

retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule.

The exemptions proposed here are standard for agencies where the information may contain investigatory materials compiled for law enforcement purposes. These exemptions are exercised by executive Federal agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for DHS/USCIS-015 Electronic Immigration System-2 Account and Case Management System of Records is also published in this issue of the **Federal Register**.

## II. Privacy Act

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

### List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

### PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Pub. L. 107-296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph "61":

#### Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

\* \* \* \* \*

61. The DHS/USCIS-016 Electronic Immigration System-2 Account and Case Management System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCIS-016 Electronic Immigration System-2 Account and Case Management is a repository of information held by USCIS to

serve its mission of processing immigration benefits. This system also supports certain other DHS programs whose functions include, but are not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/USCIS-016 Electronic Immigration System-2 Account and Case Management System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, state, local, Tribal, foreign, or international government agencies. This system is exempted from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2); 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require retrieving records from law enforcement systems.

Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule. Exemptions from these particular subsections are justified, on a case-by-case basis determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and/or reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the

course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records, or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system, would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: September 15, 2011.

**Mary Ellen Callahan,**  
*Chief Privacy Officer, Department of Homeland Security.*

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 216 and 245

[CIS No. 2484-09; DHS Docket No. DHS-2009-0029]

RIN 1615-AA90

### Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Homeland Security (DHS) is proposing to amend its regulations governing the employment creation (EB-5) immigrant classification. This rule only proposes requirements and procedures for special determinations on the applications and petitions of qualifying aliens whose employment-creation immigrant petitions were approved by the former Immigration and Naturalization Service (INS) after January 1, 1995 and before August 31, 1998. This rule would implement provisions of the 21st Century Department of Justice Appropriations Authorization Act.

**DATES:** You must submit written comments on or before November 28, 2011.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. DHS-2009-0029, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020. To ensure proper handling, please reference DHS Docket No. DHS 2009-0029 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.

- *Hand Delivery/Courier:* Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020. Contact Telephone Number (202) 272-8377.

**FOR FURTHER INFORMATION CONTACT:** Alexandra Haskell, Adjudications Officer, Business, Employment and Trade Services, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Mailstop 2060, Washington, DC 20529-2060, telephone: (202) 272-8410.

**SUPPLEMENTARY INFORMATION:**

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**List of Abbreviations**

BIA	Board of Immigration Appeals
DHS	Department of Homeland Security
DOS	Department of State
DOJ	Department of Justice
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
LPR	Lawful Permanent Resident
NTA	Notice to Appear
RA	Rural Area
TEA	Targeted Employment Area
Public Law 107-273	21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002)
USCIS	U.S. Citizenship and Immigration Services

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. The Department of Homeland Security (DHS) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

*Instructions:* All submissions should include the agency name and DHS Docket No. DHS-2009-0029. U.S. Citizenship and Immigration Services (USCIS) will post all comments received without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**II. Background**

*A. Employment Creation Immigrant Classification*

The employment creation immigrant classification is one of five employment-related bases for obtaining permanent residence in the United States. See Immigration and Nationality Act (INA) section 203(b)(1)-(5), 8 U.S.C. 1153(b)(1)-(5). DHS and the affected community commonly refer to this category as the "EB-5" immigrant classification because it is the fifth employment-related basis listed in the INA. The EB-5 immigrant classification allows qualifying aliens, and any accompanying or following to join spouses and children, to obtain lawful permanent resident (LPR) status if the qualifying aliens have invested, or are actively in the process of investing, \$1 million in a new commercial enterprise. See INA sections 203(b)(5)(A) and (C), 8 U.S.C. 1153(b)(5)(A) and (C). To qualify, the alien's investment must benefit the U.S. economy and create full-time jobs for 10 or more qualifying employees. INA section 203(b)(5)(A)(ii), 8 U.S.C. 1153(B)(5)(A)(ii). If the investment is in a Rural Area (RA) or an area that has experienced high unemployment (*i.e.*, a Targeted Employment Area (TEA)), the required capital investment amount is \$500,000 rather than \$1 million. INA section 203(b)(5)(C)(ii), 8 U.S.C. 1153(b)(5)(C)(ii); 8 CFR 204.6(f)(2). In addition, under a pilot program established by statute, qualifying aliens may meet the job creation requirement through the creation of 10 direct or indirect jobs. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610(c), Public Law 102-395, 106 Stat. 1828 (1992), 8 U.S.C. 1153 note. To get the benefit of the indirect job creation requirement, an alien must make a qualifying investment within a regional center (defined in 8 CFR 204.6(e)) approved by USCIS for participation in the pilot program. This pilot program is set to expire on September 30, 2012. See Department of Homeland Security Appropriations Act, 2010, section 548, Public Law 111-83, 123 Stat. 2142, 2177 (2009), 8 U.S.C. 1153 note.

Obtaining lawful permanent residence under the EB-5 immigrant classification is a multi-step process. First, the alien must file and obtain approval of an Immigrant Petition by Alien Entrepreneur, Form I-526 (or successor form). See 8 CFR 204.6(a). Second, the alien must obtain conditional permanent resident status on the basis of the approved Form I-526 petition. If the alien resides in the United States, he

or she may apply to become a lawful permanent resident by submitting an Application to Register Permanent Residence or Adjust Status, Form I-485 (or successor form). See 8 CFR 245.1(a). If the alien resides outside of the United States or is ineligible for lawful permanent residence through the filing of a Form I-485, then he or she must obtain a Department of State (DOS) issued immigrant visa to gain admission to the United States as a permanent resident on a conditional basis. See INA section 211(a)(1), 8 U.S.C. 1181(a)(1). Once an alien has obtained conditional resident status, the alien is called an "alien entrepreneur." INA section 216A(f)(1), 8 U.S.C. 1186b(f)(1).

The last procedural step 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 Petition by Entrepreneur to Remove Conditions, Form I-829 (or successor form). See 8 CFR 216.6(a)(1). Failure to timely submit Form I-829, or to obtain a removal of conditions through the approval of a Form I-829, results in termination of conditional resident status and placement of the alien and any accompanying dependents in removal proceedings. See 8 CFR 216.6(a)(5). Determinations by USCIS on Form I-829 are not appealable; however, an immigration judge may review the determinations in removal proceedings. See INA section 216A(c)(3)(D), 8 U.S.C. 1186b(c)(3)(D). The Board of Immigration Appeals (BIA) hears appeals from immigration judge decisions. See 8 CFR 1003.1(b).

#### B. Overview of the Public Law 107-273 EB-5 Provisions

In 1998, the Immigration and Naturalization Service (INS), the predecessor agency to USCIS, issued four precedent decisions addressing the eligibility requirements for EB-5 petitions.<sup>1</sup> The publication of these precedent decisions resulted in litigation over their applicability to cases at various stages of adjudication.<sup>2</sup> Some of this litigation continues today.

In 2002, Congress enacted special legislation to provide a small group of aliens whose EB-5-related petitions or

applications were pending at the time of the precedent decisions with an opportunity to perfect their original investments or make additional business investments in the United States and create the requisite jobs so that they can remain in the United States as lawful permanent residents. See 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, div. C, tit. I, §§ 11031-11034, 116 Stat. 1758 (2002) (8 U.S.C. 1186b note) (Pub. L. 107-273). This special legislation only applies to "eligible aliens" for whom the INS approved a Form I-526 between January 1, 1995 and August 31, 1998, and who pursuant to such approval either: (1) Obtained permanent resident status on a conditional basis and filed a timely Form I-829 before November 2, 2002; or (2) filed an application for adjustment of status or an application for an immigrant visa before November 2, 2002. Public Law 107-273 does not apply to any other aliens who are admitted or have been admitted to the United States pursuant to the EB-5 visa program.

Public Law 107-273 requires publication of implementing regulations. Until implementing regulations are effective, USCIS may not take adverse action against "eligible aliens." See Public Law 107-273 at section 11033. Accordingly, DHS is proposing implementing regulations, but only as applied to the adjudicatory and prosecutory functions of USCIS and U.S. Immigration and Customs Enforcement (ICE).

#### C. Summary of the Adjudications Required by Public Law 107-273

Public Law 107-273 contains very detailed requirements for the review and adjudication of pending applications and petitions for eligible aliens. Section 11031 describes the procedures applicable to eligible aliens who obtained lawful permanent resident status on a conditional basis but who have not had their conditions removed. Section 11032 describes the procedures applicable to eligible aliens whose applications for permanent residence on a conditional basis had not been approved at the time of enactment of Public Law 107-273.

For eligible aliens with pending I-829 petitions, section 11031 of Public Law 107-273 requires the Secretary of Homeland Security (Secretary) to make an initial determination whether the Form I-829 as filed by the eligible alien is approvable. If the petition is approvable, the conditions on the alien's permanent residence will be removed. If the petition is determined to

be deficient following the initial determination, the eligible alien and the accompanying spouse and children of the alien will be granted a second two-year period of conditional residence unless the adverse determination is based on a finding of material misrepresentation. During this period of conditional residence, the eligible alien has an opportunity to remedy the deficiencies in his or her petition and make additional investments in the commercial enterprise listed on the pending Form I-829 and/or in other commercial enterprises to comply with the capital investment and job creation requirements of the EB-5 program. At the end of this two-year period, the eligible alien must file a new Form I-829 petition with the Secretary of Homeland Security seeking to remove the conditions from his or her permanent residence. If the eligible alien's second petition is approvable, the conditional basis of the alien's permanent residence and that of the alien's accompanying spouse and children will be removed. If an eligible alien's second petition is determined to be deficient, the eligible alien's permanent resident status and that of the alien's accompanying spouse and children will be terminated. If, at any stage of the process, it is determined that an eligible alien has made a material misrepresentation on any of the petitions, the alien's status and that of the alien's accompanying spouse or children may be terminated. Finally, section 11031 provides for administrative and judicial review of each of the statutory determinations.

Section 11032 of Public Law 107-273 provides for the approval of an eligible alien's application for adjustment of status or an immigrant visa and the grant of a two-year period of conditional residence. At the completion of the two-year period of conditional residence, eligible aliens must file Form I-829 to remove the conditions from their permanent residence and that of their accompanying spouse and children. Although the procedures used to adjudicate the petitions filed by eligible aliens under section 11032 of Public Law 107-273 are governed by INA section 216A, substantial compliance with the capital investment and job creation requirements need not be related to the commercial enterprise described in their Forms I-526. Rather, eligible aliens may submit evidence related to capital investment and job creation in any commercial enterprise in the United States. If an eligible alien is determined to have complied with the capital investment and job creation

<sup>1</sup> *Matter of Soffici*, 22 I&N Dec. 158 (INS Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 169 (INS Assoc. Comm'r 1998); *Matter of Hsiung*, 22 I&N Dec. 201 (INS Assoc. Comm'r 1998); *Matter of Ho*, 22 I&N Dec. 206 (INS Assoc. Comm'r 1998).

