Nos. 01-56266 and 01-56379

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEN-WAN CHANG, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee/Cross-Appellant

On Appeal from the United States District Court
for the Central District of California
Civil Action No. CV-99-10518-GHK

REPLY BRIEF
FOR DEFENDANT-APPELLEE/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Immigration and Nationality Act of 1952, as amended:

REGULATIONS

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The United States hereby files this reply brief limited to the issues it raised as cross-appellant in its brief filed August 6, 2002 ("Def. Br."), and addressed by plaintiffs as cross-appellees in their brief filed August 29, 2002 ("Pl. Reply Br.").

I. This Court Has Jurisdiction to Hear the Cross-Appeal.

In its cross-appeal, the United States seeks review and reversal of the district court's order asserting jurisdiction to review the denial by the Immigration and Naturalization Service ("INS") of plaintiff Yi Yuan Chiang's "I-829" petition for permanent resident status under section 216A of the Immigration and Nationality Act ("INA"), and remanding Chiang's denial to the INS for a "retroactivity" analysis under Montgomery Ward v. FTC, 691 F.2d 1322 (9th Cir. 1982). *See* Def. Br. at 3, 4, 13, 15, 16-17, 21-35.

Plaintiffs contend that this Court should dismiss the cross-appeal for lack of "final order" jurisdiction under 28 U.S.C. § 1291. *See* Pl. Rep. Br. at 2, 24-26. However, the Supreme Court has instructed that section 1291 is to be given a "practical rather than a technical construction." Gillespie v. U. S. Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Industrial Loans Corp., 337 U.S. 541, 546 (1949).

> The inquiry requires some evaluation of the competing considerations underlying all finality – "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974), *quoting* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

In Stone v. Heckler, 722 F.2d 464 (9th Cir. 1983), this Court ruled on the finality of a district court order holding that the Secretary of Health and Human Services had applied an incorrect legal standard, stating the court's view of the correct standard, and remanding the case for further proceedings under that standard. Following the teachings of Cohen and the other Supreme Court decisions cited above, the Court recognized that if the district court's decision were wrong, it "would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal." 722 F.2d at 467. It found that judicial economy and fairness would both be promoted by permitting an immediate appeal of the district court's order, and so concluded that the remand order was appealable under section 1291. Id. at 468. Stone cited Gold v. Weinberger, 473 F.2d 1376, 1378 (5th Cir. 1973), and Cohen v. Perales, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds sub nom.* Richardson v. Perales, 402 U.S. 389 (1971), and has been consistently followed by this Court in cases presenting analogous circumstances, including an immigration case involving a dispute over a preference visa. Kaho v. Ilchert, 765 F.2d 877, 880-81 (9th Cir. 1985); *see also* Rendleman v. Shalala, 21 F.3d 957, 959 n.1 and accompanying text (9th Cir. 1994); Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 (9th Cir. 1990); Regents of the Univ. of California v. Heckler, 771 F.2d 1182, 1186-87 (9th Cir.

1985); Regents of the Univ. of California v. Heckler, 756 F.2d 1387, 1392 (9th Cir. 1985).

A similar result is warranted here. The district court's assertion of jurisdiction to review the denial of Chiang's I-829 petition and its order that the petition be re-adjudicated under the Montgomery Ward analysis have significant and far-reaching implications for the immigration investor program, with the hundreds of I-829 petitions that have yet to be processed. The assertion of jurisdiction involves a matter of such threshold and fundamental importance, *see* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998), that it should be resolved as quickly and as authoritatively as possible. Plaintiffs have not denied that the district court's order places aliens in the extraordinary position of having two separate vehicles to challenge the merits of an I-829 denial, each with its own opportunity for circuit court review. *See* Def. Br. at 26. The order that the INS must determine whether the Montgomery Ward factors foreclose application of the 1998 immigrant investor precedent decisions to Chiang's I-829 petition would require the agency to take into account factors which, the United States asserts, this Court has already ruled in R. L. Investment Limited Partners v. INS, 273 F.2d 874, *adopting* 86 F. Supp.2d 1014 (D. Hi. 2000), are inapplicable and which the INS lacks statutory authority to consider. *See* Def. Br. at 29-34.

Therefore, although the district court's order did not dictate a final result with respect to Chiang's I-829 petition, *see* United States v. Louisiana-Pacific Corp., 846 F.2d 43, 44 (9th Cir. 1988), it did conclusively decide two issues that are separable from the other issues presented by the petition and forces the INS to apply a potentially erroneous rule of law that may result in a wasted proceeding before the agency and (if the INS again denies Chiang's petition and Chiang again seeks review) before the district court. "Deciding this legal issue now will promote the least possible waste of judicial resources." Stone, 722 F.2d at 467. In addition, because the Attorney General may not appeal from a ruling of the INS, subsequent review of either question presented by this cross-appeal may not be available. *See* Rendleman, 21 F.3d at 959 n.1; Chugach, 915 F.2d at 457. Eluska v. Andrus, 587 F.2d 996 (9th Cir. 1978), the case primarily relied upon by plaintiffs (*see* Pl. Reply Br. at 25), is inapposite. It preceded Stone and its progeny and involved a unique exhaustion issue, that is, a special hearing required by an earlier decision by this Court, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). *See* Eluska, 587 F.2d at 997, 999-1000.

In sum, a decision by this Court on the issues raised by the cross-appeal would serve the interests of administrative and judicial economy and provide clarity to both the government and immigrant investors on the standard of law

governing I-829 petitions and the proper forum for reviewing denials of such petitions. Under Supreme Court and Circuit precedent, the district court order was "final" under 28 U.S.C. § 1291 and this Court may properly exercise jurisdiction to review it.

II. District Court Jurisdiction Over Chiang's I-829 Denial Is Not Required Either To Remedy Immediate Harm to Chiang or To Provide Full Protection of Chiang's Rights.

If the regulations governing the immigrant investor program permitted optional appeals within the INS of I-829 denials, it would be erroneous to contend that such an appeal represented an exhaustion requirement that must be met before seeking judicial relief. *See* Darby v. Cisneros, 509 U.S. 137, 146-47 (1993); Pl. Reply Br. at 9-10. However, the regulations in fact bar an intra-agency appeal, with the applicant instead granted the right by the INA and the regulations to seek full review of the basis for the denial before an independent immigration judge, with the burden of proof lying with the INS. 8 U.S.C. § 1186b(c)(3)(D) (Supp. II 2002); 8 C.F.R. § 216.6(d)(2) (2002); Def. Br. at 22-23. An adverse ruling by the immigration judge may be appealed to the Board of Immigration Appeals ("BIA"), 8 C.F.R. §§ 3.1(b) & 240.53(a) (2002), and an adverse ruling by the BIA may be appealed to a circuit court of appropriate jurisdiction. 8 U.S.C. § 1252 (Supp. II 2002).

Extensive case law establishes that district court jurisdiction under the Administrative Procedures Act ("APA") is available only when an adequate alternative has not been provided by "special statutory procedures relating to specific agencies." Bowen v. Massachusetts, 487 U.S. 879, 903 (1988); Def. Br. at 21-22, 25-27. An exception to that rule is not required to prevent "very immediate concrete injuries" to persons receiving I-829 denials, *see* Pl. Reply Br. at 11-12, 18. By special instructions to its adjudicators, the INS has taken steps up to the limits of its authority to mitigate the impact of the 1998 precedent decisions on persons with I-526 approvals, and to preserve the rights of persons with I-829 denials. *See* "EB-5 Field Memorandum Number 9: Form I-829 Processing," Mar. 3, 2000. A copy of the Field Memorandum is attached. The Court may take judicial notice of this official INS document pursuant to Lising v. INS, 124 F.3d 996, 998-99 (9th Cir. 1997).

