each other. What is more important is to assure that the Regional Center will be able to fulfill its purpose as contemplated by the statute that created the designation. The current framework in place as to the placement of the **"burden of proof" is well supported**. The **"standard of proof" is not fully specified** as to the level of proof required for a Regional Center. The statute and regulations do have certain **terminology that is yet to be fully defined, clarified and refined**. The actual **evidence** that meets the burden of proof **is fluid and ever evolving** as are the possibilities in which to invest.

<u>The Proposal (now form I-924 and attached supporting documentation) is required to show:</u>

Per 8 CFR 204.6(m)(3)
(i)… how it will *promote* economic *growth*… [Business plan.] supported by [Economic Model.]
(ii)… verifiable detail how *jobs* will be created…. [Economic Model.] based on [Business plan.]

(iii)… detailed statement regarding the amount and source of capital…committed to the regional center, … [Business plan.] [Budget.] [Organizational Documents.]
(iii)…description of the promotional efforts taken and planned… [Business plan.]
(iv)… *detailed prediction* regarding the manner in which the regional center will have a *positive impact on* the regional or national *economy*…[includes a laundry list of items] [Economic Model.] based on [Business plan.]
(v)… *supported* by economically or statistically *valid forecasting tools*…[another laundry list]… [Economic Model.] based on [Business plan.]

The Immigrant Investor Pilot Program in which the Regional Centers reside finds its origin in Section 61 0 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, as amended, which provides:

> (a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. **Such *pilot program* shall involve a *regional center* in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment**.
>
> *****
>
> (c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall **permit aliens admitted under the pilot program described in this section to establish *reasonable methodologies for determining* the number of *jobs created* by the pilot program, including such jobs which are estimated to have been created *indirectly*** through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

Public Law 108-156, Approved December 3, 2003 included:

SEC. 4. PILOT IMMIGRATION PROGRAM.

(a) **Processing Priority** Under Pilot Immigration Program for Regional Centers To Promote Economic Growth.--Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note) is amended--

(1) by striking ``Attorney General'' each place such term appears and inserting ``Secretary of Homeland Security''; and

(2) by adding at the end the following:

``(d) In processing petitions …… for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the pilot program …..”

The processing priority in (d) has become moot in that almost all I-526 petitions are filed under the Immigrant Investor Pilot Program anyway. It was never given any practical effect and now there is no need to do so. There is no point in trying to sort out any "priority" in their processing and premium processing for an additional fee is not yet available and may never be available. In order to assign a priority, USCIS would have to make an evaluation of the individual Regional Center investment project and that would look like playing favorites (because it would be). To be ranked higher than another Regional Center would lead to Congressional interference and probably State and Local government interference in trying to get a "pet project" OK'd by USCIS to attract more foreign investors. There is no way that USCIS would ever be stupid enough to give any effect to this shameless Congressional "pandering" amendment.

§ 11036 of Public Law 107-273, dated November 2, 2002, provided that:

An alien investor no longer need not "establish" an "enterprise", the alien may simply "invest" and the form of that "investment" shall include a "limited partnership".

8 CFR § 204.6 Petitions for employment creation aliens.

> (e) *Definitions.* As used in this section:
>
> ***Commercial enterprise*** means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, **partnership (whether limited or general)**, holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is **engaged in a for-profit activity formed for the ongoing conduct of a lawful business**. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

The Uniform Limited Partnership Act (ULPA), which includes revisions that are sometimes called the Revised Limited Uniform Partnership Act (RULPA), is a uniform act (similar to a model statute), proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[28] for the governance of business partnerships by U.S. States. Several versions of UPA have been promulgated by the NCCUSL, the earliest having been put forth in 1914, and the most recent was a complete revision in 2001[29]. The ULPA is enacted in at least 17 states and is proposed in still more. ULPA is endorsed by the American Bar Association, is used by the vast majority of Limited Partnerships in the U.S. and will be sufficient for EB-5 agreements for USCIS purposes.

§ 11037 of Public Law 107-273, dated November 2, 2002, included "AMENDMENTS TO PILOT IMMIGRATION PROGRAM FOR REGIONAL CENTERS TO PROMOTE ECONOMIC GROWTH" which provided some clarity as follows:

[28] Visit them at: http://www.nccusl.org/Default.aspx
[29] ULPA (2001) at: http://www.law.upenn.edu/bll/archives/ulc/ulpa/final2001.htm

(a) Purpose of Program.--Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note):

> "A regional center shall have jurisdiction over a *limited geographic area,* which shall be *described in the proposal* and *consistent with the purpose* of **concentrating pooled investment in defined economic zones**. The *establishment of a regional center* may be based on **general predictions**, contained in the proposal, concerning the **kinds of commercial enterprises** that will receive capital from aliens, the **jobs** that will be created *directly or indirectly* as a result of such capital investments, and the **other positive economic effects** such capital investments will have."

8 CFR § 204.6 Petitions for employment creation aliens.

> (e) *Definitions.* As used in this section:
>
> ***Regional center*** means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

There are statutory and regulatory requirements for Regional Centers as opposed to requirements for the individual investors. The requirements for the investors should be fully embraced, contemplated, accounted for, and promoted by the Regional Centers in their offerings. As stated in the statute, as to the Regional Centers, they are contemplated to have the main ***"purpose of concentrating pooled investment in defined economic zones."***

Standard and Burden of Proof:

***Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010) held, in pertinent part:**

> (3) In most administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
>
> (4) Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989), followed.
>
> (5) If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

In advising its adjudicators of the importance of the "standard or proof" as reiterated in *Chawathe* before it had been officially published as precedent (over four years later), USCIS reminded adjudicators of "burden of proof" and the *Matter of Brantigan* via a Policy Memo and Adjudicator's Field Manual update. In the earlier guidance (but absent from the published precedent) USCIS reminded adjudicators that different issues could involve different "standards

of proof". As examples: (1) "clear and convincing evidence" is required to prove the bona fides of a marriage entered into during removal proceedings or (2) a recent prior "immigration marriage" of new spousal petitioner, i.e., petitioning for a new spouse when the *petitioner gained LPR status* **via a spousal petition** *within the previous five years*. It was also noted that INA § 309(a) [and (c)[30]] had ***specific*** **statutorily prescribed** ***evidentiary requirements*** as well.

***Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966) held:**

> "In visa petition proceedings **the burden of proof to establish eligibility for the benefit sought rests with the petitioner**, and in the absence of proof of the legal termination of a U.S. citizen petitioner's prior marriage, reliance on the presumption of validity accorded by California law to his subsequent ceremonial marriage in that State to beneficiary is not satisfactory evidence of the termination of his prior marriage and is insufficient by itself to sustain petitioner's burden of proof of a valid marriage on which to accord beneficiary non-quota status."
>
> *****
>
> "*In visa petition proceedings,* **the burden of proof to establish eligibility sought for the benefit conferred by the immigration laws rests upon the petitioner**. Both the prior and present regulations require that if a petition is submitted on behalf of a spouse, it must be accompanied by a certificate of the marriage to the beneficiary and proof of the legal termination of all previous marriages of both spouses.
>
> However, we note that the **motion** encloses an affidavit by petitioner's daughter, now in the United States, regarding the absence of her mother. **In order to give the petitioner every opportunity to establish** the validity of his present marriage, **we will reopen the proceedings** to permit the daughter to be questioned under oath by a Service officer regarding the absence of her mother; and to ascertain what efforts were made by the petitioner to communicate with his first wife. A written memorandum should accompany the decision.
>
> **ORDER:** It is ordered that the **proceedings be reopened** in accordance with the preceding paragraph and to **afford the petitioner every opportunity to establish** the validity of his present marriage."

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[30] The AAO notes that the *Fleuti* decision, and the doctrine of "brief, casual, and innocent" departures, was nullified by the enactment of section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-575 ("IIRIRA"). The *Fleuti* doctrine, with its origins in the no longer existent statutory definition of "entry," did not survive as a judicial doctrine beyond the enactment of IIRIRA. *Matter of Collado*, 21 I&N Dec. 106 1, 1065 (BIA 1998). From: Feb022009_01E1316.pdf

Evidence Submitted on Appeal:

The last prong in the holding of *Matter of Soriano*[31], 19 I&N Dec. 764 (BIA 1988) is:

> (4) Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service.

Soriano (excerpt below) relates to a spousal petition where the district director labeled it a sham marriage in denying the first I-130 and then denied the second I-130 and in doing so, committed procedural errors. The first error was failing to put the petitioner on notice of deficiency of evidence with regard to the second I-130. The second error was failing to consider and or address the additional evidence that was submitted with the second I-130 in the denial notice. As a side matter, the appeal was accompanied by further evidence. Only because of the procedural errors was the case remanded for consideration of the evidence by the director in the first instance. The BIA would not itself consider the new evidence on appeal.