<sup>2</sup> E.g., *Am. Exp. Group Ltd. P'ship v. United States*, No. 02:06-02199 (D. S.C.); *Chang v. United States*, No. 02:99-cv-10518-GHK-AJW (C.D. Cal.); *Sang Geun An v. United States*, No. C03-3184p (W.D. Wash.).

requirements of the EB-5 program, the conditional basis of the alien's permanent residence and that of the alien's accompanying spouse and children will be removed. If it is determined that an eligible alien has made a material misrepresentation or has failed to satisfy the capital investment and/or job creation requirements of the EB-5 program, the alien's status and that of his or her accompanying spouse and children will be terminated, subject to review in removal proceedings.

The remainder of the Supplementary Information describes sections 11031 and 11032 of Public Law 107-273 in more detail and explains the corresponding proposed amendments to DHS regulations.

### III. Aliens Eligible To Receive Special Determinations on Their Petitions To Remove Conditions Under Section 11031 of Public Law 107-273

#### A. "Eligible Alien" Under Section 11031

As summarized above, a conditional resident must fall within the statutory definition of "eligible alien" under sections 11031(b)(1) and (2) of Public Law 107-273 to receive the determinations on a previously denied or currently pending Form I-829 required by section 11031(c) of Public Law 107-273. The determinations required by section 11031(c) of Public Law 107-273 (hereinafter "section 11031(c) determinations") are comprised of an initial determination and a second determination. Public Law 107-273 at section 11031(c). An "eligible alien" is an alien who obtained LPR status on a conditional basis as a result of filing a Form I-526 petition pursuant to section 203(b)(5) of the INA, 8 U.S.C. 1153(b)(5), that was approved after January 1, 1995 and before August 31, 1998. See Public Law 107-273 at sections 11031(b)(1)(A)&(B). Such alien must also have timely filed a Form I-829 pursuant to section 216A of the INA prior to November 2, 2002, the date of enactment of Public Law 107-273. See Public Law 107-273 at section 11031(b)(1)(C). A "timely-filed" Form I-829 is one that an alien filed during the 90-day period before the second anniversary of the alien's lawful admission for permanent residence. See INA section 216A(d)(2)(A), 8 U.S.C. 1186b(d)(2)(A); 8 CFR 216.6(a)(1).

In the event that an otherwise eligible alien's timely filed Form I-829 was denied prior to November 2, 2002, the alien still may be deemed to be eligible if he or she filed a motion to reopen not later than January 1, 2003. Public Law 107-273 at section 11031(b)(2)(A). If

such an eligible alien is no longer physically present in the United States, the Secretary of Homeland Security, if necessary, may parole the alien into the United States to obtain the section 11031(c) determinations. Public Law 107-273 at section 11031(b)(2)(B). The Secretary of Homeland Security, however, may not parole any alien into the United States who is inadmissible or deportable on any grounds, or if the alien's Form I-829 was denied due to a material misrepresentation of any of the facts and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), and alleged in the Form I-829 petition with respect to a commercial enterprise. Public Law 107-273 at section 11031(b)(2)(B)(i)-(ii). Under these circumstances, USCIS does not consider such alien "eligible" for the section 11031(c) determinations. In making the material misrepresentation determination, the applicable "facts and information" include, but are not limited to:

(A) Whether the alien established the commercial enterprise(s) under consideration; and

(B) Whether the alien invested or was actively in the process of investing the requisite capital.

(C) The alien sustained the actions described in (A) and (B) throughout the period of the alien's residence in the United States. See INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1) (as in effect prior to the enactment of Public Law 107-273 on Nov. 2, 2002).

A motion to reopen filed pursuant to Public Law 107-273 by otherwise eligible aliens who are in deportation or removal proceedings by reason of the denial of the I-829 petition also constitutes a motion to reopen proceedings. See Public Law 107-273 at section 11031(b)(2)(C). The scope of deportation or removal proceedings reopened under Public Law 107-273 is limited to whether:

- Any order of deportation or removal should be vacated, and

- The alien should be granted the status of an alien lawfully admitted for permanent residence unconditionally or on a conditional basis, by reason of the section 11031(c) determinations made by the Secretary of Homeland Security.

See Public Law 107-273 at section 1131(b)(2)(C).

#### B. Proposed Regulations

The statutory provisions of Public Law 107-273 are detailed; therefore, this proposed rule does not restate them. This proposed rule focuses primarily on limitations on eligibility and eligibility of aliens with denied petitions.

#### 1. Limitations on Eligibility

Under this rulemaking, in accordance with section 11031(b)(2)(C) of Public Law 107-273, aliens who are in deportation or removal proceedings and who are deportable or removable on grounds other than the denied Form I-829 would be ineligible for special determinations on their Form I-829 applications under Public Law 107-273. Proposed 8 CFR 216.7(a)(2)(i). Such aliens are statutorily barred from obtaining benefits under this law pursuant to section 11031(b)(2)(C) of Public Law 107-273.

Since the enactment of Public Law 107-273, DHS has received and acknowledged requests from several aliens eligible to receive section 11031(c) determinations to withdraw their Forms I-829. In other instances, some aliens have executed Abandonment of Lawful Permanent Residence Status, Form I-407 (or successor form). Either the withdrawal of the Form I-829 or the execution of the Form I-407 constitutes the voluntary abandonment of the alien's conditional lawful residence status. In addition, some aliens may have since acquired lawful permanent residence or another immigration status on a different basis. Public Law 107-273 does not address these scenarios. This rule proposes to exclude such aliens from "eligibility" for section 11031(c) determinations. Proposed 8 CFR 216.7(a)(2)(ii) and (iii). The actions of such aliens demonstrate that these aliens are no longer interested in pursuing LPR status based on the EB-5 immigrant classification under the provisions of Public Law 107-273. In order to be eligible to obtain status by another means, an eligible alien would have had to abandon status as an alien admitted for permanent residence on a conditional basis or have had such status terminated by USCIS. See INA section 245(f), 8 U.S.C. 1255(f); 8 CFR 245.1(c)(5); see also *Matter of Stockwell*, 20 I&N Dec. 309, 311-12 (BIA 1991) (bar to adjustment of status applicable to marriage-based conditional residents inapplicable if conditional resident status has been terminated).

For these reasons, DHS deems otherwise eligible aliens who have withdrawn their Forms I-829, executed Form I-407, or adjusted to LPR status on other grounds to have abandoned any claim to benefits under Public Law 107-273. DHS is proposing in this rule to exclude these aliens from the definition of eligible alien.

## 2. Aliens With Denied Petitions

Aliens who timely filed a Form I-829 petition that was denied on the merits prior to November 2, 2002, may still be deemed an “eligible alien.” See Public Law 107-273 at section 11031(b)(2)(A) (referencing INA section 216A(c)(3)(C), 8 U.S.C. 1186b(c)(3)(C) (discussing adverse determinations on petitions to remove conditions)). DHS proposes to define a denied petition as the decision by an INS director to deny the petition on the merits, and not denials resulting from review of a director’s decision in deportation or removal proceedings. See proposed 8 CFR 216.7(a)(1). This interpretation is supported by section 11031(b)(2)(C) of Public Law 107-273, which governs treatment of eligible aliens in deportation or removal proceedings. That provision refers to a denied petition as one that was made prior to the initiation of deportation or removal proceedings, which necessarily means a denial made by INS. See Public Law 107-273 at section 11031(b)(2)(C).

Note that an alien whose Form I-829 was denied on procedural grounds does not qualify as an “eligible alien.” See Public Law 107-273 section 11031(b)(2)(A) (limiting qualifying denied petitions that are reopened to those denied on the merits). Procedural grounds for denying Form I-829 include failure to file Form I-829 timely and the failure of the alien to appear for an interview. See 8 CFR 216.6(a)(5) and (b)(3). If an alien’s failure to timely file Form I-829 has been excused by INS or USCIS based on his or her showing that the failure was for good cause and due to extenuating circumstances or an alien’s failure to appear for an interview has been excused by INS or USCIS based on his or her showing of good cause, then the limitations on eligibility will not apply. Once excused, the alien resumes status as a conditional resident with a pending Form I-829, and is an “eligible alien” under Public Law 107-273.

Section 11031(b)(2)(A) of Public Law 107-273 required aliens with denied petitions to file a motion to reopen by January 1, 2003 to obtain the benefits offered by the statute. DHS has identified 31 such motions to reopen. DHS has granted such motions and the petitions are now considered to be pending. This rule does not further address motions to reopen since the statutory time period for filing such motions has expired.

Of the 31 motions to reopen that DHS received, none appear to have been filed by aliens who were not physically present in the United States. Moreover, in its review of all Public Law 107-273

petitions, DHS has not found that physical presence of the alien is necessary in order for USCIS to make its initial determinations. Therefore, this rule does not propose provisions governing the parole of overseas aliens with denied Forms I-829.

DHS considers a motion to reopen a denied Form I-829 pursuant to section 11031(b)(2)(A) of Public Law 107-273 to be the same as a motion to reopen deportation or removal proceedings. Public Law 107-273 at section 11031(b)(2)(C). Immigration courts have terminated or administratively closed deportation or removal proceedings in these cases to give USCIS the opportunity to make its section 11031(c) determinations. After USCIS makes these determinations, section 11031(b)(2)(C) of Public Law 107-273 requires that the Attorney General must make the decision to grant LPR status conditionally or unconditionally in proceedings. Therefore, after USCIS makes the initial 11031(c) determination, DHS must file a motion to re-calendar the proceedings. Proposed 8 CFR 216.7(a)(3). The immigration judge will take further action on the alien’s status in deportation or removal proceedings, including, as appropriate:

- Removal of the conditions and termination of proceedings,
- Extension of conditional resident status pursuant to section 11031(c)(1)(F)(ii), and
- Administrative closure so that jurisdiction shifts back to DHS for the second 11031(c) determination.

### IV. Determinations on Petitions To Remove Conditions Under Section 11031 of Public Law 107-273

Public Law 107-273 requires the Secretary of Homeland Security to make an “initial determination” on the pending Forms I-829 of eligible aliens. The Secretary also must make a “second determination” for certain eligible aliens who file new petitions to remove conditions 2 years later. See Public Law 107-273 at sections 11031(a) and 11031(c).

#### A. Initial Determinations

Under section 11031(c)(1)(A) of Public Law 107-273, the Secretary of Homeland Security must make an initial determination on each eligible alien’s Form I-829 regarding three issues. First, the Secretary must determine whether the Form I-829 contains any material misrepresentation in the facts and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), and alleged in the Form I-829 with respect to a commercial enterprise. The facts

and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), pertain to the establishment of an investment in the commercial enterprise for the duration of the conditional resident period. This determination regarding material misrepresentation must be made without regard to whether such enterprise is a limited partnership, or whether the alien entered the enterprise after its formation.

Second, the Secretary must determine whether the commercial enterprise created full-time jobs for 10 or more qualifying employees. The jobs have to exist or existed on any of the following dates:

- The date on which the Form I-829 was filed;
- Six months after that date; or
- The date on which DHS makes the determination.