First, if a preliminary determination is made that approval of an I-829 petition is precluded by the 1998 precedent decisions, the applicant will be given an opportunity to file a new I-526 petition based upon the same job-creating or job-preserving business enterprise and business plan as reflected in his original I-526 petition, but with changes made in his financing plan to achieve compliance with the regulatory standards as interpreted by the precedent decisions. Field

Memorandum at 11. Under that procedure, the INS will suspend issuance of a decision to deny the I-829 petition, which allows the alien to remain in the United States in conditional residence status while his new I-526 petition is pending. Id. at 11-12. If the I-526 petition is granted, the alien must then depart the United States to file for a new immigrant visa and obtain authorization for a new two-year conditional resident status from a consular officer abroad. Id. at 12.

Second and directly relevant to this case, if a properly filed I-829 petition has been denied but no final order of removal has been entered, conditional permanent resident status is maintained and appropriate documentation is issued to allow the alien freedom to travel and work. Field Memorandum at 15. The documents vary according to whether the applicant still has an unexpired foreign passport, but the instructions are clear: "Documentation of conditional resident status must be issued until a final order of removal is issued." Id. And if the applicant should succeed in obtaining reversal of his I-829 denial, the time he spent in conditional resident status would count toward the period for applying for naturalization. *See* INA § 216A(e), 8 U.S.C. § 1186b(e) (Supp. II 2002); *compare* Pl. Reply Br. at 12 n.2. Thus, plaintiff Chiang remains in lawful status in the United States with full rights as a conditional permanent resident. The denial of his I-829 petition did not cause him any injury that could justify departure from

the statutory scheme provided by Congress in the INA for review of that denial.[1]

Nor is departure justified by speculation over the issues that Chiang might seek to litigate in his removal proceedings. The need for Chiang to raise the broad constitutional, APA, retroactivity, and estoppel claims outlined in plaintiffs' First Amended Complaint is hypothetical at this point, because the INS might fail to carry its burden of proving his removability before the immigration judge and the BIA. If such a need should arise, Chiang may well be foreclosed by the precedent already established in R. L. Investment. For example, since R. L. Investment has already found that the INS was not bound by written opinions of its employees, such as opinions expressed in General Counsel memoranda, and that the INS should be permitted to correct any mistakes it made in administering the immigrant investor program, 273 F.3d 874 *adopting* 86 F. Supp.2d at 1022, 1024-25, it is difficult to conceive of a viable basis for estoppel against the agency. If a published opinion by the Court should result from this proceeding, the

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[1] At the same time, Chiang and other persons with I-829 denials are not in limbo burdened with uncertainty about their future. The Field Memorandum gives clear and specific instructions that I-829 denials should be followed as quickly as possible by Notices to Appear ("NTAs") in removal proceedings. *See* Field Memorandum at 10-11 and Def. Br. at 22-23; *compare* Pl. Reply Br. at 19-20. Moreover, Chiang remains the master of his own fate. He has the right to demand his money back from his limited partnership, *see* Def. Br. at 32, and to file a new I-526 petition with a financing plan that complies with the statute and regulations by providing for a genuine equity investment instead of a loan.

retroactivity issue may be settled as well.

But assuming for purposes of discussion that a final removal order is entered against Chiang, and assuming further that he seeks review of that order, and assuming further that something is left of the constitutional, APA, retroactivity, and estoppel issues by the time he files his petition for review, the petition would provide an adequate vehicle for raising such issues. *See* INS v. Chadha, 462 U.S. 919, 938 (1983) (review by court of appeals of final order of deportation includes ". . . all matters on which the validity of the final order is contingent"); Naranjo-Aguilera v. INS, 30 F.3d 1106, 1114 (9th Cir. 1994) ("Petitioners appealing orders of deportation routinely bring statutory and constitutional challenges to INS regulations and policies"); Patel v. INS, 638 F.2d 1199, 1200-1205 (9th Cir. 1980) (reversing BIA deportation order on APA grounds); *compare* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-76, 680 (1986) (finding general federal-question jurisdiction over statutory and constitutional challenges to administration of Medicare program, because otherwise review of such challenges would not be available at all). There is every reason to think that such issues would receive a full and thorough hearing if they came before this Court in that posture, because they are issues of law, not fact. The history of the immigrant investor program, the events and administrative

actions by the INS that led to the precedent decisions, and of course the contents of the precedent decisions themselves are matters of public record and have never been disputed by the government in R. L. Investment or in this case. *See* R. L. Investment, 273 F.3d 874, *adopting* 86 F. Supp. 2d at 1016-18 (describing history of immigrant investor program and background to issuance of precedent decisions), 1019-20 (reciting standards for granting summary judgment), 1022 (explaining why unpublished decisions and General Counsel memorandum did not establish binding agency policy), 1024 (same), 1027 (rejecting estoppel claim); *compare* McNary v. Haitian Refugee Center, 498 U.S. 479, 493, 497 (1991) (finding federal-question jurisdiction necessary to ensure adequate hearing for fact-intensive claims). Since there is no substantial ground at this time to believe that Chiang would be able to raise an issue in a petition for review (again, assuming that he receives a final order of removal and seeks review) that would require development of additional facts, he must follow the process described by Congress for challenging his I-829 denial.

III. A *Montgomery Ward* Analysis Has Been Mooted By *R. L. Investment* and, in Any Event, Is Not for the INS to Consider.

Apart from its finding of jurisdiction to review Chiang's I-829 denial, the district court further erred by directing the INS, on remand, to determine whether

application of the immigrant investor precedent decisions should not be applied to Chiang's I-829 petition under the Montgomery Ward retroactivity analysis. In addition to having been overtaken by the subsequent issuance of R. L. Investment, the district court's order was flawed on its own terms because it misapprehended the nature of I-829 adjudications and because it wrongly assigned the task of undertaking the Montgomery Ward analysis to the INS, whereas the analysis, to the extent it is appropriate at all, is properly performed by a court upon review of the agency's decision. It appears that the plaintiffs and the United States are in agreement on the latter point. *See* Pl. Reply Br. at 24 & n.15, 34-35.

Plaintiffs' main defense of the district court is that application of the precedent decisions to I-829 petitions would involve a retroactive application of new law. Pl. Reply Br. at 29-33. The United States has already demonstrated why that is not so, especially in the wake of R. L. Investment's holding, issued several months after the district court's order, that the INS did not make new law in issuing the precedent decisions but rather applied existing law to specific facts. Def. Br. at 27, 29-32, 50-55. The argument is simple. Section 203(b)(5) of the INA and its implementing regulations have been in place, unchanged, since 1991. In R. L. Investment, this Court held that the INS did not violate the APA by issuing "new rules" or "new criteria" when it explained and interpreted the

requirements of section 203(b)(5) and its regulations in the precedent decisions. 273 F.3d 874, *adopting* 86 F. Supp.2d at 1024; *compare* First Amended Complaint ¶ 104, Plaintiffs/Appellants' Record Excerpts 63-70. Section 216A of the INA states that adjudication of an I-829 petition requires an examination of the petitioner's compliance with the statutory requirements. *See* 8 U.S.C. § 1186b(d)(1) (Supp. II 2002) (describing required contents of petition). However, section 216A does not contain its own requirements, but instead refers back to the underlying requirements of section 203(b)(5). *See* id. If the INS did not apply "new law" when it clarified and interpreted the requirements of section 203(b)(5) in the precedent decisions, it follows as day follows night that the INS would not apply "new law" retroactively by applying the precedent decisions to I-829 petitions.