> "Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. **Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.** See Matter of Obaigbena , 19 I&N Dec. 533 (BIA 1988). **In such a case, if the petitioner desires further consideration, he or she must file a new visa petition.**

In *Soriano,* the petitioner was a USC and as such the beneficiary's immigrant visa was legally "immediately available" therefore, a priority date was not at issue so, it was only a **rigid procedural stance** that was being thrown up. It is unclear if such a stance would have stood up to judicial review in that case. That prospect will have to be tested in some other case because the petition in *Soriano* was remanded. The basic principle espoused may have a solid foothold and is fully applicable to preference visa petitions as they are tied to a filing date as a priority date. This stance was previously taken in *Katigbak* regarding *new facts information that did not previously exist* and **did** involve a *preference visa petition*.

[31] Not to be confused with *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), that the section 212(c) bars in AEDPA applied to all aliens in deportation proceedings with applications pending on April 24, 1996, which was modified later by the Supreme Court in *St. Cyr*.

In *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), it was held that:

> (1) A petitioner must be afforded a reasonable opportunity to rebut the derogatory evidence cited in a notice of intention to deny his visa petition and to present evidence in his behalf before the district director's decision is rendered.
>
> (2) Reasonable and timely requests for an extension of time to submit a rebuttal to the notice of intention to deny a visa petition should be dealt with by the district director in a reasonable and fair manner, particularly when a petition has been pending for a prolonged period or where the notice of intention to deny contains extensive investigative findings or factual allegations.
>
> (3) To be considered "reasonable," a request for an extension of time to submit a rebuttal must state with specificity the reasons for the request and be limited to a finite period, and it must not be for the purpose of obtaining documents which should have **initially** been submitted with the petition by regulation.
>
> (4) Where a petitioner fails to timely and substantively respond to the notice of intention to deny or to make a reasonable request for an extension, **the Board of Immigration Appeals will not consider any evidence first proffered on appeal as its review is limited to the record of proceeding before the district director; for further consideration, a new visa petition must be filed**.

The fourth prong above may be *appropriate* in certain circumstances, especially *when the eligibility at time of filing is applicable*. Overall, *competent filings should be encouraged*, but when the matter involved in the adjudication is highly complex, some leeway is due as noted in the third prong just above it in stressing "reasonable" requests for time to submit evidence. The non-specific regulations that generally apply to appeals and motions tend to be lenient and written in the spirit of giving the applicant the *benefit of the doubt*. Other **implementing regulations that deal with other types of benefits**, *where time of adjudication and final decision is the appropriate framework*, generally require most benefits adjudications to be satisfied on the *preponderance of the evidence* standard. Harsh rigidity in enforcement of just a very few narrowly written extremely strict regulations within 8 CFR § 103 and wielding them like the *Sword of Damocles*[32] could be seen as improper by a reviewing court.

From the first AAO Dismissal of a Regional Center appeal at: Nov182008_01K1610.pdf:

> "More persuasive is the appellant's assertion that Service Center Operations should have issued a request for additional evidence before denying the proposal pursuant to 8 C.F.R. § 103.2(b)(8) (2006) as in effect when the proposal was filed on December 26, 2006. Certainly, some of the issues raised by Service Center Operations could have been addressed in a request for additional evidence. The most expedient remedy for this error, however, is to consider the new evidence on appeal. Because Service Center Operations

[32] The Sword of Damocles is frequently used in allusion to this tale, epitomizing the imminent and ever-present peril faced by those in positions of power. **More generally, it is used to denote the sense of foreboding engendered by a precarious situation**, especially one in which the onset of tragedy is restrained only by a delicate trigger or chance. http://en.wikipedia.org/wiki/Damocles

did not issue a request for evidence, the AAO may consider any evidence that the appellant submits on appeal. *Cf: Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For the reasons discussed below, the appellant has not overcome all of the bases for denial."

"The regulation at 8 C.F.R. § 204.6(j) notes that additional evidence other than that specified in the regulations may be required. **Clearly, only an entity that exists can be designated as a regional center. Thus, it is reasonable to require evidence of the proposed regional center's existence.** *We concur with the appellant, however, that the absence of organizational documentation is the type of issue that can, under certain circumstances, be easily resolved with a request for additional evidence. The evidence submitted on appeal, however, reveals that the appellant is not capable of resolving this issue as of the date the proposal was filed*. **As the nonexistence of the regional center at the time the proposal was filed is not a flaw that can be remedied for the reasons discussed below, remanding this matter to the director for further action would be repetitive and unreasonably delay final action in this matter**. *See generally Deering Milliken, Inc. v Johnston,* 295 F.2d 856, 867 (4th Cir. 1961) (finding that a second remand by the National Labor Relations Board would cause unreasonable delays)."

"The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. US. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g., *Dor v. INS,* 89 1 F.2d 997, 1002 n. 9 (2d Cir. 1989)."

EB-5 Specific Precedents:

USCIS adjudicators and AAO have very little precedent on which to draw with regard to Regional Center Designation Adjudications. There are four EB-5 specific I&N Decisions from 1998, that deal with I-526 petitions but have certain broader application to Regional Center Proposals, and ***Spencer Enterprises* v. *U.S.*,** 229 F.Supp.2d 1025, 1038 n. 4 (E.D. Cal. 2001) *aff'd* 345 F.3d 683 (9th Cir.2003)[33] (accepting an AAO determination that business plan amendments submitted for the first time on appeal could not be considered). Both the District Court and Ninth Circuit Decisions have useful passages. *Honorable mention for:* R.L. Investment Limited Partners ***(RLILP) v. INS***, 273 F.3d 874 (9th Cir. 2001). The additional non-precedent AAO Decisions are also available. *It is those non-precedents that raise concern.*

Matter of Ho:

From the holding:

(5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise

[33] Spencer v. INS found at:
http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/752876AC2E72D7B088256DA3007BDB70/$file/0116391.pdf?openelement

has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

From the text:

"…To be "comprehensive," a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.

A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor.4 Most importantly, the business plan must be credible." *At 213*

Matter of Hsuing:

Summary:

This decision deals heavily with promissory notes and what constitutes capital. Assets used as collateral for a promissory note must be amenable to seizure and any capital must be valued at a fair market rate. The reorganization or restructuring of a pre-existing business may not cause a net loss of employment.

***Matter of Izummi* :**

Point-by-point:

For the I-924, the most pertinent parts of the 13 part holding are numbers:

(1) Regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement.

(2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

(9) The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits.

Secondary: (4)-(8),(10)-(12) all deal with monetary arrangements that must be taken into consideration when drafting investment documents and formulating the investment strategy.

(13) Alien's "establishment of enterprise" requirement was overruled by subsequent legislation.

However, the AAO has inappropriately applied this rule to Regional Center Proposals:

(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements. ***Hopefully, AAO will reassess this approach***.

Matter of Soffici:

Summary:

Merely making a direct loan is not "investing".
Merely assuming a debt is not "investing".
Merely buying an existing business without growing it does not qualify as an "EB-5 investment".

Spencer (Ninth Circuit Court):

Notably blubs:

"The question before us, then, is whether any statute has deprived the federal courts of jurisdiction to review the particular agency action at issue here: INS's denial of an immigrant investor visa petition….. In this case, we need not look to regulations or agency practice because the statutory framework provides meaningful standards by which to review INS's action…. The APA does not preclude judicial review…. Applying § 1252(a)(2)(B)(ii) here, we find that the authority to issue a visa under the immigrant investor program is not specified by any statute to be discretionary. Instead, the authority comes directly from § 1153(b)(5), which both *mandates issuance of such visas*, see 8 U.S.C. § 1153(b)(5)(A) ("Visas shall be made available.…to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise." (emphasis added)), **and** *sets out a series of standards for eligibility that the visa petitioner must meet*.... We conclude that § 1252(a)(2)(B)(ii) does not preclude judicial review of the decision whether to issue a visa pursuant to § 1153(b)(5)."

"A few errors or minor discrepancies are not reason to question an alien's credibility. See, e.g., Shah v. INS, 220 F.3d 1062, 1068 (9th Cir.2000). Numerous errors and discrepancies, however-especially where INS is evaluating the credibility of a business plan-raise serious concerns about

the viability of the enterprise. In this case, the findings catalogued above constitute substantial evidence for the AAO's determination that Chang's business plan was not credible enough to demonstrate the need for ten full-time workers. The denial of the petition on this basis was not arbitrary, capricious, or an abuse of discretion."

Spencer (District Court):

Notable blurbs:

Citing Ho favorably: "The AAO did not abuse its discretion in construing full-time employment to mean continuous, permanent employment."

Citing Ho favorably: "Doubt cast on any aspect of a petitioner's proof inherently raises questions as to the credibility of the remaining evidence of record, and any attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth lies, will not suffice."