The creation of 10 or more direct or indirect jobs will satisfy this requirement if the alien has made the required investment within an approved regional center. See Public Law 107-273 at section 11031(c)(1)(B). If the new commercial enterprise is a troubled business, then the law provides that the Secretary of Homeland Security instead must determine whether, on any of the three dates described above, the number of employees of the business is no fewer than the number of employees that existed before the alien made his or her capital investment in the business. *Id.* at section 11031(c)(1)(C).

Third, the Secretary must determine whether the eligible alien is in substantial compliance with the capital investment requirement described in INA section 216A(d)(1)(B), 8 U.S.C. 1186b(d)(1)(B), on any of the three dates listed above.

If the Secretary determines that the alien has met the job creation and capital investment requirements outlined by Public Law 107-273, and there is no material misrepresentation with respect to Form I-829, the Secretary of Homeland Security must notify the alien and, if the alien is not in deportation or removal proceedings, remove the conditional basis of the alien’s status as of the second anniversary of the alien’s lawful admission for permanent residence. The Secretary of Homeland Security will also remove the conditional status of the alien’s accompanying spouse and children as of that same date. See Public Law 107-273 at section 11031(c)(1)(E); see also proposed 8 CFR 216.7(a)(4)(i). For aliens in deportation or removal proceedings, further action will be taken in deportation or removal proceedings. See Public Law 107-273 at section 11031(b)(2)(C).

If the Secretary of Homeland Security makes an adverse determination regarding material misrepresentation, job creation, or capital investment, the Secretary must provide the alien with notice of this adverse determination and an opportunity to submit evidence to rebut the adverse determination. *Id.* at section 11031(c)(1)(F)(i). If the Secretary reverses all adverse determinations, the Secretary will notify the alien and his or her accompanying spouse and children that the adverse determination has been reversed. The Secretary will then remove the conditions of the alien, accompanying spouse, and children, effective as of the second anniversary of the alien's lawful admission for permanent residence if the alien is not in removal proceedings. *Id.* at sections 11031(c)(1)(F)(i) and 11031(b)(2)(C); *see also* proposed 8 CFR 216.7(a)(4)(i) and (iii). If the alien is in removal proceedings, DHS will move to recalendar the removal proceedings for appropriate action. *Id.*

If no such reversal takes place, the Secretary of Homeland Security (or the Attorney General if the alien is in deportation or removal proceedings) must continue the conditional basis of the alien's permanent resident status and that of the alien's spouse and children for a two-year period, but only if the adverse determination is based upon the capital investment or job creation requirements and does not involve a finding of material misrepresentation. Public Law 107-273 at sections 11031(c)(1)(F)(ii) and 11031(b)(2)(C). When an adverse determination is based upon the existence of a material misrepresentation, and the alien's rebuttal does not lead to reversal of that determination, the alien's conditional resident status and that of the alien's spouse and children must be terminated, subject to review of the adverse determination in deportation or removal proceedings. *Id.* at sections 11031(c)(1)(F)(iii) and 11031(d); *see also* proposed 8 CFR 216.7(a)(4)(vi)(A).

For any adverse determination, and prior to a subsequent decision regarding the alien's status, the alien may seek administrative review of the determination by the BIA. If the BIA denies the petition, the alien may seek judicial review. During any period of administrative or judicial review, the alien's conditional residence, along with the conditional residence of the alien's accompanying spouse and children, would continue. Public Law 107-273 at section 11031(c)(1)(F)(iv). The law provides that the procedures for judicial review are the same as the procedures for the judicial review of a final order

of removal. *See* INA section 242(a)(1), 8 U.S.C. 1252(a)(1).

In this rule, USCIS is proposing several steps leading up to its initial determination. USCIS would first make a determination on the initial Form I-829 pursuant to section 11031(c)(1) of Public Law 107-273 based on the evidence previously submitted with Form I-829. USCIS would not request additional evidence or an interview. *See* proposed 8 CFR 216.7(a)(4). While much time has passed since the passage of Public Law 107-273 in November of 2002, USCIS will be able to process these cases more efficiently if it first makes determinations on the evidence in the record rather than implementing a time-consuming request for evidence process before making a decision. Because Public Law 107-273 requires a rebuttal process in case of an adverse determination, USCIS believes that this rebuttal process is the most efficient and appropriate means to allow for the updating of information in the record.

If USCIS makes a favorable determination such that the conditions on permanent resident status should be removed, USCIS would provide written notice to the alien and, unless the alien is in removal or deportation proceedings, remove conditions. Proposed 8 CFR 216.7(a)(4)(i). If USCIS makes an adverse determination, the alien will be afforded an opportunity for the alien to update the evidence in the record. Following is a discussion of USCIS's specific proposals in this rulemaking.

#### 1. Favorable Initial Determinations

Eligible aliens may receive removal of the conditions on their permanent resident status if the Secretary of Homeland Security determines that there was no material misrepresentation on the Form I-829 and that the job creation and capital investment requirements have been met. Public Law 107-273 at section 11031(c)(1)(E). For eligible aliens who are in deportation or removal proceedings or who are overseas, additional steps may apply to effect the removal of conditions.

##### a. Aliens in Deportation or Removal Proceedings

For aliens in deportation or removal proceedings, the decision to remove conditions must take place in those proceedings. Public Law 107-273 at section 11031(b)(2)(C). Therefore, after the Secretary of Homeland Security makes a favorable determination on an eligible alien's Form I-829, jurisdiction shifts back to the immigration judge for a decision on whether the alien's conditions may be removed. To shift

jurisdiction back to the immigration judge, this rule provides that DHS must file a motion to re-calendar proceedings with the immigration judge. Proposed 8 CFR 216.7(a)(4)(i). The motion to re-calendar serves to reopen the proceedings, which previously were administratively closed. The immigration judge will issue an order terminating proceedings or vacating the order of deportation or removal and remove the conditions from an eligible alien's permanent resident status where the alien is not inadmissible or deportable on other grounds. Public Law 107-273 at section 11031(b)(2)(C). If the immigration judge determines that removal of conditions is not warranted, such as when the alien is found to be inadmissible, then deportation or removal proceedings will continue.

##### b. Overseas Aliens Who Were Not Paroled

Public Law 107-273 is silent with respect to the procedures for removing the conditions on the permanent status of overseas aliens who were not paroled into the United States for the special determination process. DHS is not aware of any potential eligible aliens currently residing abroad and has not, therefore, included any procedures for parole in this rulemaking. Should such a case arise, USCIS will notify the overseas alien of the favorable determination and removal of conditions and direct such alien to the appropriate U.S. consular office for the procedures by which he or she can secure documentation for admission to the United States. Note that if an alien with conditional resident status has been absent from the United States for 180 days or more or departed from the United States while in removal proceedings, he or she will be subject to inspection and, therefore, a determination of admissibility. INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

#### 2. Adverse Initial Determinations

##### a. Opportunity To Provide Rebuttal Evidence

USCIS is proposing in this rule a 12-week period within which an alien may submit evidence to disprove the adverse determination(s). Proposed 8 CFR 216.7(a)(4)(ii). In rebuttal, aliens would be able to submit evidence of investments in and job creation resulting from enterprises other than the commercial enterprise named in the initial Form I-829 and qualifying Form I-526. *Id.* USCIS would require such aliens to request consideration of investments in and job creation

resulting from additional commercial enterprises by filing a new Supplement to the Petition to Remove Conditions. *Id.*

Public Law 107–273 represents a significant departure from the strict rules normally applicable to the removal of conditions from an alien entrepreneur's permanent resident status. This legislation applies to a very limited group of individuals whose Form I–829 petitions were either pending at the time of the enactment of Public Law 107–273 or were reopened pursuant to the terms of that law. It was intended to redefine the standards applicable to this limited group and provide these eligible aliens who had failed to comply with these strict requirements of the existing EB–5 statutes and regulations an opportunity to cure the deficiencies of their initial petitions. Section 11031(c)(1)(A) does not preclude the consideration of capital investment in or job creation from commercial enterprises not identified in the initial Form I–829. Accordingly, consistent with the unique provisions and ameliorative purpose of Public Law 107–273, DHS will consider evidence of additional, qualifying investments and resulting job creation at the initial determination stage under section 11031(c)(1)(A), an option that ordinarily is not available to EB–5 conditional resident aliens. Additional investments and resulting job creation must be documented by completing a new supplement to Form I–829 and providing the evidence described in proposed 8 CFR 216.7(a)(5)(i)(C). *See* proposed 8 CFR 216.7(a)(4)(ii).

As more fully described below, permitting consideration of evidence of investment in commercial enterprises that are not listed in the initial Form I–829 could create instances where an eligible alien has made capital investments in commercial enterprises that are located within a targeted employment area (TEA), while also making capital investments in commercial enterprises not located in a TEA which require at least \$1,000,000 in capital investment. Under these circumstances, the pro-rating process described at proposed 8 CFR 216.7(a)(5)(iii) will be applied to determine the total amount of capital that must be invested in such instances.

The 12-week period for submitting rebuttal evidence, including the Supplement for investments in additional commercial enterprises (if applicable), would run from the date of an adverse determination notice. *Id.* The proposed timeframe would provide a substantial amount of time in which eligible aliens may submit rebuttal

evidence. It also is consistent with the timeframe for submitting additional evidence currently prescribed in 8 CFR 103.2(b)(8)(iv) and that is generally applicable to petitions and applications for immigration benefits.

Whether or not the alien submits rebuttal evidence during the 12-week period, USCIS would render a decision on whether to reverse its adverse determination(s). Proposed 8 CFR 216.7(a)(4)(ii). DHS is proposing this requirement given the age of the petitions and evidence that USCIS will be reviewing and because treatment of the alien's conditional resident status (if USCIS determines that it will not reverse the adverse determination(s)) depends on the basis of the adverse determination. If the adverse determination is based on material misrepresentation, Public Law 107–273 requires termination of conditional resident status. Public Law 107–273 at section 11031(c)(1)(F)(iii). If the adverse determination(s) is based on failure to meet the job creation or capital investment requirements, Public Law 107–273 requires continuation of conditional resident status. Public Law 107–273 at section 11031(c)(1)(F)(ii). Given these considerations, DHS prefers to proceed with its initial determination cautiously.

Public Law 107–273 requires that if all adverse determination(s) are reversed based on the rebuttal, then the alien must receive notice of this reversal. Public Law 107–273 at section 11031(c)(1)(F)(i). This rule proposes that USCIS must send written notice of its decision whether USCIS reverses the adverse determination or does not reverse the adverse determinations. Proposed 8 CFR 216.7(a)(4)(iii). The date of the notice would determine the period for administrative or judicial appeal of USCIS' adverse determinations, and when the continuation of conditional residence begins for purposes of a second determination.