The cases primarily relied upon by plaintiffs are inapplicable because they involved significantly different types of agency actions and, as a consequence, significantly different analyses of law. In Cort v. Crabtree, 113 F.3d 1081 (9th Cir. 1997), *see* Pl. Rep. Br. at 27, 32, 44-48, the disputed agency action – a "Change Notice" issued by the Bureau of Prisons – was treated by the Court as a legislative rule that established new eligibility criteria for sentence reductions. *See* id. at 1084. Applying the principle established in Bowen v. Georgetown

University Hospital, 488 U.S. 204, 208 (1988), that a legislative rule will not be given retroactive effect unless its language clearly requires that result, the Court ruled that "there is no indication anywhere in the Change Notice that the Bureau intended that any part of it would apply retroactively or serve to undo prior eligibility determinations." 113 F.3d at 1084. The Court specifically declined to address whether retroactive application of the Change Notice should be barred under Montgomery Ward or as a matter of estoppel. Id. at 1083-84 & n.2.[2] Oil, Chemical & Atomic Workers International Union v. NLRB, 842 F.2d 1141 (9th Cir. 1988), *see* Pl. Reply Br. at 34-35 n.21, concerned the retroactive effect of an NLRB decision, Indianapolis Power & Light, 273 N.L.R.B. 1715 (1985), which

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[2] Plaintiffs overstate in saying that a Montgomery Ward retroactivity analysis is appropriate to any agency action that allegedly has a retroactive effect. *See* Pl. Rep. Br. at 28. This springs from loose use of the word "rule." If the agency action is found to constitute a legislative rule because it establishes a new new norm of behavior – that is, a "new rule" – it will be examined for unwarranted retroactive effect under Bowen v. Georgetown University Hospital, as Cort v. Crabtree illustrates. If, on the other hand, the agency action is found to be merely an "interpretive rule," that perforce means that there is no "new rule" and no concern at all about retroactivity. An agency adjudicatory decision may announce a "new rule" that will naturally apply retroactively to the parties to that decision and prospectively to other persons affected by the issues decided. Montgomery Ward concerns whether, despite the normal retroactive effect of an adjudicatory decision, the "new rule" should not be applied to the losing party in the case. One of the reasons why this Court found in R. L. Investment that the immigrant investor precedent decisions did not establish new law – a "new rule" – is because it found them analogous to interpretive rules. 273 F.3d 874, *adopting* 86 F. Supp.2d at 1024.

reversed a published decision, Davis-McKee, Inc., 238 N.L.R.B. 652 (1978), and thereby established new agency law on whether a broad no-strike clause in a collective bargaining agreement is presumed to include sympathy strikes. *See* 842 F.2d at 1142-45. In ruling in R. L. Investment that the immigrant investor precedent decisions did not make new law and did not represent a violation of the APA's rulemaking provisions, this Court emphasized that the precedent decisions did not contradict or depart from any published agency decisions. 273 F.3d 874, *adopting* 86 F. Supp.2d at 1022, 1024.

The United States agrees with the plaintiffs that Montgomery Ward does not require the reviewing court to inquire into the ability of the person subject to the agency's order "to 'shoulder' the disadvantage or penalty . . . ." Pl. Rep. Br. at 34. That is precisely why the district court erred in remanding to the INS with instructions to conduct that inquiry. The district court's order of remand makes sense only if hardship can be a lawful reason for failing to comply with the immigrant investor statute's investment requirements. Because it cannot be, *see* Def. Br. at 33-34, there is no need for further agency proceedings on that issue. "Hardship" and "penalty" are also not relevant here because the INS's action in denying Chiang's I-829 petition does not impose a fine or other sanction, *see* Pl. Rep. Br. at 29. Rather, the denial found Chiang ineligible for the benefit of

unconditional lawful permanent residence status in the United States because he failed to invest the required level of qualifying equity capital and failed to show that his investment would result in creation of the statutorily-required number of full-time jobs. *See* Plaintiffs/Appellants' Record Excerpts at 101, 103-114. "Burden" in the Montgomery Ward sense really refers to the extent that the losing party relied upon previous law. The greater the reliance on the old standard, the greater the burden in shifting course and complying with the new standard. But since R. L. Investment holds that there was no "previous law" prior to the precedent decisions that bound the INS or established a "rule," Chiang is barred from claiming that the approval of his first-stage "I-526" petition created a cognizable reliance interest that could support relief under Montgomery Ward or any other rubric from the denial of his I-829 petition. Put another way, given the holding of R. L. Investment, it does not matter whether Chiang's investment plan was disapproved at the I-526 stage or the I-829 stage, because the law was the same.

Thus, for the reasons set forth in this brief and in the United States's principal brief, the Court should rule that application of the immigrant investor precedent decisions to Chiang's I-829 petition posed no retroactivity concerns under Montgomery Ward and that no further proceedings before the INS on that

issue are necessary. If there are any Montgomery Ward issues remaining after R. L. Investment and any published decision that results from this case, they can and should be heard by this Court *de novo* if and when Chiang seeks review of a final order of removal. *See* Def. Br. at 34-35.

CONCLUSION

For the reasons set forth above, the Court should find jurisdiction to hear the United States's cross-appeal and rule that the district court erred in asserting jurisdiction to review the denial of Chiang's I-829 petition. If the Court finds that the district court had jurisdiction, it should rule that the court erred in remanding to the INS for a Montgomery Ward analysis and vacate the remand order.

Respectfully submitted,

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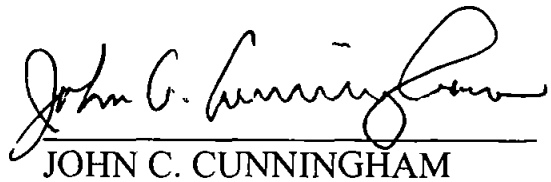

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Dated: September 13, 2002

U.S. Department of Justice
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MAR 3 2000

EB-5 FIELD MEMORANDUM NUMBER 9: FORM I-829 PROCESSING

MEMORANDUM FOR ALL REGIONAL DIRECTORS,
ALL SERVICE CENTER DIRECTORS,
DISTRICT DIRECTORS (INCLUDING FOREIGN),
DIRECTORS, ~~DDTF~~, GLYNCO AND ARTESIA

FROM. Michael A. Pearson
for Executive Associate Commissioner
Office of Field Operations

SUBJECT. AFM Update. Immigrant Investor Petitions – Form I-829 Adjudication

This memorandum updates the Adjudicators Field Manual (AFM) to provide guidance on the adjudication of petitions on Form I-829. Petition by Entrepreneur to Remove the Conditions In addition, this memorandum provides the status of certain other EB-5 matters and reminds all Immigration and Naturalization Service (Service) offices that the Service remains committed to having these complex matters adjudicated by specially trained and experienced officers. The AFM is updated by adding appendices which include a list of frequently asked questions about Form I-829, a model notice of automatic termination of status, and four model Notices to Appear (Form I-862) These policies and procedures are effective immediately and will be included in the AFM in the next release of INSERTS.

This memorandum reflects the complexity of certain EB-5 petitions and the INS' commitment to provide specialized training to Service personnel who adjudicate these petitions. All Service personnel are reminded that the "hold" on the adjudication of certain EB-5 petitions implemented pursuant to the March 19, 1998 field memorandum is over.

1 In Chapter 25 of the Adjudications Field Manual, section 25 2 is added to read as follows:

25.2 Removal of Conditions for Section 203(b)(5) Immigrants

(a) **Commitment to Trained and Experienced Officers.** All Service offices must ensure that only specially trained and experienced officers who understand the guidance provided in recent precedent decisions and field instructions adjudicate EB-5 petitions. Therefore, all

Service offices should review procedures, e.g., annual rotations and processing timelines, to ensure a careful and thorough adjudication. Training in the adjudication of petitions filed on Form I-829, Petition by Entrepreneur to Remove Conditions, is being scheduled at this time for district office adjudicators. If a district, service center, or regional office is referred a Form I-829 and is without a trained and experienced officer, the office should follow the procedures outlined in this memorandum. In addition, all such offices must ensure that the officers adjudicating petitions on Form I-829 have received training in the Marriage Fraud Amendment System (MFAS).