"Spencer Enterprises had no matter pending before the INS and has no standing to raise a procedural due process claim. ……..… While the Immigrant Investor Program creates an opportunity for eligible aliens to enter the United States and invest in the United States economy, it does not create rights in United States' businesses to require admission of non-qualifying aliens. No United States business has a vested property right in the investor alien program." ***(Denying Spencer standing in the case.)***

Citing Soffici favorably: "The letter from the Fresno County Board of Supervisors must meet the requirements of *8 C.F.R. § 204.6(i)*…….. Nothing in the record indicates that the Fresno County Board of Supervisors is considered a body of state government. Nor is there any indication that an official of the state notified the Associate Commissioner for Examinations of the County Board of Supervisors that it would be delegated the authority to certify that the geographic or political subdivision is a high unemployment area….. Although hyper-technical, the INS has insisted on strict compliance with its rules and plaintiff should have expected to meet these requirements"

"There were no interpretive guidelines published in the Federal Register. *See Pfaff v. HUD, 88 F.3d 739, 748 (9th Cir. 1996).* No officially published opinions of the INS General Counsel had been issued. *See Han v. DOJ, 45 F.3d 333, 339 (9th Cir. 1995).* ***There was therefore no prior decision, no prior rule, no prior statute, no interpretive guideline, or officially published opinion on which any party could rely in good faith***. Plaintiffs had no legally vested right in or justification for relying on the prior unpublished decisions to give rise to estoppel."

RLILP:

"..unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated."

Regional Center Administrative Appeal Path:

When it comes to Regional Center Designation adjudications, Congress did not provide much raw material to work with so the "immigrant investor pilot program" and the requirements for designation as a "regional center" under that program are largely regulatory in nature as the regulations were pretty much a blank canvass to be creative with. Congress even cited to the regulations in later legislation on EB-5! USCIS should take full advantage of that situation to craft workable regulations before it is too late. When Congress left ambiguity in the individual investor visa program and the INS put the program on hold and fought numerous battles in court, Congress slammed the agency with the dreaded EB-5 Amendments, §§ 11031-11033 of Pub. L. 107-273 (November 2, 2002). USCIS inherited that mess and still to this very day has not yet published the implementing regulations which were mandated to be written in 120 days of enactment for the "special law cases"!

The AAO points out that it maintains plenary power to review each appeal on a *de novo* basis, except as it shall limit the review by notice or rule. In the newly formalized realm of Regional Center Designation adjudication, the I-924 form instructions invoke 8 CFR 103.3(b)(16) as to derogatory information and 8 CFR 103.3 as to appeal rights, however it should be noted that like any other applicant, 8 CFR 103.5 is available as to Motions to Reopen and/or Reconsider. The AAO has only issued four precedents on EB-5 and they barely touched on the Immigrant Investment Pilot Program within the context of I-526 petitions, NOT I-924 applications.

The Form I-924 is eligible for an administrative appeal process via 8 CFR § 103.3(a) as directed in 8 CFR § 204.6(m)(5). As with virtually anything else, the I-924 is also subject to Motions to Reopen or Motions to Reconsider via 8 CFR § 103.5(a). These motion regulations, like the 8 CFR §§ 334.5 and 334.16, are also broken down in terms of who may file: the applicant or the Government. The N-400 has its peculiar "Second Hearing" and subsequent "judicial review" pathway based on specific statutory provisions. In that the Immigrant Investor Pilot Program is primarily regulatory in nature, unique regulations on this aspect would be welcome, especially considering the unique nature of the program overall.

I urge USCIS to examine the N-400 regulations and statutes as a guide in drafting I-924 adjudication and appellate review regulations.

The Regional Center is a special designation sought from USCIS. It is a benefit but it is a different kind of benefit than USCIS is used to. It is similar to form of license, a privilege that bestows rights and responsibilities. A good example of such a benefit that USCIS has tons of experience with is naturalization. The applicable statutes and regulations to examine in crafting I-924 regulations are those dealing with the N-400.

By comparison, a naturalization applicant must meet a minimum physical presence requirement and must have had their status for a minimum period of time, in most cases, before they may file an N-400, but, continuous residence can be broken and good moral character can be lost *or* proven **after filing**. A long absence from the United States or an affirmative change of residence abroad after filing an N-400 can make one ineligible. A crime committed or prosecuted after

filing may negate good moral character, while the end of probation for an otherwise non-dispositive crime or violation may serve to rehabilitate and cement eligibility for naturalization, after filing, despite the prohibition against naturalizing (as in administering the Oath to) a person who is still on probation.

Naturalization has aspects towards eligibility that are *prerequisite* to filing the application but it is not complete until the final administration of the Oath of Renunciation and Allegiance. An N-400 is only "recommended for approval" until such time as the applicant is admitted to citizenship. The premise of an investment as asserted in a Regional Center application, i.e. the business plan, and the previously vetted written documentation, are only "recommended for a favorable determination" as supporting prima facie evidence of eligibility for a future I-526 and even further I-829. A *prima facie showing of eligibility*, through use of previously vetted plans and documentation, is a good starting point but is not the final word. An individual applicant *must still prove complete eligibility for a favorable determination* on the individual petition.

An I-924 is similar to an N-400 in terms of reciprocity also. In the case of: Luria v. United States, 231 U.S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913), quoted below, it was recognized by the U.S. Supreme Court that a grant of naturalization is a mutual agreement between the naturalization applicant and the United States of America. The designation as Regional Center can be viewed in a similar light. There must be a mutual agreement between the parties to respect their agreement. Each party bears a responsibility to the other.

The Regional Center must prove itself to get the desired chance and then it must fulfill its promise through its actions. Just as a naturalization applicant can perfect his/her N-400 application during the process, so too, can a Regional Center applicant perfect its I-924 application. A naturalization applicant automatically has two chances to pass INA § 312 English and civics requirements and is afforded more chances through a "Second Hearing" (N-336 'appeal') and three further tiers of judicial review. A Regional Center should be afforded ample opportunities to perfect its application for designation due to the benefits that it is expected to provide in return for that honor. Many high standards and promises are extracted from the applicant in order to attain status and gain rights and privileges in an air of mutual agreement to assume and bear obligations and duties on both sides in a formal exchange between them.

> "Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other…….
>
> ……These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name,—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past."

8 CFR § 336.2 Hearing before an immigration officer.

(b) Upon receipt of a timely request for a hearing, the Service shall schedule a review hearing before an immigration officer, within a reasonable period of time not to exceed 180 days from the date upon which the appeal is filed. The review shall be with an officer other than the officer who conducted the original examination under section 335 of the Act or who rendered the Service determination upon which the hearing is based, and who is classified at a grade level equal to or higher than the grade of the examining officer. **The reviewing officer shall have the authority and discretion to review the application for naturalization, to examine the applicant, and either to affirm the findings and determination of the original examining officer or to re-determine the original decision of the Service in whole or in part**. The reviewing officer shall also have the discretion to review any administrative record which was created as part of the examination procedures as well as Service files and reports. He or she may receive new evidence or take such additional testimony as may be deemed relevant to the applicant's eligibility for naturalization or which the applicant seeks to provide. **Based upon the complexity of the issues to be reviewed or determined, and upon the necessity of conducting further examinations with respect to essential** naturalization **requirements**, such as literacy or civics knowledge, the reviewing immigration officer may, in his or her discretion, conduct a **full *de novo* hearing or may utilize a less formal review procedure, as he or she deems reasonable and in the interest of justice.**

I suggest incorporating similar language as found in 8 CFR § 336.2(b) to § 204.6, as follows: [suggested (m)(5)(i) is a modification to existing (m)(5)].

(m) Requirements for regional centers…….

(5) Decision to participate in the Immigrant Investor Pilot Program.

(i) Prompt Decision on Initial Application. The Service Center Director shall notify the regional center applicant of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program under subparagraph (3) of this paragraph (m) and § 103.2 of this chapter.

If approved, the Approval Notice will describe the geographic area covered, the specific industries or types of businesses approved for investment and will make specific reference to the job projection and economic impact model and/or methodology that was submitted and reviewed for acceptability. The written Approval Notice will inform the Regional Center of its recordkeeping and reporting responsibilities and prohibition against making substantive material changes to previously submitted and reviewed standard written business documents and/or business plans and/or investment instruments anticipated to be submitted with individual investor petitions.

If the application is denied, of the reasons for the denial and of the applicant’s right of appeal to the Administrative Appeals Office (AAO). The written Denial Notice will be furnished informing the applicant of the reasons for denial along with notification of motion and appeal rights. The procedures for appeal may be the same as those contained

in § 103.3 of this chapter, or as modified herein, while motions may be treated as described in § 103.5 of this chapter, or as modified herein, as applicable.

(ii) Prompt Decision on Amendment Application. The Service Center Director shall notify the regional center applicant of his or her decision on the request to amend or modify its participation in the Immigrant Investor Pilot Program under subparagraph (3) of this paragraph (m) and § 103.2 of this chapter.