If USCIS determines that reversal of adverse determinations is appropriate, then the procedures proposed for favorable determinations at proposed 8 CFR 216.7(a)(4)(i) would apply. If USCIS determines that reversal of adverse determination is not appropriate, then the procedures that apply would depend on whether the alien is or is not in deportation or removal proceedings. *Id.* If the alien is in deportation or removal proceedings, the decision on the alien's conditional resident status must be made by the immigration judge in proceedings. Proposed 8 CFR 216.7(a)(4)(iv). Therefore, DHS would need to file a

motion to re-calendar proceedings. *Id.* If the alien is not in deportation or removal proceedings, USCIS would extend the conditional residence of an eligible alien (and that of the alien's spouse and/or children if their status was obtained under section 216A of the Act) for a two-year period upon an adverse determination that is not based on a material misrepresentation. Proposed 8 CFR 216.7(a)(4)(v)(B).

Regardless of whether the alien is in proceedings or not, DHS is proposing to require that the notice affirming the adverse determinations must contain the reasons for the decision, as well as USCIS's determination (if applicable) regarding the number of qualifying jobs created, amount of capital investment made, and the date described in section 11031(c)(1)(D) of Public Law 107–273 that USCIS applied to each determination. Proposed 8 CFR 216.7(a)(4)(iii). In the case of multiple investors, jobs would be allocated among the investors. *Id.*

#### b. Appellate Review of Adverse Determinations

As required by section 11031(c)(1)(F)(iv) of Public Law 107–273, an alien may seek administrative review with the BIA of an adverse determination, and during the period in which the adverse determinations are pending with the BIA or circuit court, this rule provides that the conditional basis of the alien's permanent resident status and that of any accompanying spouse and/or children be continued automatically. *See* proposed 8 CFR 216.7(a)(4)(vi). This rule implements the authority of both DHS and the Department of Justice (DOJ) to continue status most efficiently by granting continued status automatically. To receive evidence of the continuation of status, however, aliens would need to appear at a USCIS office as they do now in keeping with current USCIS policies applicable to conditional residents. *See* Chapter 25.2(c) of the Adjudicator's Field Manual.<sup>3</sup>

#### c. Continuation of Conditional Residence

Section 11031(c)(1)(F)(ii) of Public Law 107–273 provides for the continuation of conditional resident status for an additional two-year period after an adverse determination based on failure of the alien to meet the job

<sup>3</sup> The USCIS Adjudicator's Field Manual is available at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>.

creation and capital investment requirements if rebuttal evidence does not result in reversal of the adverse determination. Reversal may also occur following review by the BIA or the federal courts. *See* Public Law 107–243 section 11031(c)(1)(F)(iv).

Consistent with removal of conditions following favorable determinations, this rule proposes that either USCIS or an immigration judge (if the alien is in deportation or removal proceedings) may continue conditional residence for a new two-year period. *See* proposed 8 CFR 216.7(a)(4)(v). For aliens who are not in deportation or removal proceedings, this rule proposes that USCIS would continue conditional resident status and send notice of the continuation of status. *See* proposed 8 CFR 216.7(a)(4)(v)(B). For aliens in deportation or removal proceedings, proceedings would have been administratively closed pursuant to proposed 8 CFR 216.7(a)(3) in order for USCIS to have jurisdiction to render its determinations. Therefore, to shift jurisdiction from USCIS back to the immigration judge for a decision on whether continuation of conditional residence is appropriate, the rule proposes that DHS (USCIS or ICE) file a motion to re-calendar proceedings with the immigration judge. Proposed 8 CFR 216.7(a)(4)(iv).

The starting date for the new two-year period of conditional residence will vary, depending upon several factors. This rule proposes that if the alien is not in deportation or removal proceedings, the date of USCIS's decision following receipt of rebuttal evidence, or, if no evidence is submitted, the date of the close of the rebuttal period, would trigger the new two-year period. Proposed 8 CFR 216.7(a)(4)(v)(C). However, if the alien seeks review of the adverse USCIS determinations by the BIA or the federal courts, DHS does not believe the two-year period should begin until after there is a final decision by the highest appellate body. Therefore, this rule proposes that the two-year period should begin after the alien has exhausted the avenues for appellate review by the BIA or the federal courts. *See* proposed 8 CFR 216.7(a)(4)(v)(C).

#### d. Termination of Status

Section 11031(c)(1)(F)(iii) of Public Law 107–273 provides for the termination of conditional resident status upon an adverse determination based on material misrepresentation if rebuttal evidence does not result in reversal of the adverse determination. After termination of status, the underlying adverse determination is

subject to review in removal proceedings. Public Law 107–273 at section 11031(d). Since, in addition to the rebuttal review process following an adverse determination, section 11031(c)(1)(F)(iv) of Public Law 107–273 also provides for a review process by the BIA and the federal courts, this proposed rule provides that termination of conditional resident status is appropriate after completion of both the rebuttal process and any BIA or judicial review, if such review is sought. *See* proposed 8 CFR 216.7(a)(4)(v)(A).

This proposed rule maintains the same distinction made in section 11031(b)(2)(C) of Public Law 107–273 regarding the division of authority to terminate conditional resident status for aliens who are in deportation or removal proceedings and those who are not. Only the Attorney General has authority to terminate status for aliens who are in deportation or removal proceedings. For aliens who are not in such proceedings, this rule is consistent with the procedures for terminating status under the normal process described in 8 CFR 216.6(d)(2). This rule proposes that if the alien is not in deportation or removal proceedings and receives an adverse determination based upon material misrepresentation, status will be terminated automatically, effective on the date of the notice of decision following the rebuttal period. *See* proposed 8 CFR 216.7(a)(4)(v)(A). If the adverse determination is appealed to the BIA or federal courts pursuant to proposed 8 CFR 216.7(a)(4)(vi), then termination is effective the date of the highest appellate body's decision. *Id.* The effective dates provided in this rule ensure that termination of status does not occur before a final decision on the adverse determination is made.

Following automatic termination, DHS (USCIS or ICE) will issue a Notice to Appear (NTA) to commence removal proceedings. An alien can seek review of the adverse determinations in those proceedings. Since status has been terminated, the rule requires the alien and the accompanying spouse and/or children to surrender their evidence of conditional resident status (Form I–551, Permanent Resident Card, formerly known as an Alien Registration Receipt Card) to DHS. While there is no appeal following automatic termination of status, aliens whose status has been terminated may seek review of the adverse USCIS determination in removal proceedings. *Id.*; *see also* Public Law 107–273 at section 11031(d).

For aliens who are already in deportation or removal proceedings, termination of status under section 11031(c)(1)(F)(iii) of Public Law 107–

273 is not automatic since section 11031(b)(2)(C) of Public Law 107–273 requires such decisions to be made in proceedings. So that jurisdiction over such aliens rests with the immigration judge following the USCIS adverse determination process, this rule provides that DHS file a motion to re-calendar proceedings. *Id.*

#### B. Second Stage Determinations

For eligible aliens whose conditional residence was continued for a new two-year period due to an adverse determination relating to the job creation or capital investment requirements, section 11031(c)(2) of Public Law 107–273 provides a process for removing those conditions. To remove conditions, the eligible immigrant investor must file a petition within the 90-day period before the second anniversary of the continuation of conditional resident status. Public Law 107–273 at section 11031(c)(2)(B) and (C). If a petition is filed after the 90-day period, the law provides that, with good cause and extenuating circumstances, this late filing may be excused by the Secretary of Homeland Security. *Id.* at section 11031(c)(2)(C)(ii). Where a petition is timely filed, Public Law 107–273 requires the following determinations to be made by the Secretary of Homeland Security:

- Whether the petition contains any material misrepresentation in the facts and information alleged in the petition with respect to the commercial enterprises included in the petition.
- If the initial determination was adverse with respect to the job creation requirement, whether all the enterprises considered together, including the number of jobs found to have been created at the initial determination stage, created 10 or more full-time jobs for qualifying individuals, and whether those jobs exist on the date of the determination. *See* Public Law 107–273 at section 11031(c)(2)(E)(ii).
- If the initial determination was adverse with respect to the capital investment requirement, whether the eligible alien is in substantial compliance with the capital investment requirement described in INA section 216A(d)(1)(B), 8 U.S.C. 1186b(d)(1)(B), on the date that the determination is made. Any capital amount that was determined to have been invested in the initial determination must be subtracted from the required capital amount at the time of the second determination. *See* Public Law 107–273 at section 11031(c)(2)(E)(iii)(II). In addition, the determinations must include consideration of any capital investment made by the alien in a commercial

enterprise, regardless of whether the enterprise is a limited partnership, the alien entered the enterprise after its formation, the investment was made before or after the initial determination was made, or the commercial enterprise is the same one considered in the initial determination, so long as such facts and information are included in the petition. *Id.* at section 11031(c)(2)(A).

Consistent with the initial determination process, a favorable determination at the second stage of review results in the removal of the conditions on permanent resident status for the alien and any accompanying spouse and child. *Id.* at section 11031(c)(2)(F). The removal of conditions is effective on the second anniversary of the continuation of conditional resident status. *Id.* at section 11031(c)(2)(F). If the Secretary of Homeland Security renders an adverse determination, the alien must be so notified and provided an opportunity to submit rebuttal evidence. *Id.* at section 11031(c)(2)(G)(i). Reversal of an adverse determination based upon the rebuttal evidence results in the removal of conditions. *Id.* If the adverse determination is not reversed, conditional resident status of the alien and any accompanying spouse and children is terminated, subject to review of the determination in removal proceedings. *Id.* at section 11031(c)(2)(G)(ii).

This rule proposes to implement section 11031(c)(2) of Public Law 107–273 by:

- Establishing procedures for filing the second petition to remove conditions;
- Describing supporting evidence;
- Defining the scope of the determination; and
- Describing DHS favorable and adverse determinations.

These proposals are discussed below and are proposed in 8 CFR 216.7(a)(5).

#### 1. Filing the Petition to Remove Conditions From Second Period of Conditional Residence

This rule proposes that the alien's petition to remove conditions from the second period of conditional residence must be filed on Form I–829 in accordance with the form instructions and with appropriate fee as stated in those instructions. Proposed 8 CFR 216.7(a)(5)(i). DHS has determined that the Form I–829 remains an appropriate form to remove conditions at the end of the second two-year period because the same action—removal of conditions—is being requested by the alien. DHS also is proposing that the alien file a supplement to Form I–829 with the

second Form I–829. The purpose of the supplement to Form I–829 would be to provide a means within the petition for the eligible alien to state the facts and information described in sections 216A(d)(1)(A) and (B) of the INA with respect to any commercial enterprise which the alien wants to have considered, regardless of whether the enterprise is a limited partnership, the alien entered the enterprise after its formation, or the enterprise was created before or after the initial determination was made. This is the same supplement proposed for the initial determination stage.

#### 2. Failure To File the Petition To Remove Conditions

Failure to timely file the second Form I–829 results in termination of conditional resident status and the institution of removal proceedings. *See* Public Law 107–273 at section 11031(c)(2)(D). However, a late filing can be deemed timely if the alien establishes good cause and extenuating circumstances. *Id.* at section 11031(c)(2)(C)(ii). This exception is the same exception that is applicable to aliens seeking removal of conditions under normal procedures. *See* INA section 216A(d)(2)(B), 8 U.S.C. 1186b(d)(2)(B). To maintain consistency, this rule parallels the regulations applicable to aliens seeking removal of conditions under normal procedures. *See* 8 CFR 216.6(a)(5).