Service center directors in Texas and California, regional directors and district directors in offices with a high volume of Form I-829 petitions shall designate a trained and experienced officer as an EB-5 POC to facilitate the review and management of petitions on Form I-829 in accordance with these instructions For purposes of clarity in these instructions, the term "service center director" includes the service center EB-5 POC and the term "district director" includes the district EB-5 POC.

(b) **Failure to File Form I-829.** These instructions provide procedures consistent with those provided for the adjudication of Form I-751, Petition to Remove Condition on Residence (for alien spouse) where possible Under 8 CFR 216 6(a), immigrant investors in conditional resident status must submit Form I-829 to the appropriate service center within the 90-day period immediately preceding the second anniversary of his or her admission to the United States as a conditional permanent resident. A conditional resident's failure to properly file Form I-829 within the time period prescribed in the statute and the regulations will result under 8 CFR 216.6(a)(5) in the automatic termination of the conditional resident's status and initiation of removal proceedings

Service officers are reminded that, in accordance with the Notice in the Federal Register at 63 Fed. Reg. 67135, published on, and in effect since, December 4, 1998, the service centers in Vermont and Nebraska no longer have jurisdiction over EB-5 matters. Form I-829 petitions are to be filed at either (1) the Texas Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Vermont and Texas Service Centers or (2) the California Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Nebraska and California Service Centers.

However, to facilitate timely notification, immediately upon publication of this memorandum, the Nebraska and Vermont Service Centers will generate a printout from the MFAS to determine those conditional residents whose I-526's were approved by those centers who have failed to file timely Form I-829s to have the conditions on their status removed in accordance with Section 216A(c) of the Immigration and Nationality Act (the Act). Termination of conditional status for failure to file to remove the conditions during the proper period is

automatic by law and by regulations. This one time procedure is necessary to avoid excess movement of files that may result in undue delay and due to service resource concerns.

Where it is determined that Form I-829 has not been timely filed, the appropriate service center director shall issue the attached standard notice which states that the failure to file has resulted in the automatic termination of the alien's status. (See Appendix 22-3). The alien's MFAS file shall be updated as "Automatic Termination" and the notice of automatic termination generated. Where such alien is unrepresented, the original notice of automatic termination is to be sent to the alien whose conditional resident status has been automatically terminated. Where such alien is represented, the notice shall be sent to the attorney or representative of record. Two copies of the notice of automatic termination are to be placed in the A-file. The A-file will be routed to the mailroom with instructions to forward the file to the Office of Adjudications of the Service District Office with jurisdiction over the location of the conditional resident's last known address for issuance of the NTA. The service center shall update CIS and RAFACS to indicate that the files have been transferred.

Hereafter, each service center shall generate weekly a printout from the MFAS to determine those conditional residents within their respective jurisdictions who have failed to file timely Form I-829 to have the conditions on their status removed in accordance with Section 216A(c) of the Act The Nebraska Service Center will forward this report to the California Service Center weekly for issuance of the standard notice Likewise, the Vermont Service Center will forward this report to the Texas Service Center weekly for issuance of the standard notice. Thereafter, the service centers will use standard letters to respond to all inquiries regarding the termination of conditional resident status. The letter will direct inquiries to the District Counsel's Office of the Service District Office to which the A-file was transferred.

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

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

(d) **Adjudication of Form I-829 By Service Center. (1) Initial Review of Form I-829.** A service center director in receipt of a timely filed petition on Form I-829 may approve the petition without an interview, issue a request for further evidence that can be provided in writing,

or refer it for an adjudication (with or without the interview) by a district office under 8 CFR 216.6(d).

The service center director must initially review the petition in order to determine which course to take. The petition must be adjudicated with the A-file and normal procedures are to be followed for requesting the A-file (see paragraph (e) for procedures in the event of delay in receipt of a requested A-file). In addition, the director is to follow normal procedures for consultation and referral to operational and investigative units where this is appropriate. If necessary, such units may coordinate the referral of a petition on Form I-829 to the Department of Treasury's Financial Crimes Enforcement Network (FINCEN) with a request for appropriate research.

(2) **Approval of Form I-829 by the Service Center Director.** A service center director may approve a petition on Form I-829 if he or she is satisfied that the petition establishes the requirements for removal of the conditions under 8 CFR 216.6(c)(1), enumerated at paragraph (f)(5) of this memorandum. If the petition is approved, the service center director will remove the conditions on the conditional resident's status as of the second anniversary of his or her admission as a conditional resident. Written notice of the decision must be provided to the conditional resident if he or she is not represented; however, if the conditional resident is represented as evidenced by a duly executed Form G-28, the notice must be provided to the attorney or representative of record only Pursuant to 8 CFR 216.6(d)(1)) the notice must require the conditional resident to report to the appropriate district office for processing for a new permanent resident card, Form I-551 At the district office, the conditional resident shall surrender any permanent resident card previously issued and receive interim documentation valid for 12 months in the form of either a temporary I-551 stamp in his or her unexpired foreign passport (if the expiration date of the passport is one year or more), or a Form I-94 containing a temporary I-551 stamp and his or her photograph. The district director should follow normal procedures for card production.

(3) **Request for Evidence**. A service center director may also issue a request for additional evidence (RFE). An RFE must be based on a determination by the service center director that, in his or her discretion, in order to approve or refer the petition, the conditional resident must provide further documentation or answer certain questions in writing. In such a case, any questions posed must be stated with specificity. If the questions cannot be answered in writing, the petition must be referred for an interview. An RFE is not appropriate if the petition is clearly deniable on grounds other than those for which the RFE might be issued. Under 8 CFR 103.2(b)(8), a conditional resident is to be provided 12 weeks to respond to an RFE. Upon receipt of the conditional resident's response to the RFE, the service center director must approve or refer the Form I-829 petition.

(4) **Determination that Referral to District Office is Appropriate.** The service center

director should refer a petition on Form I-829 to a district director if the initial review of the petition, or the response to a request for additional evidence, reveals that:

(A) under the regulation at 8 CFR 216.6(c)(1), the requirements for removal of conditions have not been met and the case should be denied without an interview, or that

(B) an interview is necessary to approve or deny the petition.

A recommendation that the petition be denied without an interview is appropriate where the service center director determines that there is no material issue of fact in dispute and that the petition does not meet the requirements of the law and the regulations. In such a case, it should be clear that an interview is unlikely to produce evidence to alter a decision to deny the petition.

Section 216A(d)(3) of the Act provides the Attorney General with authority to waive the deadline for an interview or the interview itself, if that is appropriate. Accordingly, an interview is not required to either approve or deny the petition; neither is an interview a benefit that the alien may request. Under current regulations, both service center and district directors have authority in appropriate cases to waive the interview and adjudicate the petition. However, a service center director only has authority to waive an interview if the petition appears to be approvable on its face; he or she cannot waive the interview if the petition appears deniable. As discussed in paragraph 5, below, the recommendation that accompanies the referral should include the service center director's recommendations regarding whether an interview is necessary to approve or deny the petition

(5) **Service Center Recommendation** (A) Denial Without Interview. A service center director who refers a Form I-829 petition to a district director with a recommendation that the requirements for removal of conditions are not met and the case should be denied without an interview (see paragraph 4, above) shall forward the petition as directed by the regional EB-5 POC with:

- a memorandum reviewing the petition and explaining the reasons for his or her recommendation, in particular, the reasons why an interview is unnecessary for the denial of the petition.