If approved, the Approval Notice will add to, subtract from, or otherwise modify the prior Approval Notice and include the specific changes made by the amendment to the Regional Center's previously authorized participation in the Immigrant Investor Program.

A Denial of a Proposed Amendment does not void the prior Approval Notice unless that participation is officially terminated pursuant to subparagraph (7) of this paragraph (m).

If the amendment application is denied, the Amendment Denial Notice shall inform the applicant of the reasons for the denial and of the applicant's right of appeal to the Administrative Appeals Office (AAO). The Denial Notice shall be restricted to the amendment only, and will be furnished informing the applicant of motion and appeal rights. The procedures for appeal may be the same as those contained in § 103.3 of this chapter, or as modified herein, while motions may be treated as described in § 103.5 of this chapter, or as modified herein, as applicable.

(iii) Initial Agency Review of Appeal or Motion. The Center Director shall expeditiously and thoroughly review any appeal or motion of a denied Regional Center Initial or Amendment Application. If the applicant indicates that the brief and/or additional evidence will follow submission of the I-290B, the case may set aside until the additional submission has been received or the allotted time has passed. The applicant is only allowed the time specified for a *single submission of the brief and/or additional evidence*. No extensions of time shall be granted by the Center Director in the context of an Appeal or Motion.

If no brief or additional evidence has been submitted within the time allowed, *the Center Director may summarily dismiss* the Appeal or Motion in accordance with § 103.3 (a)(1)(v) of this chapter and restrict further review of that summarily dismissed case to renewed right of appeal only, with no further motion option; or *make and issue a new decision based on the record as altered by* any statement on the I-290B and any evidence initially submitted with the I-290B Motion and restrict further review of that re-denied case to renewed right of appeal only, with no further motion option; or certify the decision to the AAO in accordance with § 103.4 of this chapter when the case involves an unusually complex or novel issue of law or fact. Any such subsequently filed restricted appeal shall be immediately forwarded to the AAO, without the detailed review afforded to an initial submission on review.

(A) *Favorable Initial Decision on Appeal or Motion.* The Center Director shall review any appeal or motion and if the case is approvable as submitted, shall approve the

application and issue the decision; or certify the decision to the AAO in accordance with § 103.4 of this chapter when the case involves an unusually complex or novel issue of law or fact.

(B) *Unfavorable Initial Decision on Appeal.* If the initial submission for review is denoted as an **appeal** but is not approvable as submitted, the appeal and complete application receipt file shall be forwarded to the AAO.

(C) *Unfavorable Initial Decision on Motion*. If the initial submission for review is denoted as a **motion** but is not approvable as filed, the Director may either, dismiss the motion and restrict further review to renewed right of appeal only, with no further motion option; or certify the decision to the AAO in accordance with § 103.4 of this chapter when the case involves an unusually complex or novel issue of law or fact. Any such subsequently filed restricted appeal shall be immediately forwarded to the AAO, without the detailed review afforded to an initial submission on review.

(iv) AAO Review of Regional Center Application. Unless the Chief of the Administrative Appeals Office has specifically delegated authority to a USCIS Officer who is a journeyman level adjudicator or higher at the Service Center to further develop a particular case, these procedures are reserved for use by the reviewing Appeals Officer within AAO.

(A) *Basic Review.* The reviewing officer shall have the authority and discretion to review the application for Regional Center Designation and any evidence already on record, and either to affirm the findings and determination of the original adjudicating officer or to modify or re-determine the original decision in whole or in part.

(B) *Availability of Additional Records.* The reviewing officer shall also have the discretion to review any administrative record which was created as part of the adjudication procedures as well as other USCIS files and reports, including VIBE, or outside sources of information and databases, including internet sources.

(C) *Request for evidence or testimony, independent inquiry or investigation in the course of an Administrative Appeal of a denial of a benefit under the INA.*

(1) He or she may request specific evidence, receive new evidence or interview the applicant and witnesses, in-person or telephonically, and take such additional testimony as may be deemed relevant to the applicant's eligibility for Designation as a Regional Center and may consider any additional evidence that the applicant seeks to provide, within a reasonable period of time, before a decision is made. Any derogatory information, is subject to disclosure in accordance with § 103.2 (b) (16) of this chapter, as amended, or modified in the interests of national security.

(2) The Appeals Officer or, Service Center Officer delegated specific authority by the Chief of the AAO, who is or may reasonably be expected to be involved in the decisional

process who receives, or who makes or knowingly causes to be made, a communication ordinarily prohibited by this 5 USC § 557 shall place within the record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications;

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(v) standardized sworn statements will suffice as documentation of in-person communication;

(vi) telephonic interviews may be recorded with consent of both (or all) parties; and

(vii) non-redacted e-mail directly pertaining to the case will be incorporated into the record.

(D) *Flexibility in standard of review.* Based upon the complexity of the issues to be reviewed or determined, and upon the necessity of conducting further deliberation with respect to essential requirements, the reviewing Officer may, in his or her discretion, conduct a *full de novo review* or may utilize an *ad hoc review* procedure, as he or she deems reasonable and *in the interest of justice and economic benefits to the United States*.

(E) *AAO Decision.* The Appeals Officer shall follow established procedures in consultation with fellow Appeals Officer and Supervisors. Any delegated Reviewing Officer shall coordinate any consultation or outside research through the AAO. AAO may consult with the USCIS Office of Chief Counsel, other USCIS or DHS components, the Library of Congress, the State Department, or any other Government Agency *as authorized by superiors at USCIS* in researching legal questions and complex or novel issues concerning business practices, investments, economics, labor, or any other relevant subject. *The Appeals Officer may further develop the case and facts thereof within a reasonable period of time as set by AAO and USCIS management.* The Appeals Officer may approve or deny the benefit upon completion of development and review of the case. The written decision will reflect the grant or denial of the benefit with specificity. The least desirable option is to remand for correction of USCIS procedural or substantive errors.

(1) *AAO Approval of the Benefit.* This may be in the form of a sustained appeal or motion. This may be the remand of an overturned recommended denial with instructions to approve, *as specified in the written remand order,* and notify the applicant of rights and responsibilities. This may be an affirmance of a recommended approval, with or without modification. The AAO may either prepare an Approval Notice itself and remand it to the Service center to issue, or remand to the Service Center to prepare and issue the Approval Notice as systems capabilities and staffing dictate to ensure prompt notification.

The Approval Notice will describe the geographic area covered, the specific industries or types of businesses approved for investment and will make specific reference to the job projection and economic impact model and/or methodology that was submitted and reviewed for acceptability. The written Approval Notice will inform the Regional Center of its recordkeeping and reporting responsibilities and prohibition against making substantive material changes to previously submitted and reviewed standard written business documents and/or business plans and/or investment instruments anticipated to be submitted with individual investor petitions.

(2) *AAO Denial of the Benefit.* This may be in the form of a dismissed appeal or motion. This may be an affirmance of a recommended denial, with or without modification. This may be an overturned recommended approval. The AAO will issue a detailed analysis of the law and facts of the case in support of its decision. The denial will include the rights to submit a single optional motion to reopen and/or reconsider or to submit a new application, or to file for judicial review in accordance with 5 USC § 706.

(3) *Remand.* With the procedures afforded to the Appeals Officer or delegated Officer in this paragraph (m) (5) (iv), remands should be limited to:

Remand with specific instructions, described in (E) (1), or

A procedural error: **Reversible error** during a proceeding sufficiently harmful to justify reversing the judgment of the prior Officer, or

A substantive error:

(i)mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence which by due diligence could not have been discovered in time to avoid forwarding the case to AAO

(iii) fraud, misrepresentation, or other misconduct of an adverse party (for referral to fraud investigation or OIG, if employee misconduct;

(iv) a prior rule, precedent, statute or regulation, upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the rule should have prospective application; or

(v) any other reason justifying relief from the operation of the rule.

(4) *Consideration for Publication*. Any decision whether an Approval, Denial, or remand in which the case involves an unusually complex or novel issue of law or fact, or matter of first impression, the decision shall be referred to the appropriate parties in accordance with § 103.3 (c) of this chapter.

Regulatory References:

8 CFR § 103.2 Applications, petitions, and other documents.

(b) *Evidence and processing*

(16) *Inspection of evidence.* An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) *Determination of statutory eligibility.* A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

(iii) *Discretionary determination.* Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided the USCIS Director or his or her designee has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security.

(iv) *Classified information.* An applicant or petitioner shall not be provided any information contained in the record or outside the record which is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security, unless the classifying authority has agreed in writing to such disclosure. Whenever he/she believes he/she can do so consistently with safeguarding both the information and its source, the USCIS Director or his or her designee should direct that the applicant or petitioner be given notice of the general nature of the information and an opportunity to offer opposing evidence. The USCIS Director's or his or her designee's authorization to use such classified information shall be made a part of the record. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

***See generally*, 8 CFR § 103.3 Denials, appeals, and precedent decisions.**

(a) *Denials and appeals* —(1) *General*

(iv) *Function of Administrative Appeals Unit (AAU).* The AAU is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner, Examinations.