This rule proposes that failure to timely file the Form I–829 results in the automatic termination of conditional resident status. Proposed 8 CFR 216.7(a)(5)(ii). DHS will provide the alien with notice of termination and issue and serve an NTA to aliens to institute removal proceedings or DHS will move to re-calendar administratively closed deportation or removal proceedings for aliens already in deportation or removal proceedings. *Id.* USCIS could accept a late filing, but only if USCIS is satisfied in its discretion that the alien has established good cause and extenuating circumstances. *Id.* If USCIS accepts a late filing before the immigration judge has jurisdiction over the case, this rule proposes that USCIS must restore conditional resident status and adjudicate the petition on the merits. *Id.* If USCIS accepts a late filed Form I–829 after the immigration judge has jurisdiction, this rule proposes that DHS and the alien file a joint motion to terminate proceedings with the immigration judge and that conditional resident status will be restored after proceedings are administratively closed

or terminated and the petition is adjudicated on the merits. *Id.*

#### 3. Evidence Supporting the Second Form I–829

In order for DHS to be equipped to make determinations on the second Form I–829, USCIS must examine the evidence supporting the petition as it does for Forms I–829 filed by aliens under the normal (non-Pub. L. 107–273) process. This rule proposes to require the alien to submit any documentation in support of the second Form I–829 that is necessary for meeting the requirements of section 11031(c)(2) of Public Law 107–273 and the implementing regulations. The proposed rule also specifies particular documentary evidence that the alien must submit with the petition. Proposed 8 CFR 216.7(a)(5)(i)(A)–(D). DHS bases the proposed list of required evidence on the evidence that EB–5 aliens are required to submit with their petitions to remove conditions under the normal (non-Pub. L. 107–273) process. This evidence includes:

- Evidence that the alien invested or was actively in the process of investing the requisite capital, such as an audited financial statement or other probative evidence; and
- Evidence that the alien created, or can be expected to create within a reasonable time, ten full-time jobs for qualifying employees. *See* 8 CFR 216.6(a)(4).

In the case of a “troubled business” as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur would be required to submit evidence that the commercial enterprise maintained the number of existing employees at no fewer than the pre-investment level for the period of conditional permanent residence commencing on the effective date of the initial determination. Such evidence could include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Form I–9 or successor form).

To make determinations on the second Form I–829, USCIS must consider in particular: The scope of the second determination, as authorized by Public Laws 107–273; the commercial enterprises and investments that the alien wants USCIS to consider; qualifying jobs; and substantial compliance with the capital investment requirement.

#### a. Limited Scope of the Second Determination

At the second determination stage, Public Law 107–273 requires consideration of material misrepresentation in the petition and

limits consideration of the job creation and capital investment requirements to the requirement or requirements that formed the basis for the initial adverse determination. Public Law 107–273 at section 11031(c)(2)(E). Public Law 107–273 further requires the Secretary of Homeland Security to credit the alien for the number of jobs determined to be created or the amount of capital determined to be invested at the initial determination stage by subtracting this amount from the number or amount needed to satisfy the overall EB–5 job creation and capital investment requirements. *Id.* at section 11031(c)(2)(E)(ii)(III) and (iii)(II); proposed 8 CFR 216.7(a)(5)(iv).

With respect to the types of evidence DHS is proposing for the second determination stage, if the adverse determination at the initial stage was based on failure to meet the job creation requirement, the rule proposes to require the alien to submit evidence of the number of qualifying jobs created since conditional resident status was continued and the beginning and ending dates of when the jobs existed. Proposed 8 CFR 216.7(a)(5)(i)(A). For example, the alien may include with the petition payroll records, tax documents, and Forms I–9 to evidence the additional qualifying jobs that were created.

Note that if the eligible alien has invested in a troubled business, documentation would be necessary to accompany the Form I–829 demonstrating that the level of employment on the date of the second determination was maintained at no less than the pre-employment level. Public Law 107–273 at section 11031(c)(2)(E)(ii)(II) (cross referencing section 11031(c)(1)(C)). If the eligible alien's qualifying investment is within an approved regional center, the eligible alien would need to submit evidence of indirect job creation if the alien is relying on indirect jobs to demonstrate that he or she has met the job creation requirement. *Id.* (cross-referencing section 11031(c)(1)(B)). Because section 11031(c)(2)(E)(ii)(II) of Public Law 107–273 sufficiently covers the requirements with respect to investments in troubled business and within an approved regional center, DHS has determined that it is not necessary to repeat the requirements in this proposed rule.

If the adverse determination at the initial stage was based on failure to meet the capital investment requirement, this rule proposes to require the alien to provide evidence of his or her capital investment in one or more commercial enterprises since conditional resident status was continued. Proposed 8 CFR 216.7(a)(5)(i)(B). Such evidence could

include audited financial statements, federal tax returns, bank statements, bank wire transfers, or escrow agreements.

b. *Additional commercial enterprises and investments.*

Regardless of whether the initial adverse determinations were based on only the job creation or capital investment requirements, Public Law 107–273 requires the Secretary of Homeland Security to consider for the second determination any capital investments in commercial enterprises in the United States. Public Law 107–273 at section 11031(c)(2)(A) and (B). Such investments include those that were made before or after the initial adverse determination and in commercial enterprises other than the one considered for the initial determination that were created at any time before or after the initial adverse determination and regardless of whether the alien entered the enterprise after its formation. *Id.* at section 11031(c)(2)(A) and (B).

To implement section 11031(c)(2)(A) and (B) of Public Law 107–273, DHS is proposing to require the alien to provide evidence of the capital investments and corresponding commercial enterprises that he or she wants USCIS to consider for its second determination. *See* proposed 8 CFR 216.7(a)(5)(i)(C). Evidence of the capital investment made in the commercial enterprise and considered at the initial determination would not be required. *Id.* DHS has determined that to require aliens to present such documentation would be duplicative and, therefore, unnecessary.

The type of evidence of the alien's capital investments that DHS is proposing to require is based on the type of evidence that was required to be submitted with the initial Form I–829 pursuant to 8 CFR 216.6(a)(4). The evidence that this proposed rule would require for each commercial enterprise which the alien desires to have considered includes:

- Audited financial statements, or other probative evidence of the alien's capital investment for each commercial enterprise to be considered; and
- Evidence of each commercial enterprise's formation and current ownership structure including, but not limited to: Articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and a certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to

that effect. *See* proposed 8 CFR 216.7(a)(5)(i)(C).

c. *Treatment of Capital Investments in Different Types of Commercial Enterprises*

There may be instances where an eligible alien has made capital investments in commercial enterprises that are located within a targeted employment area (TEA) which require at least \$500,000 in capital investment, while also making capital investments in commercial enterprises not located in a TEA which require at least \$1,000,000 in capital investment. Section 203(b)(5)(C) of the INA, 8 U.S.C. 1153(b)(5)(C), and 8 CFR 204.6(f) define and describe the amount of investment capital required in both targeted (TEA) and non-targeted locations within the United States. These provisions, however, contemplate the consideration of capital investments in only one commercial enterprise. Sections 11031(c)(2)(A) & (B) of Public Law 107–273 do not discuss how capital investments in commercial enterprises located both within and without a TEA must be evaluated in total at the time of the second determination to meet the capital investment requirements. This rule describes at 8 CFR 216.7(a)(5)(iii) the prorating approach that DHS proposes to use to determine the total amount of capital that must be invested in such instances. DHS proposes to utilize a multi-step process as follows to make such determinations:

- The creditable amount of an eligible alien's capital investments in all of the commercial enterprises located within a TEA would be determined by USCIS. If the eligible alien has complied with the \$500,000 capital investment requirement, then the capital investment requirement under Public Law 107–273 will be met. If the eligible alien has not complied with the \$500,000 capital investment requirement, then the amount of the eligible alien's creditable capital investment in all commercial enterprises located within a TEA would be divided by 500,000 to determine the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises located in a TEA.
- The creditable amount of an eligible alien's capital investments in all of the commercial enterprises that are not located within a TEA would be determined by USCIS. If the eligible alien has complied with the \$1,000,000 capital investment requirement, then the capital investment requirement under Public Law 107–273 will be met. If the eligible alien has not complied

with the \$1,000,000 capital investment requirement, then the amount of the eligible alien's creditable capital investment in all commercial enterprises not located in a TEA would be divided by 1,000,000 to determine the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises that are not located in a TEA.

- The prorated percentage of the eligible alien's capital investment in commercial enterprises located in a TEA would be combined with the prorated percentage of the eligible alien's capital investment in commercial enterprises that are not located within a TEA to arrive at the eligible alien's total creditable capital investment. This total creditable capital investment will be represented as a percentage, and the percentage must equal or exceed 100% in order for the alien to meet the statutory capital investment requirement.

As an example, if an eligible alien's creditable capital investment in a commercial enterprise located within a TEA was \$300,000, then the prorated percentage of the eligible alien's capital investment in the commercial enterprise would be 60% ( $\$300,000/\$500,000 \times 100 = 60\%$ ). In order for that eligible alien to meet the statutory capital investment requirements based upon an additional capital investment in a commercial enterprise that is not located within a TEA, he or she would have to be credited with an additional capital investment of \$400,000 ( $\$400,000/\$1,000,000 \times 100 = 40\%$ ). In this example, the \$300,000 capital investment and the additional \$400,000 capital investment would constitute 100% of the capital investment requirement by utilizing a combination of capital investments in commercial enterprises located both within and without a TEA.

#### d. Substantial Compliance With the Capital Investment Requirement

If the failure to meet the capital investment requirement was the basis for the initial adverse determination, eligible aliens must demonstrate that, on the date of the second determination, they are in substantial compliance with the capital investment requirement for the second determination. See Public Law 107-273 at section 11031(c)(2)(E)(iii). This rule proposes to utilize the same definition of substantial compliance for the initial and second determinations, discussed in detail later in this **SUPPLEMENTARY INFORMATION**. See proposed 8 CFR 216.7(c)(2).

#### 4. Favorable Determinations on the Second Form I-829

Favorable determinations on the second Form I-829 result in the removal of conditions for the alien and accompanying spouse and children as of the second anniversary of the continuation of conditional resident status. Public Law 107-273 at section 11031(c)(2)(F). This rule proposes that upon a favorable determination by USCIS warranting removal of conditions, USCIS will remove the conditions on the alien's permanent resident status if the alien is not in deportation or removal proceedings, and will send the alien written notice of these decisions. Proposed 8 CFR 216.7(a)(5)(v). Removal of conditions would be effective on the second anniversary of the continuation of conditional residence. *Id.* Because Public Law 107-273 requires status determinations for aliens in deportation or removal proceedings to take place within those proceedings, this rule would require USCIS to provide written notice of the favorable determinations to those aliens in proceedings and to take no action on removing conditions. *Id.* DHS also would be required to file a motion to re-calendar proceedings so that the status determinations can take place within proceedings. *Id.* These procedures parallel those applied to favorable determinations made at the initial determination stage of the process.