(B) Adjudication With Interview. A service center director who refers a Form I-829 petition with a recommendation that an interview is necessary to approve or deny the petition (see paragraph 4, above) shall forward the petition as directed by the regional EB-5 POC with:

- a memorandum reviewing the petition and explaining the reasons for his or her specific recommendation; and
- a list of recommended questions that should be answered in an interview in order to approve or deny the petition.

(e) **Regional EB-5 POC Coordination**. Each regional director shall designate an officer

in his or her respective regional office to receive appropriate training and to coordinate the management of petitions on Form I-829 within his or her region. The responsibilities of the regional EB-5 POC include determining to which district office the service center director will forward the petition; coordinating the referral with the proper district director; ensuring that the petition is adjudicated by a trained district office adjudicator in accordance with these instructions, and; keeping a record of the distribution of cases within his or her region. In addition, the regional EB-5 POC is responsible for assisting an adjudications officer who has not received a requested A-file from a service center or district office within 30 days of a request (see paragraph (d)(1) of this field memorandum). In such a case, if a CIS file transfer request (FTR) screen indicates that no file transfer was initiated (FTI) after 30 days, the regional EB-5 POC must contact the regional POC for records at the File Control Office and coordinate the transfer of the requested file The regional EB-5 POC shall also coordinate the referral of substantive questions received from service centers and district offices to the Headquarters Immigration Services Division (HQISD) for a responsive review.

Prior to forwarding a file for referral, the service center director shall contact the appropriate regional EB-5 POC at the number located at Appendix 22-4. When contacted by a service center director, the regional EB-5 POC shall consult with the district office having jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States. If there is a trained officer at that location, the regional EB-5 POC shall direct the service center director to forward the petition to that office. If there is no trained officer at that location, the regional EB-5 POC shall consult with district offices as necessary to direct the referral of the case in accordance with the availability, and expeditious use, of trained and experienced district office adjudicators The regional EB-5 POC shall consider whether a district director without a trained and experienced officer prefers to detail in such an officer from another district office or has other preferences, e.g. for a telephonic or video interview.

In a specific case, a district director may determine and recommend to the regional EB-5 POC that, due to the limited availability of trained district office adjudicators, he/she must delegate his or her authority to a district director with a trained and experienced officer. A delegation of authority must be clear and in writing. In such cases, the regional EB-5 POC is responsible for ensuring that a written delegation of authority from the district director with jurisdiction is transmitted by fax or mail to the district director under whose authority the interview will be performed.

In all cases, once a district office is selected to perform the adjudication, the regional EB-5 POC will direct the service center director to forward the case file by certified mail or express mail service to that office flagged in red marker "to the attention of the district EB-5 POC." The service center director must record the referral of the case in MFAS in accordance with routine procedures.

(f) **Adjudication of Form I-829 by District Office.**

(1) **Procedures for Currently Received Form I-829s.** Upon issuance of this memorandum, district offices with Form I-829 petitions prepared and transmitted in a manner that is NOT consistent with the procedures outlined in this memorandum must return those files to the appropriate service center, with the A-file, marked to the attention of the EB-5 POC and, in red, "I-829 return." The district director must update CIS accordingly. In accordance with the Notice in the Federal Register, 63 FR 67135, published on December 4, 1998, effective immediately, the Vermont and Nebraska Service Centers no longer have jurisdiction over EB-5 matters Form I-829 petitions shall be returned to:

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

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

When a Form I-829 file is returned to the California or Texas Service Center, the district office must manually send the petitioner, or the attorney or representative of record if the petitioner is represented, a notice of the file transfer The notice of file transfer should inform that, if necessary, the conditional resident may take the receipt notice to the nearest district office and receive evidence of status in accordance with the procedures set forth in paragraph (g).

In addition, the Vermont and Nebraska Service Centers are instructed to forward any outstanding Form I-829 petitions to the Texas and California Service Centers. Upon receipt of a returned file, the Texas and California Service Centers are instructed to prepare and transmit the file with the required recommendation through a regional EB-5 POC in accordance with these instructions.

(2) **Initial Review of Form I-829 Transmitted in Accordance with these Instructions.** District offices that receive a petition on Form I-829 prepared and transmitted in accordance with these instructions may approve or deny the petition with or without an interview The district director must initially review the petition in order to determine whether or not an interview will be conducted and that the necessary written delegation of authority is in the case file In adjudicating the petition, the district director may accept or reject the service center director's recommendation.

(3) **Waiver of the Interview.** A district director may waive the interview if an interview is not necessary because either:

(A) the petition is approvable and the requirements for removal of the conditions are established; or

(B) the petition is deniable because on its face those requirements are not established.

Therefore, to waive the interview and approve or deny the petition, the district director must be satisfied that the initial review of the petition demonstrates that the requirements for the removal of conditions are met or not met and an interview can provide no information relevant to that finding and, therefore, will serve no purpose. If the interview is waived, the petition must be annotated and MFAS updated in accordance with routine procedures

(4) **The Form I-829 Interview.** If an interview is necessary to approve or deny the petition, the district director will offer the conditional resident the option of traveling to the district office for a face-to-face interview or, if available, participating telephonically or by video conferencing. The interviewing officer shall create a record of the interview that responds to the service center director's memorandum and sets forth new or additional information or issues arising from the interview. The officer who conducts the interview shall render a final adjudication of the Form I-829 and recommend a decision to the district director in accordance with his or her findings If a conditional resident fails to appear for an interview, the alien's permanent resident status shall be terminated automatically in accordance with the procedures outlined at 8 CFR 216 6(b)(3).

(5) **Approval of Form I-829 by the District Director**. A district may approve a petition on Form I-829 if he or she is satisfied that the petition establishes that the requirements for the removal of the conditions have been met under 8 CFR 216.6(c)(1), namely that:

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

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

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

(D) the conditional resident created or can be expected to create within a reasonable period of time ten full-time jobs to qualifying employees.

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

(6) **Action by District Director upon Approval.** If, after initial review or after the interview, the petition is approved, the district director will remove the conditions on the conditional resident's status as of the second anniversary of his or her admission as a conditional permanent resident. The district director must provide written notice of the decision to the conditional resident if he or she is not represented; however, if the conditional resident is represented as evidenced by a signed G-28, the notice must be provided to the attorney or representative of record only. Pursuant to 8 CFR 216 6(d)(1), the notice must require the conditional resident to report to the appropriate district office for processing of a new permanent resident card, Form I-551. At that time the conditional resident shall surrender any permanent resident card previously issued and shall receive temporary evidence of lawful permanent resident status in accordance with paragraph (d)(2) of this section. The district director shall ensure that the file, including all relevant documents, for example, a delegation of authority or a record of the interview, is returned to the appropriate service center director Normal procedures should be followed for entering the decision into MFAS and card production

(7) **Derogatory information.** In accordance with 8 CFR 216 6(c)(2), if the review of the petition, or the interview itself, reveals derogatory information concerning the requirements for removal of conditions (see paragraph (5)), the district director shall provide the conditional resident the opportunity to rebut such information. A 30-day period from the date of issuance is a reasonable period of time within which to allow the petitioner to submit a rebuttal. This opportunity to rebut provided by 8 CFR 216.6(c)(2) does not entail a notice of intent to deny. Rather the district director shall issue a Form I-72, Form Letter for Returning Deficient Applications/Petitions, with a short explanation of the derogatory information, a request that the conditional resident respond only to that information, and the date the response is due. This will provide the conditional resident with an opportunity to rebut only that information on the Form I-72. Derogatory information should be limited to information that the alien has not previously had an opportunity to address and the opportunity to rebut should not reopen the entire case. The opportunity to rebut shall also be provided if it is determined that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs).