Regulatory History:

AAU became AAO on Nov. 22, 1994, 59 FR 60070. That internal reorganization[34] of the Immigration and Naturalization Service was approved by Attorney General Janet Reno on January 14, 1994.

It should be noted that the regulations pertaining to Appeals and Motions in 8 CFR were primarily promulgated by the Executive Office for Immigration Review (EOIR[35]) in the specific context of Motions and Appeals in Immigration Proceedings before the Immigration Courts and the BIA. The AAU/AAO was only a peripheral concern and it merely borrowed from EOIR's regulations from the very beginning and took them too much to heart and out of context.

From: 61 FR 18899-18910, July 1, 1996:

AGENCY: Department of Justice.

ACTION: Final rule.

AFFECTING: 8 CFR Parts 1, 3, 103, 208, 212, 242, and 246.

> "SUPPLEMENTARY INFORMATION: Under the final rule, parties will have the opportunity to file only one motion to reopen and one motion to reconsider during the administrative adjudication process. In most instances, the motion to reopen must be filed not later than 90 days after the date on which the final administrative decision was rendered……. Generally, a motion to reconsider must be filed not later than 30 days after the date on which the final administrative decision was rendered….. The rule also provides that a notice of appeal will be timely if filed within 30 days of the issuance of an Immigration Judge's decision. The Department notes that the new 30-day period for filing appeals and the provisions for filing appeals directly with the Board apply to Immigration Judge decisions…. the old regulation's 10-day period (13 days if the appeal is mailed) for filing appeals and provisions for filing appeals with the Immigration Courts apply to Immigration Judge decisions issued before the effective date of this rule……..
>
> The rule outlines the required content of motions and notices of appeal, and requires parties to file or remit directly with the Board of Immigration Appeals ("Board"):

[34] See 59 FR 60070 at: http://frwebgate2.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=KTnaSA/6/1/0&WAISaction=retrieve
[35] In a January 1983, Departmental reorganization, the Attorney General created the Executive Office for Immigration Review (EOIR).

(1) All motions to reopen and motions to reconsider decisions of the Board pertaining to proceedings before Immigration Judges;
(2) all notices of appeals of decisions of Immigration Judges; and
(3) all relevant fees or fee waiver requests.

Furthermore, the rule addresses the definition of the term "lawfully admitted for permanent residence", the procedure for certifying a case to the Board, and appeals of in absentia decisions. The Department notes that the field sites of the Executive Office for Immigration Review ("EOIR"), formerly referred to as the Offices of the Immigration Judges, are now called Immigration Courts.

The Department of Justice has published a number of proposed rules addressing both the motion practice and the appeals process before the Board. Most recently, the Department published a proposed rule regarding these procedures in May 1995 that incorporated and expanded proposed rules published in May and June 1994. 60 FR 24573 (May 9, 1995); 59 FR 29386 (June 7, 1994); 59 FR 24977 (May 13, 1994).

In response to the above rulemakings, the Department received 71 comments. The comments addressed a number of issues, including the definition of the term "lawfully admitted for permanent residence", the time and number limitations on motions to reopen and reconsider, the availability of an appeal where an order has been entered in absentia (particularly in exclusion proceedings), the streamlined appeals procedure, and the construction of briefing schedules for both motions and appeals.

The Department has carefully considered and evaluated the issues raised by the commenters and has modified the rule considerably. The following sections summarize the comments, set forth the responses of the Department of Justice, and explain the final provisions adopted. We note that a number of technical corrections were made to the proposed rule. These corrections include the addition of 8 U.S.C. 1282, 31 U.S.C. 9701 and 8 CFR part 2 to the authority citation for Part 208 and the addition of 8 U.S.C. 1252a to the authority citation for Part 242…."

"Moreover, in a *recent* case, the Supreme Court noted that the Immigration Act of 1990, which amended the Act, demonstrated a congressional intent to ``expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions." Stone v. INS, 115 S.Ct. 1537, 1546 (1995). Justice Kennedy, writing for the majority, stated:

> 'Congress' intent in adopting and then amending the Act was to expedite both the initiation and the completion of the judicial review process. * * * [A] principal purpose of the 1990 amendments to the Act was to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions. In the Immigration Act of 1990, Congress * * * [f]irst * * * directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file. Sec. 545(b). Second, it *instructed* the Attorney General to promulgate regulations specifying

> the maximum time period for the filing of those motions, hinting that a 20-day period would be appropriate.'
>
> Stone v. INS, 115 S.Ct. at 1546 (*emphasis supplied*)."

It is clear that the regulations pertaining to Appeals and Motions were created for a different venue than what now exists. The BIA is in a different forum than AAO. The BIA is the appellate body from an **adversarial** administrative proceeding which much more resembles a criminal trial while the AAO is the appellate body from an **inquisitorial** administrative paper-based and usually faceless adjudication. **The BIA and AAO are qualitatively different in nature.** Since March 1, 2003, the AAO should have been forming a new self identity in accordance with its new home in a customer service oriented agency. USCIS is charged with the fair and impartial evaluation of eligibility for benefits under the Immigration and Nationality Act. AAO needs to re-evaluate its place in the grand scheme of the current reality as a part of the U.S. Citizenship and Immigration Services.

This has been born out as recently as March 3, 2011, in the consolidated Opinion of the Second Circuit *Luna v. Holder*[36] [Consolidating: 07-3796-ag Luna v. Holder and 08-4840-ag Thompson v. Holder].

> "The sole and exclusive means for challenging a final order of removal is to file a petition for review in a federal court of appeals. If a petition for review is filed more than 30 days after the order of removal, the court of appeals lacks jurisdiction over the petition…….
>
> We hold that applying the 30-day filing deadline to Petitioners does not violate the Suspension Clause because **the statutory motion to reopen process as described herein is an adequate and effective substitute for habeas review**. We reach that conclusion based on our further holdings that (1) the statutory motion to reopen process cannot be unilaterally terminated by the Government and (2) agency denials are subject to meaningful judicial review. Accordingly, we dismiss as untimely Petitioners' petitions for review." **[Emphasis added.]**
>
> ……..
>
> "Before 1996, aliens involved in immigration proceedings could move to reopen their proceedings before the BIA. However, the authority for such motions derived solely from regulations promulgated by the Attorney General."

The AAO simply deals with totally different types of cases than the BIA and needs new regs.

No Need to Re-Invent the Wheel:

In 67 FR 54877-54905, August 26, 2002, DOJ published on behalf of the Board of Immigration Appeals, a final rule, effective September 25, 2002, entitled: "Procedural Reforms To Improve Case Management"

[36] The consolidated Opinion is found at: http://www.ca2.uscourts.gov/decisions/isysquery/5898c92e-acc5-4b64-a475-a7fc2a9100e6/4/doc/08-4840%2007-3796_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/5898c92e-acc5-4b64-a475-a7fc2a9100e6/4/hilite/

From the “Supplementary Information” certain important issues were considered and thoroughly discussed. USCIS and AAO do not have to start from scratch. What INS and EOIR have done under the authority of the Department of Justice and the Attorney General can be used as a starting point or baseline. Some concepts can be imported as is, while others will need to be fine tuned, a few can be scrapped. With regard to the ultimate authority of the A.G. as the final arbiter of immigration law interpretation within the Executive Branch, it seems that will have to stand as is.

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III. Comments on the Proposed Rule

The comments received on the proposed rule can generally be grouped into broad categories. In this analysis, we divide the comments and further discussion of the rule into specific subparts in order to provide a cohesive overview of the comments, the changes made in light of the comments, and the final rule…….

A. General Due Process Issues

Some commenters argued in a general way that the proposed rule violates due process or that it is otherwise bad procedure…..

Initially, the Department notes that the due process clause of the Constitution does not confer a right to appeal, even in criminal prosecutions. See Ross v. Moffitt, 417 U.S. 600, 611 (1974) (``[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.");….

1. The Respondent's Interest in the Individual Proceeding

First, and foremost, the vast majority of issues presented on appeal to the Board involve applications for relief from removal, not removal itself. Accordingly, the process that is due is not a process related to the government's efforts to remove the respondent from the United States…….

2. The Government's Interest in the Immigration Adjudication Process

The interest of the government in effective and efficient adjudication of immigration matters, moreover, is substantially higher than an individual respondent's interest in his or her own proceeding. Congress is granted plenary authority under the Constitution in immigration matters and Congress has delegated broad authority to the Attorney General to administer the immigration laws. The authority is not merely one involving a discrete set of benefits and penalties, but implicates, in conjunction with the Secretary of State, the vast external realm of foreign relations…..

3. Balancing of Interests in the Adjudicatory Process

Some commenters expressed concern that the expansion of the streamlining initiative, with its emphasis on single-member review of cases, will result in violations of the due process rights of respondents-appellants…….