#### 5. Adverse Determinations on the Second Form I-829

An adverse determination on the alien's second Form I-829 leads to termination of conditional resident status. Public Law 107-273 at section 11031(c)(2)(G)(ii). However, prior to termination, the alien may submit evidence to rebut the adverse determinations so that the adverse determinations are reversed. *Id.* at section 11031(c)(2)(G)(i). This rule proposes a process for rebutting adverse determinations made by USCIS and terminating conditional residence status if no rebuttal is submitted or the rebuttal evidence does not result in a reversal of the adverse determinations.

Similar to the process for rebutting initial adverse determinations, this rule proposes a 12-week period within which the alien may submit a written rebuttal to USCIS after receiving written notice from USCIS of the adverse determinations. Proposed 8 CFR 216.7(a)(5)(vi)(A). USCIS would render a decision on the rebuttal evidence after receiving the rebuttal evidence. If USCIS determines that the rebuttal evidence is

not sufficient to reverse its adverse determinations, USCIS would terminate the alien's conditional status and that of his or her accompanying spouse and/or children. If the alien is not already in deportation or removal proceedings, USCIS would issue an NTA to commence removal proceedings regardless of the ground on which the adverse determinations were based. Proposed 8 CFR 216.7(a)(5)(vi)(B)(2). If the alien is in deportation or removal proceedings, USCIS would notify the alien of the adverse determination and file a motion to re-calendar with EOIR so that the termination of the alien's conditional resident status would be made in proceedings. On the other hand, if USCIS determines that the rebuttal evidence is sufficient to reverse the adverse determinations, removal of conditions would result, either by USCIS or the immigration judge (or the BIA) as appropriate. Proposed 8 CFR 216.7(a)(5)(vi)(A).

If USCIS does not receive rebuttal evidence during the 12-week period, this rule proposes that the alien's conditional resident status and that of his or her accompanying spouse and/or children will be automatically terminated, even if the alien is in deportation or removal proceedings. Proposed 8 CFR 216.7(a)(5)(vi)(B)(1). This procedure contrasts with the procedure DHS is proposing for the rebuttal period following the initial determination. As discussed previously, if USCIS does not receive rebuttal evidence during the 12-week period following notice of adverse determinations at the initial determination stage, no automatic consequences result. See proposed 8 CFR 216.7(a)(4)(ii). DHS is proposing differing procedures following the rebuttal period for initial determinations and second determinations because, unlike at the second determination stage, USCIS's consideration of the alien's petition at the initial determination is complicated by two additional considerations: (1) Public Law 107-273 requires differing treatment of an alien's status depending on the basis for the adverse determination; and (2) USCIS's determinations at the initial determination stage would be based on facts and evidence that are dated.

At the initial determination stage, Public Law 107-273 requires termination of conditional resident status only if the adverse determination is based on material misrepresentation. Public Law 107-273 at section 11031(c)(1)(F)(iii). Public Law 107-273 requires continuation of conditional resident status if the adverse

determination is based on a failure to meet the job creation or capital investment requirements. Public Law 107-273 at section 11031(c)(1)(F)(ii). By contrast, at the second determination stage, Public Law 107-273 provides for termination of conditional resident status regardless of the basis for the adverse determination. Public Law 107-273 at section 11031(c)(2)(G)(ii). An additional complication at the initial determination stage is that the petitions and supporting documentation reviewed by USCIS for its initial determination date from the late 1990s and, therefore, may no longer provide USCIS with a complete picture of the alien's eligibility. DHS has determined that USCIS should approach these cases cautiously, and provide every opportunity in the decision-making process for USCIS to revisit the evidence before it. At the second determination stage, on the other hand, the petition will be based on contemporary information and evidence. Therefore, USCIS should be able to proceed with its second determination as it would a non-Public Law 107-273 EB-5 petition.

The termination of conditional resident status under proposed 8 CFR 216.7(a)(5)(vi)(B)(1) or (2) would not be subject to appeal but would be reviewable in subsequent removal proceedings. Public Law 107-273 at section 11031(d); proposed 8 CFR 216.7(a)(5)(vi)(B)(1) or (2). If the alien's status (and that of his or her spouse and children) is terminated under proposed 8 CFR 216.7(a)(5)(vi)(B)(1) or (2), the alien and spouse and children would be required to surrender any Form I-551 previously issued.

### C. Common Definitions Applicable to Removal of Condition Determinations

The rule proposes to define several statutory terms, in some cases for ease of reference and, in other cases, to better explain the statutory terms. The rule proposes to define the following terms for ease of reference and it relieves the regulations from cumbersome descriptions or cross-references to Public Law 107-273 each time the regulations refer to these terms:

- Denied initial Form I-829: an initial Form I-829 that was denied by an INS director on the merits of the petition.
- Initial Form I-829: a Form I-829 that was timely filed before November 2, 2002 by an eligible alien.
- Qualifying Form I-526: a Form I-526 that was approved after January 1, 1995 and before August 31, 1998.
- Second petition to remove conditions: a petition to remove conditions (Form I-829 or successor

form) timely filed by an eligible alien following an initial adverse determination.

See proposed 8 CFR 216.7(a)(1).

DHS also is proposing to define the following substantive terms relating to petitions to remove conditions (either under section 11031 or 11032(e) of Pub. L. 107-273):

#### 1. Material Misrepresentation

An adverse determination made on a petition to remove conditions based on "material misrepresentation" leads to termination of conditional resident status. Public Law 107-273 sections 11031(c)(1)(F)(iii), 11031(c)(2)(G)(2), and 11032(e). DHS is proposing in this rule to define material misrepresentation to mean a statement or representation in a petition to remove conditions, as originally filed or supplemented, or in any accompanying documentation, which, as a matter of discretion, is determined to be both false and one to which importance would reasonably be attached for determining whether to grant the petition, without regard to the petitioner's or any other person's intent or to whether or not there was detrimental reliance upon the statement or representation. Proposed 8 CFR 216.7(c)(1); see *Kungys v. United States*, 485 U.S. 759, 771-772 (1988) (holding that the materiality test is whether the concealments or misrepresentations had a natural tendency to influence the decision of the immigration agency). Material misrepresentation also includes an omission that has the effect of making any material representation in the Form I-829 or accompanying documentation false. For example, if the alien failed to mention in the initial Form I-829 that he or she received his or her capital investment back since becoming a conditional resident, then this omission would constitute a material misrepresentation.

#### 2. Substantial Compliance With the Capital Investment Requirement

Public Law 107-273 requires DHS to consider whether the eligible alien is in "substantial compliance" with the capital investment requirement. Public Law 107-273 sections 11031(c)(1)(A)(iii), 11031(c)(2)(E)(iii), and 11032(e)(2)(C). By contrast, removing the conditions from permanent resident status of an alien entrepreneur typically requires aliens to demonstrate that they invested, or were actively in the process of investing, the requisite amount of capital. See INA section 216A(d)(1)(A)(i), 8 U.S.C. 1186b(d)(1)(A)(i). The requirement to be "actively in the process of investing"

capital has no quantitative aspect with respect to the amount of the investment. Instead, it focuses on the process of investing the required capital, and could be satisfied by showing that the process of investing the capital has been commenced and is continuing. Substantial compliance suggests that the substance of the capital investment has in fact been made.

Accordingly, this rule defines substantial compliance as meaning that that the alien has invested nearly all the requisite amount (*i.e.*, \$1 million or \$500,000). 8 CFR 216.7(c)(2). If the remaining amount has not been invested, the alien must provide evidence that the balance is legally obligated for final disbursement within a reasonable period of time after any one of the three dates specified in sections 11031(c)(1)(D) and 11032(e)(3) of Public Law 107-273, as applicable:

(1) The date on which the Form I-829 was filed (not applicable to petitions to remove conditions considered under section 11031(c)(2) of Public Law 107-273, relating to the second determination;

(2) Six months after that date (limited to petitions to remove conditions considered under section 11031(c)(1) of Pub. L. 107-273); or

(3) The date upon which the determinations are made (applicable to petitions to remove conditions considered under sections 11031(c)(1) and (2) and 11032).

DHS has determined that assigning a rigid numerical standard to define "substantial compliance" would not fairly take into account the unique circumstances of each investment. Because several years have passed since the enactment of Public Law 107-273 and the law's deadline for completing the initial determinations, DHS believes that requiring eligible aliens to demonstrate that they have made "nearly all" the required capital investment is reasonable.

This rule proposes to exclude from consideration any funds returned to the alien or required to be returned to the alien (provided by legally enforceable documents or contracts relating to the enterprise) in the form of guaranteed interest payments or as redemption for his or her capital investment interest, or otherwise diverted. Returned funds would not have been made available to the commercial enterprise for the purposes of creating qualifying jobs.

#### 3. Full-time Employment

In making its initial and second determinations on petitions to remove conditions under section 11031(c) of Public Law 107-273, the Secretary of

Homeland Security must consider whether the commercial enterprise created full-time positions for 10 or more qualifying employees. Public Law 107–273 at section 11031(c)(1)(A)(ii); *see also* Public Law 107–273 at section 11031(c)(2)(E)(ii)(III). Section 11031(f) of Public Law 107–273 defines “full-time” as “a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.” This rule adopts the statutory definition for “full-time,” but also further describes what is meant by the term “position.” *See* proposed 8 CFR 216.7(c)(3). This rule provides that a qualifying “position” is one that is required by the commercial enterprise at all times. DHS believes that such a clarification is necessary to ensure that the term full-time employment is given consistent treatment with the interpretation used by DHS in other EB–5 contexts and creates the type of permanent employment contemplated by the EB–5 program. The proposed definition ensures that only continuous full-time employment, rather than intermittent, temporary, seasonal, or transient employment, is considered. Such definition does not, however, require that the position be filled by a specific employee.

#### *D. Treatment of Spouses and Children Where Eligible Alien Is Deceased*

If the eligible alien is deceased, this rule proposes that the accompanying spouse and/or children will qualify as eligible aliens provided they meet the requirements of section 11031 of Public Law 107–273 for the removal of conditions in place of the principal. *See* proposed 8 CFR 216.7(a)(6). This provision is similar to current regulations which permit the spouse and children of a deceased alien entrepreneur to remain eligible for the removal of the conditions. 8 CFR 216.6(a)(6). The basis for this approach is that the alien entrepreneur has not become ineligible to remove conditions due to failure to meet the substantive or procedural requirements, but, instead, because of an outside event. In order to remain eligible for the removal of conditions, the spouse and children can “step into the shoes” of the eligible alien and demonstrate eligibility just as the eligible alien could have done. This rule would clarify that in order to “step into the shoes” of the eligible alien, eligibility can be demonstrated individually or by the alien, spouse and children collectively.