If no unresolved derogatory information is present, the petition shall be approved pursuant to the procedures outlined in paragraph (f)(6) of this section of the Field Manual. See also 8 CFR 216.6(c)(2)

If the conditional resident fails to overcome such derogatory information or evidence that the investment funds were obtained through other than legal means, the director may deny the petition in accordance with paragraph (f)(8) of this section, terminate the conditional resident's status, and issue a Notice To Appear (NTA) (See Appendix 22-2)

For example, the interview may reveal that a conditional resident has created positions for only seven full time employees. If, in rebuttal, the conditional resident states that he or she intends to create three additional positions at an indefinite time in the future, the petition has not met the requirements of the regulations and the petition should be denied. On the other hand, an interview may reveal that while a conditional resident has created positions for ten full time employees, only nine are actually working. The conditional resident may present rebuttal information by demonstrating that he or she actively recruited the tenth employee, and the tenth employee is expected to be hired and begin employment imminently. The director may, after considering this information as well as all of the evidence supporting the petition as a whole, determine that such a petition is approvable.

If derogatory information unrelated to any of the requirements for removal of conditions is identified during the course of the interview (for example, an arrest or criminal conviction), such information shall be forwarded to the investigations unit for appropriate action, and no opportunity to rebut shall be provided.

(8) **Denial of Form I-829 by the district director.** A district director must deny a petition on Form I-829 if the petition does not establish the requirements for removal of conditions listed in 8 CFR 216.6(c)(1). If, after initial review or after the interview, the district director denies the petition, he or she shall provide written notice to the conditional resident if he or she is not represented. However, if the conditional resident is represented, the district director shall provide written notice of the decision to the conditional resident's attorney or representative of record only. No appeal shall lie from this decision. The conditional resident may seek review of the district director's decision in removal proceedings. In issuing this denial notice, the district director shall:

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

--the conditional resident's status, and that of his or her spouse or children, is terminated as of the date of the decision and, in the case of a conditional resident that is not represented, that an NTA is attached, or, in the case of a represented conditional resident, that an NTA will be served separately upon the alien,

--the conditional resident is instructed to surrender to the district office any permanent resident card, Form I-551, previously issued by the Service and request temporary evidence of conditional residence; and

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

(B) issue and serve an NTA together with the notice if the conditional resident is not represented (if the conditional resident is represented, the notice should be sent only to the attorney or the representative of record and the NTA should be sent to the conditional resident) in accordance with the routine procedures (See Appendix 22-2) and with proper service of the NTA to the Executive Office of Immigration Review,

(C) enter the denial information into MFAS

(D) ensure that the A-file includes all relevant documents, for example, a delegation of authority or a record of the interview, and is forwarded to the appropriate Office of the District Counsel. An office of the district or regional counsel with questions regarding this field memorandum should contact the Office of the General Counsel at the number for that office at Appendix 22-4.

(9) **Grounds for Denial of Form I-829** A district director may deny Form I-829 on the following grounds:

(A) Denial due to alien's failure to meet the statutory and regulatory requirements as a factual matter The Service lacks authority to grant a Form I-829 petition if the petition does not meet the statutory and regulatory requirements. This is true even if the Service granted the original I-526 petition in error and the petitioner has complied with the investment plan outlined in the Form I-526 If a director determines, after initial review of the Form I-829 petition, or referral for an interview, that the petition on its face does not meet the statutory and regulatory requirements, the petition must be denied.

(B) Denial due to features discussed in the June 26, 1998, field memorandum Special procedures referenced in the June 26, 1998, field memorandum should be followed when a district director determines that a Form I-829 should be denied solely because one or more of the seven features discussed therein, and precluded under the recently issued precedent decisions, were present in the Form I-526. (If the petition is deniable for any other reason, for example because the conditional resident did not meet the job creation or preservation requirement or the new commercial enterprise has failed or is no longer viable, then the Service will follow normal procedures for denying a petition.) In a case deniable solely for one of the seven features discussed in the June 26, 1998, field memorandum, the conditional resident will be given an opportunity to file a new Form I-526 based upon the same job-creating or job-preserving business enterprise and business plan as in the original Form I-526 petition but with changes made to the financing of the business plan, while the Service suspends issuance of a decision to deny his or her Form

I-829. This would allow conditional residents who exercise this option to remain in the United States in conditional resident status while their new petition is pending A decision on the pending Form I-829 would be issued once adjudication of the Form I-526 is completed. Should the Service grant the new Form I-526 petition, the conditional resident could seek to obtain an immigrant visa from a consular officer abroad and return to the United States to begin a new 2-year period of conditional residence. Thus, for cases falling under this paragraph, the district director shall issue a notice of intent to deny that shall state the reasons for the issuance of the notice of intent to deny and shall advise the conditional resident of the following:

- If he or she files, with the service center having jurisdiction over the location of the new commercial enterprise, a new petition on Form I-526, with the fee, within 90 days of the date of the notice of intent to deny, and this new petition does not contain the defects in the original filing, the Service will suspend issuance of a denial of his or her Form I-829 until it has adjudicated the new Form I-526 Concurrently, the conditional resident should send a copy of both the new Form I-526 and proof of filing to the district director of the district office that issued the notice of intent to deny. Exercising this option will allow the conditional resident to remain in the United States in conditional resident status during the adjudication of the new petition Should the new petition be approved, however, he or she will be required to depart the United States to file for an immigrant visa and obtain authorization for a new 2-year conditional resident period from a consular officer abroad, since, pursuant to section 245(f) of the Act, conditional residents cannot apply within the United States for adjustment of status

- If he or she does not file a new Form I-526 within 90 days of the date of the notice of intent to deny, the Service will proceed to deny the Form I-829 on the merits of the petition and issue a Notice to Appear for removal proceedings.

- If he or she does exercise the option to file a new Form I-526, the conditional resident must agree to continue to provide the same opportunities for employment for the entire new conditional resident period. In addition, the new petition that is filed must be based upon:
  - an investment in the same job-creating or job-preserving United States business as the original petition;
  - a business plan that is the same as in the original petition and that was sufficient and was otherwise fully complied with in the original petition throughout the two-year conditional period; and
  - the same job-creating or job-preserving United States business that actually created or preserved the required number of jobs.

The only change that may be made in the new petition is in the financing of the business plan.

- In the new Form I-526 petition that is filed under these procedures, the conditional resident must recognize that the original request to remove the conditions on the conditional resident's status was deniable or subject to denial because the original petition did not comply with the law and the regulations.

- If the new Form I-526 petition is denied, the Service will proceed to deny the Form I-829 on the merits of the petition and issue a Notice to Appear for removal proceedings.

- If the new Form I-526 petition is approved, the conditional resident must, within 60 days of the date of the approval notice, submit to the service center director of the service center where the new Form I-526 was approved a completed and signed Form I-407, Abandonment by Alien of Status as Lawful Permanent Resident, abandoning his or her permanent resident status, and his or her expired Form I-551, Permanent Resident Card, if still in his or her possession. Upon receipt of Form I-407, the Service will proceed to deny the Form I-829 for failure to prosecute. Once this denial is issued, the alien will no longer be in lawful status and will begin to accrue time unlawfully present in the United States for purposes of section 212(a)(9)(B)(i) of the Act. The alien should promptly depart the United States to avoid any adverse consequences under the Act and file for an immigrant visa with a consular office abroad. The Form I-407 must be received by the service center by the close of business on the last day of the 60-day period. If the Service does not receive Form I-407 by the close of the 60-day time period, the Service will proceed to deny the Form I-829 on the merits of the petition and issue a Notice to Appear for removal proceedings.

- When filing for a new immigrant visa with a consular officer abroad, the alien should provide to the consular officer a copy of the notice of intent to deny, a copy of the Form I-407, evidence of the date of departure from the United States (e.g., boarding pass), and evidence of the approval of the new Form I-526 petition, in addition to any documentation required by the consular officer for visa processing.