The Department finds that single-member review under the final rule is both fair and reliable as a means of resolving the vast majority of non-controversial cases, while **reserving three-member review** for the much smaller number of cases **in which there is a substantial factual or legal basis** for contesting removability **or in which an application for relief presents complex issues of law or fact**. In this context, the Attorney General is free to tailor the scope and procedures of administrative review of immigration matters as a matter of discretion…..

Each case varies according to the needs presented by the respondent and the issues…..

[In recognition of the differences between appeals from the decision of an immigration judge and appeals from decisions by a district director or other Service official, this rule retains the de novo standard of review for appeals in the latter case, as discussed below.]……

B. General Comments Relating to the Role and Independence of the Board

Some commenters argued that the provisions of this rule, either individually or in combination, would adversely affect the fairness or effectiveness of the Board's adjudications by limiting the independence and perceived impartiality of the Board. Some commenters criticized the provision in Sec. 3.1(a)(1) of the proposed rule that the Board members act as the ``delegates'' of the Attorney General in adjudicating appeals,….

1. The Attorney General's Authority

These arguments misapprehend the nature of the Board and the rule. The Board is an administrative body within the Department, and it is well within the Attorney General's discretion to develop the management and procedural reforms provided in this rule….

[The Board was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. Reorg. Plan V (May 22, 1940); 3 CFR Comp. 1940, Supp. tit.3, 336. The Board is not a statutory body; it was created wholly by the Attorney General from the functions transferred. A.G. Order 3888, 5 FR 2454 (July 1, 1940); see Matter of L-, 1 I&N Dec. 1 (BIA; A.G. 1940).]……..

2. Independence of Administrative Adjudicators

Several commenters argued that the independence and impartiality of immigration judges and immigration adjudicators must be affirmed. They asserted that the proposed rule would adversely affect the independence of the Board…….

These comments misapprehend the distinction between ``independence" and ``fundamental fairness." The Constitution requires fundamental fairness, not that the adjudicator be ``independent" of policy direction or management by the Executive. The Department agrees with the principle of independence of adjudicators within the individual adjudications, but notes that freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review…..

3. Attorney General Opinions and Written Orders

Several commenters objected to the new language in Sec. 3.1(d)(3)(i) of the proposed rule that the Board is subject to legal opinions and written orders issued by the Attorney General, in addition to the Attorney General's review of individual Board decisions….

[The Board has expressly acknowledged, for example, that the Attorney General's determination of a legal issue in interpreting the Act is binding on the Board and the immigration judges, even if that determination is reflected in the SUPPLEMENTARY INFORMATION to a rule rather than in the text of a rule or in an Attorney General or OLC Opinion. See *Matter of A-A-*, 20 I&N Dec. 492, 502 (BIA 1992)…]…

4. The Effect of Regulations

Although not specifically raised in the public comments, the Department also notes that the language of Sec. 3.1(d)(1) of the proposed rule states that the Board will resolve the issues before it in a manner that is ``consistent with the Act and the regulations." This language clarifies the role of regulations in administrative adjudications under the Act……

C. Expanded Single-Member Review

Many of the key features of the final rule are codified in the new provisions of 8 CFR 3.1(e), which directs the Chairman to establish a case management system with specific new standards for the efficient and expeditious resolution of all appeals coming before the Board…..

1. General Comments on the Adequacy of Single-Member Review

Many of the comments expressed the concern that single-member review of decisions by the immigration judges will mean that procedural failures in the record will be overlooked--that a single Board member's review will somehow be ``cursory" or will give a ``boilerplate stamp of approval" to the decision on appeal…..

The Department believes that the Board's experience with the streamlining initiative has proven that fears of procedural failures or substantive errors being overlooked are not well founded. Even single-member review is a multi-stage process involving review by Board staff and by a Board member assigned to the screening panel. Individual Board members are well-equipped to determine both the legal quality and sufficiency of an immigration judge's decision, and to determine if the appeal qualifies for referral to a three-member panel…..

2. Summary Dismissals

The proposed rule included a provision that the screening panel, *in those cases not summarily dismissed*, would order the preparation of a transcript and set a briefing schedule. This provision presumed a review by the screening panel at the outset of the process ….. to determine such fundamental matters as whether the appeal was timely filed, whether the Board had jurisdiction, or whether the Notice of Appeal facially provided sufficient reasons for an appeal to be lodged. Some commenters did not seem to grasp the distinction between these core ``adjudicability'' issues that could be dismissed without the preparation of the transcript and briefs, and those issues, such as whether a brief was filed, that inevitably must be decided only upon the completed record. Although this lack of understanding appears to the Department to require this further explanation, it does not appear to warrant any change in the rule.

3. Summary Affirmances Under Streamlining

Many commenters expressed concerns about the general idea of authorizing a single Board member to issue a summary affirmance of an immigration judge's decision. A few commenters argued that decisions affirming an immigration judge's decision without further elaboration would not be considered by the public to be as legitimate as a more fully developed written decision……

These concerns fail to consider the Board's experience under the existing streamlining process, which, since 1999, has authorized single Board members to summarily affirm a decision without opinion, in appropriate cases……and in 1998, see 64 FR 56135, 56137 (Oct. 18, 1999), but have not been borne out by the Board's experience since then…..

4. Other Dispositions by a Single Board Member--Affirmances, Modifications, and Remands

Some commenters took the position that single Board members should not be permitted to affirm, modify, or remand the decision of an immigration judge in a short opinion…….

At the outset, it should be noted that the Board has been allowed to summarily affirm decisions of the immigration judge ``for the reasons stated therein'' for many years before the streamlining initiative was begun. The Board was never prohibited from doing so. In reality, some panels of the Board have done so in the past with great success……

Individual panels at the Board have differed on the content of Board decisions in non-precedent cases over time. Some panels have included an introduction, a statement of issues present in the record, a full restatement of the proceedings before the immigration judge, a complete recitation of the established and controverted facts presented in the record, analysis of the applicable law, and the panel's conclusions and order. This is, in effect, de novo review of every case, notwithstanding the complexity of the issues presented. For cases in which there are no substantial factual or legal issues, this commitment of resources cannot be justified in light of the Board's current situation.

Other panels, more recently, have developed orders that include an adoption of the immigration judge's decision, only a short statement of the issues presented on appeal, with a statement of relevant facts and controlling precedent, and the order. Typically, these decisions are to be read in conjunction with the immigration judge's decision. The Department believes that this more limited appellate review process, to determine whether the immigration judge has erred, is more appropriate for the majority of cases……

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E. De novo Review and the Clearly Erroneous Standard

1. De novo and Clearly Erroneous Standards of Review of Factual Determinations by the Immigration Judges

……

2. ``Correction'' of Clearly Erroneous Factual Determinations

The Department's adoption of the ``clearly erroneous'' standard encompasses the standards now commonly used by the federal courts with respect to appellate court review of findings of fact made by a trial court. See Dickinson v. Zurko, 527 U.S. 150, 153 (1999). Under this standard, an appellate tribunal merely has authority to reverse erroneous fact findings and no authority to correct them. See id. However, it has been pointed out that the word ``correct'' in proposed Sec. 3.1(e)(6) might appear to give three-member panels authority to go beyond the traditional ``clearly erroneous'' standard used in such review and to engage in de novo fact-finding to ``correct'' clearly erroneous facts. This was not the Department's intent and Sec. 3.1(e)(6) has been revised.

3. Clearly Erroneous Standard Applied

One of the more complicated contexts in which the clearly erroneous standard will be applied is in the area of asylum. For example, the Board has established standards for immigration judges to make credibility determinations. Matter of A-S-, supra. These standards involve several different types of findings: whether inconsistencies exist, whether omissions in an application indicate exaggeration in testimony, or whether a respondent has indicated through his or her demeanor that he or she is being less than truthful.

The ``clearly erroneous'' standard will apply only to the factual findings by an immigration judge, including determinations as to the credibility of testimony, that form the factual basis for the decision under review. The ``clearly erroneous'' standard does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to ``past persecution'' or a ``well-founded fear of future persecution.''

The distinction requires a more refined analytical approach to deciding cases, but focuses on the qualities of adjudication that best suit the different decision-makers. Immigration judges are better positioned to discern credibility and assess the facts with the witnesses before them; the

Board is better positioned to review the decisions from the perspective of legal standards and the exercise of discretion.

For example, under section 208 of the Act, a respondent may establish eligibility for asylum by showing that he has been persecuted on account of a protected ground under section 101(a)(42) of the Act, e.g., religion. See generally Matter of Chen, 20 I&N Dec. 16 (BIA 1989). The immigration judge's determination of ``what happened'' to the individual is a factual determination that will be reviewed under the clearly erroneous standard. The immigration judge's determinations of whether these facts demonstrate harm that rises to the level of ``persecution,'' and whether the harm inflicted was ``on account of'' a protected ground, are questions that will not be limited by the ``clearly erroneous'' standard…….