#### **V. Adjustment of Status Applications Under Section 11032 of Public Law 107–273**

In addition to providing special treatment for certain aliens who previously attained conditional resident status, Public Law 107–273 also provides for the special treatment of “eligible aliens” who have not yet become conditional residents. Specifically, section 11032(a) of Public Law 107–273 requires DHS or the Secretary of State to grant conditional residence status to eligible aliens meeting the following criteria:

- The alien filed a Form I–526 that was approved after January 1, 1995 and before August 31, 1998;
- Pursuant to this approval, the alien timely filed a Form I–485 or an application for an immigrant visa (DS–230) prior to the date of enactment of Public Law 107–273, November 2, 2002; and
- The alien is not inadmissible or deportable.

*See* Public Law 107–273 at section 11032(b).

If the qualifying Form I–526 was revoked following approval, the alien may still be eligible for conditional resident status if the basis for the denial or termination was failure to meet the job creation requirement in INA section 203(b)(5)(A)(ii), 8 U.S.C. 1153(b)(5)(A)(ii). *See* Public Law 107–273 at section 11032(c)(1). If the qualifying Form I–485 or application for immigrant visa was denied or terminated on or before November 2, 2002, the alien may still be eligible for conditional resident status if the basis for the denial or termination was the alien’s failure to meet the job creation requirement or the alien’s departure from the United States without permission (“advance parole”). *See id.* at section 11032(c)(2)(A). If an eligible alien is no longer in the United States, such alien may be paroled into the United States if necessary to obtain adjustment of status to that of a conditional resident. *See id.* at section 11032(c)(2)(B).

As the authority of DHS only extends to the adjudication of Form I–485 adjustment applications filed by aliens physically present in the United States, this rule only discusses the applicability of section 11032(c) of Public Law 107–273 to eligible aliens who filed such applications. This rule does not extend to applications for immigrant visas, since such applications are processed by the Department of State.

In this rule, DHS is proposing procedures eligible aliens must follow to request USCIS to consider them for

conditional residence under Public Law 107–273. DHS also is proposing to describe how USCIS will make eligibility determinations, including determinations for special cases involving overseas aliens. Finally, DHS is proposing the approval and denial processes.

#### *A. Definitions*

Before outlining the required procedures, this rule proposes several definitions of terms used in the proposed provisions to avoid repeated cross-references to section 11032(c) of Public Law 107–273 or lengthy descriptions. At proposed 8 CFR 245.25(a), DHS is proposing definitions for the following terms: application for adjustment of status; qualifying Form I–485; qualifying Form I–526; and Form I–485 that is no longer pending. The definitions track the statutory language in Public Law 107–273. For the term, “Form I–485 that is no longer pending,” DHS is proposing an additional clarification. Under this rule, the phrase “no longer pending” would mean that DHS terminated for reasons of abandonment or denied the alien’s Form I–485 on or before November 2, 2002, the date of enactment of Public Law 107–273. DHS will disregard the denial or termination without the need for the alien to file a motion to reopen or take other procedural steps.

#### *B. Procedures for Requesting Consideration for Conditional Resident Status*

##### **1. Filing a New Application for Adjustment of Status**

DHS is proposing in this rule that aliens seeking to qualify for conditional resident status under section 11032 of Public Law 107–273 must, in accordance with the form instructions, file with USCIS a newly completed Form I–485 or succeeding form, without fee, and with any documentary evidence of continued eligibility that is signed and dated after the date that a final rule is effective and on or before the date that is 180 days from date of such effective date. Proposed 8 CFR 245.25(b). The alien would be required to subsequently appear when requested by USCIS to submit certain biometric information (with fee) and for an interview as part of the determination process if USCIS determines that an interview is necessary. Proposed 8 CFR 245.25(b)(1)(iii).

DHS is also proposing the submission of additional documentation with the new Form I–485 in cases where:

- The alien’s qualifying Form I–485 is no longer pending or

• The alien's qualifying Form I-526 was revoked.

Without this information, USCIS would not be equipped to make a determination on whether a revoked petition should be disregarded or a denied or terminated application for adjustment of status should be reopened.

#### a. Forms I-485 That Are No Longer Pending

If the alien's Form I-485 was no longer pending as of November 2, 2003, DHS is proposing to require the alien to submit evidence to show the reasons why the Form I-485 is no longer pending. To qualify for benefits under section 11032 of Public Law 107-273, the alien must demonstrate that his or her I-485 is no longer pending due to a determination by INS that the alien either failed to satisfy the job creation requirement or departed the United States without advance parole while the Form I-485 was pending. Proposed 8 CFR 245.25(b)(3). The primary evidence would be a decision from INS denying or terminating the Form I-485. However, USCIS would accept secondary evidence, including a sworn statement from the alien regarding the basis for the denial, termination, withdrawal, or abandonment.

#### b. Forms I-526 That Have Been Revoked

Otherwise eligible aliens whose qualifying Forms I-526 were revoked may still be able to receive the benefits of Public Law 107-273 and obtain conditional resident status. *See* Public Law 107-273 at section 11032(c)(1). USCIS may not grant a request for adjustment of status on Form I-485 based on a revoked Form I-526 because of INA section 245(a)(3), 8 U.S.C. 1255(a)(3), requires that an alien must have an immigrant visa immediately available in order to adjust status. A petition that USCIS revokes based on a finding of ineligibility nullifies the previous USCIS decision to approve the petition. However, under Public Law 107-273, if INS or USCIS revoked the approval of the alien's Form I-526 petition based on a determination that the alien failed to meet the job creation requirement, USCIS must disregard the revocation for purposes of approving the alien's Form I-485. *See* Public Law 107-273 at section 11032(c)(1). If USCIS revoked the Form I-526 due to other grounds of ineligibility, then USCIS will not disregard the revocation since Public Law 107-273 only authorizes the one basis for disregarding revocations. This rule proposes that in cases where revocation is not authorized, USCIS will deny the Form I-485 if it is still

pending. Proposed 8 CFR 245.25(f). Aliens whose Forms I-526 were revoked on other grounds of ineligibility would not be able to establish eligibility for adjustment of status under section 11032 of Public Law 107-273 to file the new Form I-485.

In order for USCIS to be equipped to make determinations regarding the revoked petition, USCIS would need information regarding the revocation. Therefore, if the alien is seeking consideration for conditional residence under section 11032 of Public Law 107-273 notwithstanding the revocation of his or her qualifying Form I-526, DHS is proposing to require the alien to submit evidence demonstrating that USCIS should disregard the revocation. Proposed 8 CFR 245.25(b)(4). The primary evidence would be a copy of the revocation decision where the sole stated reason for the decision is failure of the alien to meet the job creation requirement. However, if the alien lost the decision or no longer has the decision for some other reason, USCIS would accept secondary evidence including a sworn statement of the alien regarding the reasons for the revocation and additional supporting evidence. Using the information submitted by the alien, USCIS would be able to confirm the information contained in its own records.

#### c. Reasons for Requiring Additional Submissions

The procedures and requirements in proposed 8 CFR 245.25(b)(1) would provide USCIS with up-to-date information regarding the alien so that USCIS can make a determination on whether such aliens are currently inadmissible or deportable and, in turn, ineligible for conditional resident status under section 11032(b)(3) of Public Law 107-273. Therefore, failure to follow these requirements would result in denial of the alien's qualifying Form I-485 because USCIS would not be able to determine whether the alien qualifies for conditional residence under Public Law 107-273. Proposed 8 CFR 245.25(b). The requirements would also provide USCIS with information regarding which aliens with qualifying EB-5 petitions are still interested in pursuing conditional residence through the EB-5 program on the basis of such petitions.

#### 2. Aliens Not Physically Present in the United States

Under this rule, aliens who are not physically present in the United States may still qualify for conditional residence under section 11032(c)(2)(B) of Public Law 107-273. Proposed 8 CFR

245.25(b)(2). DHS is proposing that such aliens follow the procedures in proposed 8 CFR 245.25 and timely file a new Form I-485 and any supporting documentation in order for USCIS to consider their cases. However, with respect to the requirement to appear for biometric information capture and an interview, DHS is proposing that USCIS would notify aliens who are not physically present in the United States following receipt of the new Form I-485 to make any required appearances at the DHS office located outside the United States having jurisdiction over the alien's foreign residence. Proposed 8 CFR 245.25(b)(2). After considering the new Form I-485 and information obtained through the biometric capture and interview at the DHS office overseas, USCIS would be better able to make a determination as to whether it is necessary to parole the alien for adjustment of status pursuant to section 11032(c)(2)(B).

#### 3. Spouses and Children

At proposed 8 CFR 245.25(b)(5), DHS is proposing to require spouses and children accompanying or following to join principal EB-5 aliens pursuant to section 203(d) of the INA, 8 U.S.C. 1153(d), as permitted under Public Law 107-273, to each file an application for adjustment of status. Applications should be filed with the principal EB-5 alien's application for adjustment of status. However, in case circumstances change between the time that the principal alien files his or her own application for adjustment of status and the date USCIS makes a decision on the principal's application, this rule would permit applications for accompanying and following to join spouses and children to be filed up until the date of decision. Applications filed for accompanying or following to join spouses and children would be required to include evidence of eligibility and, in particular, evidence of the qualifying relationship, such as marriage and birth certificates. For spouses and children who are overseas and seeking to join the principal EB-5 alien *after* such alien has received conditional resident status (*i.e.*, "following to join" the principal alien), USCIS cannot grant the adjustment of status application while they are overseas. Therefore, following a determination of eligibility, DHS is proposing to require that these dependents appear at a DHS office abroad to request parole by filing an Application for Travel Document, Form I-131 or successor form, in accordance with the instructions to the form to return to the United States for

adjustment of status. Proposed 8 CFR 245.25(c)(3).

### C. Determinations on Eligibility

DHS is proposing that prior to approving or denying the qualifying Form I-485 under section 11032 of Public Law 107-273, USCIS would make determinations on whether the alien qualifies as an eligible alien. Proposed 8 CFR 245.25(c). DHS is further proposing to create an intermediate step, described more fully below, to accommodate eligible aliens and their spouses and children who are overseas and may need to be paroled into the United States to be granted conditional resident status.

To determine whether an alien qualifies for conditional resident status, USCIS would review the qualifying Form I-485, the new Form I-485, and any information based on the recent collection of biometric information, interview, any Form I-526 revocation proceedings, and any previous denial of Form I-485 if no longer pending. At this stage, USCIS would determine whether all of the requirements in section 11032(a), (b), and (c) are met, such as:

- Whether the revocation of the alien's qualifying Form I-526 was based on failure of the alien to meet the job creation requirement and, therefore, should be disregarded;
- Whether a ground of inadmissibility or deportability applies to the alien; and
- Whether the alien's denied or terminated Form I-485 should be reopened because the denial was based on failure to meet the job creation requirement.

An additional consideration would be whether the alien obtained permanent residence on other grounds. In such a case, there would be no need for USCIS to apply section 11032 of Public Law 107-273 and grant conditional residence. Proposed 8 CFR 245.25(c)(1). Another consideration would be whether the eligible alien departed the United States while his or her qualifying Form I-485 was pending. An alien would not qualify for conditional residence under section 11032 of Public Law 107-273 if he or she departed without advance parole. Proposed 8 CFR 245.25(c)(2). This consequence applies to adjustment of status applicants under regular procedures applicable to Forms I-485. DHS does not believe that a different rule should apply to adjustment applicants seeking benefits under section 11032 of Public Law 107-273.