- Finally, if admission for a new two-year conditional period is authorized by the consular officer and the alien is admitted to the United States as a conditional resident, he or she will be required to comply with all the requirements of the law, including the employment creation requirements, so that the jobs previously

created or preserved by the new commercial enterprise are sustained throughout the new 2-year conditional period.

MFAS should be appropriately updated and the case file placed in a holding area, or holding cabinet, marked "EB-5 I-829 90 day hold" during the response period. At the end of the 90-day period, the district director shall determine whether a response has been received and, if so, whether that response provides evidence that a new petition has been filed in accordance with the notice. If no response is received, the district director shall proceed to prepare and issue the denial and the NTA in accordance with the procedures outlined above If a new petition is filed in accordance with the notice, the district director shall forward the original file to the service center director with jurisdiction over that filing. The service center director must promptly adjudicate the petition pursuant to the guidelines provided in recent precedent decisions and field instructions.

For those conditional residents whose new Form I-526 petitions are approved, the service center director shall mail the approval notice to the conditional resident if unrepresented or, if represented, to the attorney or representative of record and record the approval of the new petition in CLAIMS The service center director shall place the file in a holding cabinet, marked "EB-5 60-day hold" during the 60-day period in which the alien must submit Form I-407 (and Form I-551, if any) before departing the United States and filing for a new immigrant visa at a consular office abroad. Immediately after the end of the 60-day period, the service center director will determine whether the alien submitted Form I-407. If the alien failed to submit the Form I-407, the service center director shall transfer the alien's file to the district office for issuance of a denial of the Form I-829 on the merits of the petition and a Notice to Appear. If it is determined that the alien submitted the Form I-407, the service center director shall transfer the alien's file with a copy of Form I-407 to the district office that issued the notice of intent to deny Form I-829 for issuance of a denial of the Form I-829 for failure to prosecute. MFAS must be updated accordingly. Form I-407, in the original, shall be forwarded to the Texas Service Center for additional processing. Upon the admission of an alien based upon the new immigrant visa, immigration officers shall ensure that a new A number is not created, but that the prior A number is assigned to the alien's new immigrant visa.

(C) Denial due to fraud or other criminal grounds. When a district director determines that a petition may be deniable for fraud or other criminal grounds, the Form I-829 petition shall be referred to the district's investigations branch with specific requests for a benefit fraud investigation. The district director may also coordinate the referral of a Form I-829 petition to FINCEN with a request for appropriate research. The district director shall make no disposition of the petition until he or she obtains a report of the results of the referral or investigation.

(g) **Extension of Status for Conditional Residents with Pending or Denied Forms**

I-829. Service officers are advised that no extension of status can be given to an alien who has not filed a Form I-829, unless the district director accepts a late petition based upon the alien's showing of good cause in accordance with 8 CFR 216.6(a)(5).

Upon receipt of a properly filed Form I-829, the Service is authorized by 8 CFR 216.6(a)(1) to extend automatically a conditional resident's status, if necessary, until such time as a service center or district director has adjudicated the petition. Therefore, if necessary, a district immigration information officer (IIO) in receipt of a request for documentation for travel or employment purposes from a petitioner who requires an extension of status based on a filed Form I-829 shall check the status of the petitioner on MFAS. If the Form I-829 has been denied, the IIO should check DACS to determine if an NTA has been issued. If no NTA has been issued, the IIO must ensure that the petitioner is issued an NTA through Investigations or Adjudications, depending on the policy of the district office

If the Form I-829 is still pending or it has been denied but no final order of removal has been entered, the IIO must collect the expired Permanent Resident Card and issue either:

(A) a temporary I-551 stamp with a 12-month expiration date in the petitioner's unexpired, foreign passport (if the expiration date of the passport is one year or more), or

(B) if the petitioner is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the petitioner.

The IIO must use the same conditional resident status code initially issued to the petitioner and grant the status for an additional 12 months. Documentation of conditional resident status must be issued until a final order of removal is issued. An order of removal is final if a decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals.

Where the Form I-829 has been denied for failure to appear for an interview, the alien's permanent resident status will be automatically terminated. Temporary evidence of permanent resident status as stated above should only be issued if the conditional resident's status is restored as described in 8 CFR 216.6(b)(3).

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

2. The AFM Table of Contents is revised and a new Appendix 22-1 is added to read as follows:

Appendix 22-1

FREQUENTLY ASKED QUESTIONS ABOUT FORM I-829

1. **What is the Form I-829?** Form I-829, Petition by Entrepreneur to Remove the Conditions, is a petition that must be filed by an alien entrepreneur, or immigrant investor, in conditional permanent resident status under section 203(b)(5) of the Immigration and Nationality Act.

2. **What is the Form I-829 used for?** Section 203(b)(5) provides an alien entrepreneur/investor with a 2-year period of conditional residence to invest the required capital in a new commercial enterprise that the alien has established. In addition, in the 2-year period the alien entrepreneur/investor must create full-time employment for the required number of United States workers. (United States workers may be citizens, aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States, other than the petitioner and immediate family members) Form I-829 is used by an alien entrepreneur/investor at the end of the 2-year conditional period to request removal of the conditions on his or her lawful permanent resident status.

3. **When is Form I-829 filed?** It must be filed within the 90-day period preceding the second anniversary of the conditional resident's admission to the United States or adjustment of status as a conditional resident.

4. **Where is Form I-829 filed?** Form I-829 must be filed with the INS service center having jurisdiction over the location of the alien entrepreneur/investor's commercial enterprise in the United States On December 4, 1998, the Service published a Federal Register Notice announcing that all petitions related to alien entrepreneur/ immigrant investor classification were to be filed at the newly defined jurisdictional areas of either the Texas Service Center or the California Service Center (63 FR 67135).

   Petitions on Form I-829 are filed (1) with the Texas Service Center if the new commercial enterprise is located, or will principally be doing business, in the geographic area previously under the jurisdiction of the Vermont and Texas Service Centers or (2) with the California Service Center if the new commercial enterprise is located, or will principally be doing business, in the geographic area previously under the jurisdiction of the California and Nebraska Service Centers.

   The Nebraska and Vermont Service Centers no longer have jurisdiction over Form I-829. The Nebraska and Vermont Service Centers were authorized to forward EB-5 petitions to the Texas and California Service Centers if necessary due to incorrect filing for a

60-day period following December 4, 1998. (That time period has expired.)

5. **What are the mailing addresses for these new filing locations?** The current mailing addresses for these petitions and applications are as follows: for the California Service Center, 24000 Avila Road, 2nd floor (P O Box 10526), Laguna Niguel, California 92607-0526; for the Texas Service Center, P O. Box 852135, Mesquite, Texas, 75185-2135.

6. **What is the fee for Form I-829?** To be considered properly filed, Form I-829 must be accompanied by the fee required under 8 CFR 103 7(b)(1), which is $345

7. **What other documents are filed with Form I-829?** Under 8 CFR 216.6(a)(4), the petition for removal of conditions must be accompanied by evidence that
   - a commercial enterprise was established by the alien entrepreneur/investor;
   - the alien entrepreneur/investor invested or was actively in the process of investing the requisite capital;
   - the alien entrepreneur/investor sustained the actions at (1) and (2) throughout the period of his or her residence in the United States, and;
   - the alien entrepreneur/investor created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees.

8. **Are the entrepreneur/investor's spouse and child required to file separate applications?** Under 8 CFR 216.6(a), they should be included in the conditional resident's petition on Form I-829, at Part 3. Children who have reached the age of twenty-one, children who have married during the period of conditional permanent residence, and the former spouse of an entrepreneur, who was divorced from the entrepreneur during the period of conditional residence, may be included in the conditional resident's petition or may file a separate petition on Form I-829.