4. Harmless Error

Several commenters expressed the view, in essence, that there exists a gap between review of all facts de novo and a ``clearly erroneous'' threshold. They argue that the immigration judges frequently misstate facts that require further review.

The Department agrees that in some cases an immigration judge may misstate facts, but disagrees that in all such cases further adjudication of those facts is necessary. In many instances, such errors, or perceived errors, do not prejudice a respondent, and are, in effect, harmless errors. Section 3.1(e)(4) of the rule provides that summary affirmance is only appropriate if the single Board Member determines that ``any errors in the decision under review were harmless or nonmaterial'' and all other conditions apply……

5. Litigation Concerns……..

6. De novo Review by the Attorney General

Some commenters suggested that it was inappropriate for the Attorney General to adopt a ``clearly erroneous'' standard for the Board, but use a de novo standard himself in reviewing the Board's determination, such as in Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002). This suggestion misapprehends the different roles of the Attorney General and the Board. As discussed above, the Attorney General is charged not merely with adjudicating immigration matters, but with establishing policy and managing the immigration process. The Board, on the other hand, is delegated authority by the Attorney General to adjudicate cases before it, not make policy or manage the immigration process. It is appropriate for the Attorney General to exercise broader authority than he delegates to the Board.

7. Review of Service Decisions

The comments on de novo review have raised an issue of the scope of review of factual determinations by officers of the Service in decisions under review by the Board. **Review of decisions by the district director and other Service officers do not have the benefit of a full record of proceedings or,** except in rare cases, **a transcript of hearings before an**

independent adjudicating officer. *Rather these decisions are made on applications and interviews, and other information available to the Service.*

In light of this difference, the Department has clarified the language of the final rule to retain de novo review of Service officer decisions, either by a single Board member or by a three-member panel. Accordingly, Sec. 3.1(d)(3) has been revised to retain the Board's authority to review decisions of the Service de novo. The process for initial single Board member review will be retained, but the scope of review is broadened. The same standards for referral to a three-member panel will be applied.

And the discussion goes on and on…..

F. New Evidence and Taking Administrative Notice of Facts

G. Reduction in Size of the Board
1. Quality of Board Member Personnel
2. Resource Requirement Concerns
3. Advantages of a Smaller Board

H. Case Processing Issues
1. Simultaneous Briefing
2. Transcript Timing
3. Immigration Judge Time Limits To Review Decisions
4. 30-Day Notice of Appeal Filing Requirement
5. Decisional Time Limits
6. Holding Cases Pending Significant Changes in Law and Precedent

I. Decisional Issues
1. Management of Decisions
2. Remand Motions
3. Rehearing en banc
4. Separate Opinions
5. Changes in the Notice of Appeal
6. Barring Oral Argument Before a Single Board Member
7. Location of Oral Argument
8. Summary Dismissal of Frivolous Appeals and Discipline
9. Mandatory Summary Dismissals
10. Finality of Decisions and Remands

J. Applicability of Procedural Reforms to Pending Cases

K. Transition Period and Reduction of the Backlog

L. Administrative Fines Cases

M. Miscellaneous and Technical Issues

1. The Board's Pro Bono Project
2. Fundamental Changes in Structure
3. Technical Amendments

[End]

DHS can build on what has already been accomplished in the realm of reorganizing and streamlining the Administrative Appellate Process.

AAO is Already Changing:

At the "USCIS Administrative Appeals Office Stakeholder Engagement" of February 2, 2011, Director Mayorkas and AAO Chief Perry Rhew stated that AAO was making changes.

Highlights mentioned in the Executive Summary[37] of that event include:

> **Role of the AAO**
>
> The role of the AAO is to produce appellate decisions that provide fair and legally supportable resolutions of individual applications and petitions for immigration benefits. These decisions provide guidance to applicants, petitioners, practitioners and government officials in the correct interpretation of immigration law, regulations and policy. The AAO weighs in on matters affecting USCIS operations as a member of the senior leadership team. While the AAO has a long history of discussing legal and policy issues with other USCIS entities, it does not seek their input prior to reaching a decision in an individual case. The AAO does not seek to speak for the Office of Chief Counsel or the Office of Policy and Strategy, or for any other entity other than the AAO.
>
> **The Appeals Process**
>
> The AAO reviews appeals on a *de novo* basis, which means the AAO takes a new look at the entire case as if no decision had previously been issued. When a case arrives at the AAO, the branch manager assigns it to an adjudicator who drafts a decision in the case. Each decision goes through further review before being put in final form and mailed to the parties to a case.
>
> In some instances, the AAO will also review cases that are certified from USCIS field offices. A certification is a request by a USCIS field office for a review of a decision (approval or denial). USCIS field offices will certify a case to the AAO when the facts or issues of a case are so novel or complex that review by the AAO is an appropriate means of obtaining guidance. In response to a stakeholder question, USCIS also clarified that is does not have jurisdiction over Cuban Adjustment Applications that are denied, but that there are instances where the field will certify a denial to the AAO, which explains why

[37] http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=09df1980a9aaa210VgnVCM100000082ca60aRCRD&vgnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD

Cuban Adjustment Applications are listed on the USCIS website as an application under the jurisdiction of the AAO.

USCIS Policies

The AAO stated that it is working to publish a proposed regulation that will help streamline the appeals process and give the public a much better understanding of what to expect when they file an appeal. The proposed AAO regulation, to be published for public comment soon, will address the third issue noted above and may provide an opportunity for stakeholders to comment on other policies, such as the first and second issues noted above.

Recent USCIS Guidance:

From the USCIS Policy Memo of January 11, 2006, updating the Adjudicator's Field Manual in accordance with *Matter of Chawathe* when it was a USCIS Adopted Decision. That slightly edited AAO Decision became Precedent on October 20, 2010. *See* 25 I&N Dec. 369 (AAO, 2010).

"The burden is on the petitioner to establish that he or she is eligible for the benefit sought *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). This means that if an alien seeking a benefit has not shown eligibility, the application should be denied. The government is not called upon to make any showing of ineligibility until the alien has first shown that he is eligible. You may contrast this in your mind with a criminal case or with a removal hearing in which the government must first prove its case.

Once an applicant has met his or her initial burden of proof, he or she can be said to have made a "prima facie case." This means that the applicant has come forward with the facts and evidence which show that, at a bare minimum, and without any further inquiry, he or she has initial eligibility for the benefit sought. This does not mean that your inquiry is over. An alien may have established initial eligibility, but it is up to you to determine if there are any discretionary reasons why an application should be denied, or if there are any facts in the record (including facts developed during the course of the adjudicative proceedings, such as during an interview) which would make the applicant ineligible for the benefit. If such adverse factors do exist, it is again the applicant's burden to overcome these factors."

AAO Appellate Authority and Jurisdiction:

The BIA was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. Reorg. Plan V (May 22, 1940); 3 CFR Comp. 1940, Supp. tit.3, 336. The Board is not a statutory body; it was created wholly by the Attorney General from the functions transferred. A.G. Order 3888, 5 FR 2454 (July 1, 1940); see Matter of L-, 1 I&N Dec. 1 (BIA; A.G. 1940).

As part of another reorganization at DOJ, the Attorney General created EOIR by regulation in 1983, as an agency independent from the INS. The Homeland Security Act gave it permanent statutory authority and kept it in the DOJ. The Office of Administrative Appeals in EOIR was established by the Immigration Reform and Control Act of 1986 and amended by the Immigration and Nationality Amendments Act of 1990[38].

As it existed in the CFR revision dated January 1, 1998, (earliest version on the NARA website: http://www.gpoaccess.gov/cfr/index.html) the Administrative Appeals Unit (AAU) had the authority over the applications and petitions enumerated at 8 CFR § 103.1(f)(3). The assignment of these specific areas of authority to the AAU is found in 8 CFR §103.3.

The promulgation history of 8 CFR § 103.3 as listed in the **current** e-cfr (March 3, 2011), is as follows:

[31 FR 3062, Feb. 24, 1966, as amended at 37 FR 927, Jan. 21, 1972; 48 FR 36441, Aug. 11, 1983; 49 FR 7355, Feb. 29, 1984; 52 FR 16192, May 1, 1987; 54 FR 29881, July 17, 1989; 55 FR 20769, 20775, May 21, 1990; 55 FR 23345, June 7, 1990; 57 FR 11573, Apr. 6, 1992; 68 FR 9832, Feb. 28, 2003]

The promulgation history of 8 CFR § 103.1 as listed in the **1998**, edition, is as follows:

[59 FR 60070, Nov. 22, 1994, as amended at 61 FR 13072, Mar. 26, 1996; 61 FR 28010, June 4, 1996; 62 FR 9074, Feb. 28, 1997; 62 FR 10336, Mar. 6, 1997] This section was amended a few times again after this [primarily by EOIR] and then completely disappeared after the Jan. 2003, edition.