9. **Will entrepreneurs/investors remain in status after they file Form I-829?** Under 8 CFR 216.6(a), upon receipt of a properly filed Form I-829, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition. The Form I-829 receipt notice will state that the conditional resident's Form I-551, Permanent Resident Card, is extended for one year. If the petition is not adjudicated within this time period, the conditional resident, if necessary, should contact the district office nearest to where he or she is living thirty (30) days before the Form I-551 expiration date is reached for further documentation regarding status and employment.

10. **Can entrepreneurs/investors travel after filing Form I-829?** Under 8 CFR 216 6(a)(3), an alien entrepreneur who has filed Form I-829 is authorized to

travel outside the United States and return if in possession of appropriate documentation. The regulation at 8 CFR 211.1(a)(5) authorizes admission if an alien presents an expired Form I-551, Permanent Resident Card, accompanied by a filing receipt issued within the previous 6 months for a Form I-829, if seeking admission or readmission after a temporary absence of less than 1 year. (Some filing receipts may authorize travel for up to 1 year.) Waivers from visa requirements may be obtained under 8 CFR 211.1(b). District offices are authorized to issue (a) a temporary I-551 stamp with a 12-month expiration date in the petitioner's unexpired, foreign passport (if the expiration date of the passport is one year or more), or (b) if the petitioner is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the petitioner. An alien entrepreneur may wish to contact his or her local INS district office to discuss the travel planned and determine the routine procedures of that office for obtaining such necessary travel documentation. If necessary, thirty (30) days before the expiration of the Form I-829, the conditional resident should contact the district office nearest to where he or she is living for such documentation for purposes of travel outside of the United States.

3. The AFM Table of Contents is revised and a new Appendix 22-2 is added to read as follows:

Appendix 22-2

MODEL NOTICES TO APPEAR (NTAs) – **Note: The allegations must be appropriately modified in the case of NTAs issued for derivatives (i.e., spouse and children).**

FOR IMMIGRANT ENTREPRENEUR TERMINATED DUE TO FAILURE TO FILE FORM I-829 (for District Office use)

A. Termination of Conditional Permanent Residence (Entry on Immigrant Visa)
ALLEGATIONS:

1. You are not a citizen or national of the United States;
2 You are a native of _____and a citizen of _____;
3 On _____, you were lawfully admitted to the United States for permanent residence on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;
4. Your status was terminated on _____ because you failed to properly file the Request for Removal of Conditions (Form I-829).

CHARGE:
Section 237(a)(1)(D)(i) of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216A of the Act your status was terminated under such respective section.

B. Termination of Conditional Permanent Residence (Adjustment)
ALLEGATIONS:

1. You are not a citizen or national of the United States;
2. You are a native of _____ and a citizen of _____;
3. You were admitted to the United States at _____ as a nonimmigrant;
4. On _____ your status was adjusted to that of a permanent resident on a conditional basis based upon your engagement/investment in a new commercial enterprise known as _____.
5 Your status was terminated on _____ because you failed to file a Request to Remove Conditions (Form I-829).

CHARGE:

Section 237(a)(1)(D)(i) of the Immigration and nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under Section 216A of the Act your status was terminated under such respective section.

FOR IMMIGRANT INVESTOR/ALIEN ENTREPRENEUR TERMINATED DUE TO SUBSTANTIVE DENIAL OF FORM I-829 (for DISTRICT OFFICE use)

C. Termination of Conditional Permanent Residence (Entry on Immigrant Visa)
ALLEGATIONS:

1. You are not a citizen or national of the United States,
2. You are a native of _____ and a citizen of _____;
3. On _____, you were lawfully admitted to the United States for permanent residence on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;
4. Your Request for Removal of Conditional Residence was denied by the District Director on _____ because you failed to meet the requirements necessary to remove the conditions on your status.

CHARGE:
Section 237(a)(1)(D)(i) of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216A of the Act your status was terminated under such respective section.

D. Termination of Conditional Permanent Residence (Adjustment)

ALLEGATIONS:

1. You are not a citizen or national of the United States;
2. You are a native of _____and a citizen of _____;
3. You (entered without inspection, were paroled, or were admitted to the United States at _____as a nonimmigrant) (specify);
4. On _____your status was adjusted to that of a permanent resident on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;
5. Your Request for Removal of Conditional Residence was denied by the District Director on _____ because you failed to meet the requirements necessary to remove the conditions on your status.

CHARGE:

Section 237(a)(1)(D)(i) of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216A of the Act your status was terminated under such respective section

4. The AFM Table of Contents is revised and a new Appendix 22-3 is added to read as follows

Appendix 22-3

MODEL NOTICE OF AUTOMATIC TERMINATION OF CONDITIONAL RESIDENCE OF IMMIGRANT INVESTOR/ALIEN ENTREPRENEUR BASED UPON FAILURE TO PROPERLY FILE FORM I-829 PETITION.

Notice of Conditional Resident Status Termination

A review of the records of the Immigration and Naturalization Service (Service) reveals that you were admitted to the United States as a conditional permanent resident on [insert date of admission or adjustment].

In accordance with the provisions of section 216A(c)(2) of the Immigration and Nationality Act (the Act), you were required to file a petition (Form I-829) requesting removal of the conditional basis of residence between [insert date 21 months after date of admission or adjustment] and [insert date 24 months after date of admission or adjustment] As of this date, the Service has no record that you have filed such a petition.

Therefore, in accordance with the provisions of Section 216A(c)(2)(A) of the Act, the permanent residence status previously accorded you is hereby terminated as of [insert date 24 months after date of admission or adjustment].

All privileges that you have derived from the status, including the privileges to reside and work in the United States, are terminated concurrently

A Notice to Appear is attached, or will be forwarded under separate cover to you. Your file is being forwarded to the Office of District Counsel of the INS District Office having jurisdiction over the location of your last known address. All inquiries should be made to the District Counsel Office.

In accordance with section 216A(c)(2)(B) of the Act, you may request review of this determination in removal proceedings In those proceedings, you shall have the burden of proving your compliance with the requirement to file the petition (Form I-829) within the designated period.

Sincerely,

Director

5 The AFM Table of Contents is revised and a new Appendix 22-4 is added to read as follows

Appendix 22-4

POINTS OF CONTACT FOR EB-5 CASES

Questions about ADJUDICATIONS issues may be directed to Katharine A. Lorr at HQADN, (202) 353-8177.

Questions about INVESTIGATIONS issues may be directed to Maryann Maillet at HQINV (202) 514-0747.

Questions about legal issues from regional or district counsel offices may be directed to Susan Mathias at HQCOU, (202) 514-2895

Questions from service center directors or district directors regarding the procedures outlined in these instructions may be directed to the regional EB-5 POC at the following numbers: Western Regional Office – 949-360-3314; Central Regional Office – 214-767-7430; Eastern Regional Office – 802-660-5036

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE Nos. 01-56266 and 01-56379

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,038 words.

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Dated: September 13, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2002, I directed that two copies of the foregoing Reply Brief for Defendant-Appellee/Cross-Appellant be served upon counsel for plaintiffs-appellants/cross-appellees by deposit in the established Department of Justice mail collection location in sufficient time for same-day collection and transmittal to the U.S. Postal Service for first-class mailing addressed to:

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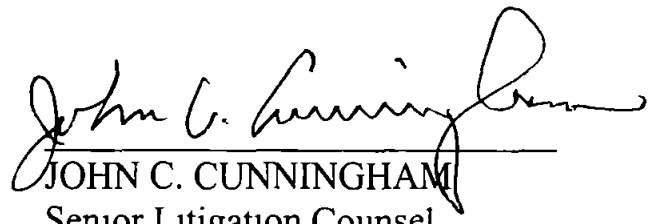

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