The promulgation history of 8 CFR § 103.1 as listed in the **2003**, edition, is as follows:

[59 FR 60070, Nov. 22, 1994, as amended at 61 FR 13072, Mar. 26, 1996; 61 FR 28010, June 4, 1996; 62 FR 9074, Feb. 28, 1997; 62 FR 10336, Mar. 6, 1997; 63 FR 12984, Mar. 17, 1998; 63 FR 63595, Nov. 16, 1998; 63 FR 67724, Dec. 8, 1998; 64 FR 27875, May 21, 1999; 66 FR 32144, June 13, 2001; 67 FR 4794, Jan. 31, 2002; 67 FR 39257, June 7, 2002]

Effective Date Note: At 67 FR 78673, Dec. 26, 2002, Sec. 103.1 was amended by revising paragraph (f)(3)(iii)(C), effective Jan. 27, 2003. For the convenience of the user, the revised text is set forth as follows:

103.1 Delegations of authority.

(f) (3) (iii) (C) Indochinese refugee applications for adjustment of status under section 103 of the Act of October 28, 1977, *or section 586 of Public Law 106-429*; *(added text)*

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[38] Wasem, Ruth Ellen. *Toward More Effective Immigration Policies: Selected Organizational Issues.* Washington D.C., USA . UNT Digital Library. http://digital.library.unt.edu/ark:/67531/metacrs9993/. Accessed March 7, 2011.

(1998) CODE OF FEDERAL REGULATIONS, TITLE 8--ALIENS AND NATIONALITY

CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

PART 103--POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS--Table of Contents

8 CFR § 103.1 Delegations of authority.

(f) *Executive Associate Commissioner for Programs*—(1) *General*. Under the direction and supervision of the Deputy Commissioner, the Executive Associate Commissioner for Programs is delegated authority for policy development, review and integration of the Service's enforcement and examinations programs, and for providing general direction to, and supervision of, the Associate Commissioners for Enforcement and Examinations.

(3) *Associate Commissioner for Examinations*. (i) General. Under the direction and supervision of the Executive Associate Commissioner for Programs, the Associate Commissioner for Examinations is delegated authority and responsibility for program and policy planning, development, coordination, evaluation, and staff direction to the Adjudications and Nationality, Inspections, Administrative Appeals, Service Center Operations, and Records programs, and to direct and supervise the:

(A) Assistant Commissioner for Adjudications and Nationality;[Now Field Ops]

(B) Assistant Commissioner for Inspections;

(C) Assistant Commissioner for Service Center Operations; [Assoc. Dir. SCOPS]

(D) Assistant Commissioner for Records; and

(E) Director of Administrative Appeals. [Chief, AAO]

(ii) Administrative Fines. The Associate Commissioner for Examinations is delegated the authority to impose administrative fines under provisions of the Act in any case which is transmitted to the National Fines Office by a district director.

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(A) Breaching of bonds under Sec. 103.6(e);

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act; [I-526 but NOT I-829]

(C) Indochinese refugee applications for adjustment of status under section 103 of the Act of October 28, 1977;

(D) Revoking approval of certain petitions under Sec. 205.2 of this chapter.;

(E) Applications for permission to reapply for admission to the United States after deportation or removal under Sec. 212.2 of this chapter;

(F) Applications for waiver of certain grounds of excludability under Sec. 212.7(a) of this chapter;

(G) Applications for waiver of the two-year foreign residence requirement under Sec. 212.7(c) of this chapter;

(H) Petitions for approval of schools under Sec. 214.3 of this chapter;

(I) Decisions of district directors regarding withdrawal of approval of schools for attendance by foreign students under Sec. 214.4 of this chapter;

(J) Petitions for temporary workers or trainees and fiancees or fiances of U.S. citizens under Secs. 214.2 and 214.6 of this chapter;

(K) Applications for issuance of reentry permits under 8 CFR part 223;

(L) Applications for refugee travel documents under 8 CFR part 223;

(M) Applications for benefits of section 13 of the Act of September 11, 1957, as amended, under Sec. 245.3 of this chapter;

(N) Adjustment of status of certain resident aliens to nonimmigrants under Sec. 247.12(b) of this chapter;

(O) Applications to preserve residence for naturalization purposes under Sec. 316a.21(c) of this chapter;

(P) Applications for certificates of citizenship under Sec. 341.6 of this chapter;

(Q) Administration cancellation of certificates, documents, and records under Sec. 342.8 of this chapter;

(R) Applications for certificates of naturalization or repatriation under Sec. 343.1 of this chapter;

(S) Applications for new naturalization or citizenship papers under Sec. 343a.1(c) of this chapter;

(T) Applications for special certificates of naturalization under Sec. 343b.11(b) of this chapter;

(U) [Reserved]

(V) Petitions to classify Amerasians under Public Law 97-359 as the children of United States citizens;

(W) Revoking approval of certain petitions, as provided in Secs. 214.2 and 214.6 of this chapter;

(X) Orphan petitions under 8 CFR 204.3;

(Y) Applications for advance process of orphan petitions under 8 CFR 204.3;

(Z) Invalidation of a temporary labor certification issued by the governor of Guam under Sec. 214.2(h)(3)(v) of this chapter;

(AA) Application for status as temporary or permanent resident under Secs. 245a.2 or 245a.3 of this chapter;

(BB) Application for status as temporary resident under Sec. 210.2 of this chapter;

(CC) Termination of status as temporary resident under Sec. 210.4 of this chapter;

(DD) Termination of status as temporary resident under Sec. 245a.2 of this chapter;

(EE) Application for waiver of grounds of excludability under Parts 210, 210a, and 245a of this chapter;

(FF) Application for status of certain Cuban and Haitian nationals under section 202 of the Immigration Reform and Control Act of 1986;

(GG) A self-petition filed by a spouse or child based on the relationship to an abusive citizen or lawful permanent resident of the United States for classification under section 201(b)(2)(A)(i) of the Act or section 203(a)(2)(A) of the Act;

(HH) Application for Temporary Protected Status under part 240 of this chapter;

(II) Petitions for special immigrant juveniles under part 204 of this chapter;

(JJ) Applications for adjustment of status under part 245 of this title when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act;

(KK) Petition for Armed Forces Special Immigrant under Sec. 204.9 of this chapter;

(LL) Request for participation as a regional center under Sec. 204.6(m) of this chapter;

(MM) Termination of participation of regional center under Sec. 204.6(m) of this chapter; and

(NN) Application for certification for designated fingerprinting services under Sec. 103.2(e) of this chapter.

Statutory Home of Administrative Appeals

Pub. L 99-603 Immigration Reform and Control Act of 1986 (IRCA)

TITLE I--CONTROL OF ILLEGAL IMMIGRATION
Part B--Improvement of Enforcement and Services
SEC. 111. AUTHORIZATION OF APPROPRIATIONS FOR ENFORCEMENT AND SERVICE ACTIVITIES OF THE IMMIGRATION AND NATURALIZATION SERVICE.

(a) Two Essential Elements.--It is the sense of Congress that two essential elements of the program of immigration control established by this Act are--

(2) an **increase in examinations and other service activities** of the Immigration and Naturalization Service and other appropriate Federal agencies **in order to ensure prompt and efficient adjudication of petitions and applications** provided for under the Immigration and Nationality Act.

(b) Increased Authorization of Appropriations for INS and EOIR.--In addition to any other amounts authorized to be appropriated, in order to carry out this Act there are authorized to be appropriated to the Department of Justice--

(1) for the Immigration and Naturalization Service, for fiscal year 1987, $422,000,000, and for fiscal year 1988, $419,000,000; and

(2) for the Executive Office of Immigration Review, for fiscal year 1987, $12,000,000, and for fiscal year 1988, $15,000,000.

Pub. L. 101-649 Immigration Act of 1990 (IMMACT90)

TITLE V--ENFORCEMENT
Subtitle D--General Enforcement
SEC. 545. DEPORTATION PROCEDURES; REQUIRED NOTICE OF DEPORTATION HEARING; LIMITATION ON DISCRETIONARY RELIEF.

(a) In General.--Chapter 5 of title II is amended by inserting after section 242A the following new section:

"DEPORTATION PROCEDURES

"Sec. 242B. (a) Notices.--
*****
"(d) Treatment of Frivolous Behavior.--The Attorney General shall, by regulation--

"(1) define in a proceeding before a special inquiry officer or before an appellate administrative body under this title, frivolous behavior for which attorneys may be sanctioned,

"(2) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

"(3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this subsection shall be construed as limiting the authority of the Board to take actions with respect to inappropriate behavior.
*****
(d) Regulations on Motions To Reopen and To Reconsider and on

Administrative Appeals.--Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to--

(1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions; and

(2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

(e) Conforming Amendment.--The 8th sentence of section 242(b) (8 U.S.C. 1252(b)) is amended to read as follows: "Such regulations shall include requirements consistent with section 242B.".