Finally, for principal aliens and their spouses and children who are not physically present in the United States, DHS is proposing that following a

determination of eligibility, USCIS would send such aliens a notice requiring them, by a specific date, to apply for parole to return to the United States at a DHS office located in the jurisdiction of their overseas residence. Proposed 8 CFR 245.25(c)(3). Applicants can learn which DHS office services their residence by viewing the USCIS Office and Service Locator at [https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office\\_type=OS](https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=OS). Applicants may be requested to appear at the overseas DHS office for capture of biometric information and/or an interview in connection with the parole application. DHS proposes to make physical presence in the United States a requirement for adjudication of the I-485 application because its jurisdiction to grant conditional residence based on adjustment of status is limited to the United States.

If USCIS determines that an alien who is overseas does not qualify as an eligible alien or for conditional resident status under section 11032 of Public Law 107-273, USCIS will terminate processing of the alien's Form I-485 and that of any accompanying spouse and children. Proposed 8 CFR 245.25(c) and (e). Likewise, if USCIS determines that an alien who is overseas does qualify as an eligible alien for conditional residence under section 11032 of Public Law 107-273, but that a spouse or child does not qualify for conditional resident status, USCIS will terminate processing of the respective spouse's or child's Form I-485. Proposed 8 CFR 245.25(c) and (e). There is no administrative appeal of a decision to terminate processing of any application of an alien who is overseas. See INA section 245(a), 8 U.S.C. 1255(a). Therefore, under this proposed rule, if the alien fails to obtain parole into the United States, USCIS will deny the alien's Form I-485. In such a case, the alien would not have met the requirements of sections 11032(b)(3) or (c)(2)(B) of Public Law 107-273.

### D. Decisions on Granting Conditional Resident Status

#### 1. Approvals

After USCIS makes a determination of eligibility, USCIS would make a decision on the Form I-485. Upon approval of the new Form I-485, USCIS would grant the alien conditional residence under section 216A of the INA, 8 U.S.C. 1186b, as of the date of the approval. USCIS would also approve Forms I-485 filed for the principal alien's accompanying spouse and children, if their Form I-485 is properly filed in accordance with proposed 8

CFR 245.25(b)(5) and the spouse or child is eligible to receive a visa under section 203(d) of the INA, 8 U.S.C. 1153(d). Proposed 8 CFR 245.25(d). USCIS will send written notice of the approval to the eligible alien(s). Note that prior to approval, USCIS must ensure that a visa number is available for each eligible alien from the Department of State under sections 201(d) and 203(b)(5) of the INA. 8 U.S.C. 1151(d) and 1153(b)(5).

#### 2. Denials

Under this proposed rule, USCIS would be required to deny qualifying applications for adjustment of status to conditional residence if it determines that the eligible alien did not meet the requirements in section 11032 of Public Law 107-273 and the regulatory requirements in proposed 8 CFR 245.25. Proposed 8 CFR 245.25(e). In particular, USCIS would deny conditional residence:

- When USCIS cannot disregard the revocation of the eligible alien's qualifying Form I-526;
- When USCIS cannot reopen the eligible alien's Form I-485 that is no longer pending;
- If USCIS determines that the eligible alien is inadmissible or deportable on any ground; or
- If the eligible alien is no longer physically present in the United States and is not timely paroled into the United States if DHS requires such parole.

USCIS would provide the alien with written notice of the denial. It would also initiate removal proceedings if the alien is physically present in the United States. At that time, an immigration judge would have jurisdiction to review USCIS's decision. Proposed 8 CFR 245.25(e).

### VI. Determinations on Petitions To Remove Conditions Under Section 11032 of Public Law 107-273

Section 216A of the INA, 8 U.S.C. 1186b, governs the entire removal of condition process for EB-5 aliens who do not fall within the scope of Public Law 107-273. Section 11032(e) of Public Law 107-273 modifies part of the regular process for removing conditions after USCIS grants conditional residence pursuant to Public Law 102-273.

Just as under the regular process, an alien granted conditional resident status under section 11032(a) of Public Law 107-273 must file a petition to remove conditions within 90 days prior to the second anniversary of becoming a conditional resident. Public Law 107-273 at section 11032(e)(1). The petition must demonstrate that:

• The alien invested or is actively in the process of investing the requisite capital of \$1 million or \$500,000,

• He or she has sustained the investment during the period of residence in the United States, and

• He or she is otherwise conforming to the requirements of the EB-5 visa classification. *See id.*; INA sections 203(b)(5), 216A(d)(1); 8 U.S.C. 1153(b)(5), 1186b(d)(1).

Unlike the regular process, however, section 11032(e) of Public Law 107-273 provides that the petition can be based on any commercial enterprise in the United States in which the alien has made a capital investment at any time. Public Law 107-273 at section 11032(e)(1). In making a determination on the petition to remove conditions, section 11032(e) of Public Law 107-273 requires that three determinations be made. These are similar to the determinations required for eligible aliens seeking removal of conditions under section 11031 of Public Law 107-273:

1. A determination must be made as to whether the petition contains any material misrepresentation in the facts and information alleged in the petition with respect to the commercial enterprises included in the petition. Public Law 107-273 at section 11032(e)(2)(A).

2. A determination must be made as to whether all commercial enterprises included in the petition together created full-time jobs for 10 or more qualifying individuals and that those jobs exist or existed on either of the following dates: The date on which the investor's initial application for adjustment of status or immigrant visa was filed, or the date on which the determination on the Form I-829 is made. *Id.* at sections 11032(e)(2)(B) and (e)(3). If the investment was made within an approved regional center under the EB-5 Pilot Program, then the indirect jobs that were created can be used to meet this requirement. *Id.* at section 11032(e)(2)(B). If the immigrant investor has made an investment in a troubled business, the number of employees of the business cannot be any less than the pre-investment level. *Id.*

3. A determination must be made as to whether, considering the alien's investments in enterprises on either or both of the dates described above, the alien is or was in substantial compliance with the capital investment requirement. *Id.* at section 11032(e)(2)(C).

Because the requirements in section 11032(e) of Public Law 107-273 are based on the requirements applicable to the regular process for removing

conditions in section 216A(c) and (d) of the INA, 8 U.S.C. 1186b(c) and (d), DHS is proposing that the regulations governing the regular removal of condition process at 8 CFR 216.6 also apply to section 11032(e) cases, except where specifically covered by the provisions proposed by this rule. *See* proposed 8 CFR 216.7(b)(1). Referring to the current regulations at 8 CFR 216.6(a)(1), DHS is proposing that Form I-829 must be filed to remove conditions for aliens granted conditional residence under section 11032(a) of Public Law 107-273. Proposed 8 CFR 216.7(b)(1). This rule also describes the documentary evidence that eligible aliens would be required to include with the Form I-829. Proposed 8 CFR 216.7(b)(2). This list is different from the list applicable to aliens who fall outside the scope of Public Law 107-273, since section 11032(e) of Public Law 107-273 requires that a different inquiry be made on the petitions to remove conditions of eligible aliens. In particular, this rule requires evidence to be presented regarding:

- The dates on which jobs created by the commercial enterprise existed;
- All commercial enterprises in which the eligible alien invested and upon which a determination will be made; and
- Whether the alien is or was in substantial compliance with the capital investment requirement described in section 216A(d)(1)(B) of the INA, 8 U.S.C. 1186b(d)(1)(B).

If the petition to remove conditions is based upon commercial enterprises located both within and outside of a TEA, the investment amount must comply with proposed 216.7(a)(5)(iii). The rule does not propose special provisions governing the processes for requiring appearances by the alien, issuing a decision on the petition, granting or terminating status, and providing avenues for review of adverse decisions since the current regulations adequately cover these areas. *See* 8 CFR 216.6.

## VII. Treatment of Children

The special benefits of Public Law 107-273 extend to the spouses and children of eligible aliens. In addition, section 11031(e) of Public Law 107-273 provides that an alien who obtained conditional resident status before November 2, 2002 by virtue of being a child of an eligible alien will be considered to be a child for purposes of this section notwithstanding any subsequent change in age or marital status. Likewise, under section 11032(f) of Public Law 107-273, an alien who

was a child on the date that Form I-485 or application for an immigrant visa (DS-230) was filed will be considered to be a child for purposes of this section notwithstanding any subsequent change in age or marital status.

DHS has determined that regulations implementing sections 11031(e) and 11032(f) of Public Law 107-273 are not necessary because the statutory provisions are sufficiently detailed. However, DHS invites comments from the public regarding whether there are issues that should be addressed in the regulations.

## VIII. Regulatory Requirements

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is "required by 5 U.S.C. 553 \* \* \*, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for interpretative rule involving the internal revenue laws of the United States. \* \* \*" DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule applies to individuals who file petitions and applications under the EB-5 program. The impact is on these persons in their capacity as individuals, so that they are not, for purposes of the RFA, within the definition of small entities established by 5 U.S.C. 601(6).

### B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, this rule is not subject to the Unfunded Mandates Reform Act of 1995.

### C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based

companies to compete with foreign-based companies in domestic and export markets.

#### D. Executive Order 12866

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has not been submitted to the Office of Management and Budget for review. DHS has considered the benefits and costs associated with the changes proposed in this rule and has determined that the benefits justify the costs.

The majority of changes being proposed describe how USCIS would apply adjudication practices to the alien investor population covered by Public Law 107-273. The alien investor population covered by Public Law 107-273 filed petitions with USCIS during the period January 1, 1995 thru August 31, 1998. There are two distinct groups of aliens to which this rule applies: Those who have already obtained permanent resident status on a conditional basis are covered by section 11031 of Public Law 107-273, and those who have never obtained permanent resident status are covered by section 11032 of Public Law 107-273.

Pursuant to section 11031, DHS is proposing to reconsider alien investor petitions for removal of conditions filed during the applicable timeframe that meet the statutory eligibility requirements specified in section 11031 Public Law 107-273. Generally, DHS would apply adjudication standards that are similar to current practices in alien investor adjudication, while offering a few flexibilities. DHS estimates that 581 principal alien investors would be covered under this provision. Under the proposed rule, these covered alien investors would have further opportunity to satisfy their investment criteria in order to qualify for the removal of conditions on their lawful permanent residence. Most significantly, these principal alien investors would have the ability to count investment activities beyond the scope of their original investment. These enhanced flexibilities would represent significant qualitative benefits to the alien investor and their qualifying family members.

Principal alien investors seeking to benefit under section 11031 of Public Law 107-273 would be permitted to complete a Supplement to Form I-829 Petition by Entrepreneurs to Remove Conditions. Currently, there is no fee for the Supplement; thus the compliance cost to alien investors is directly attributable to the opportunity cost of

completing the Supplement. According to the form instructions, the Supplement takes approximately 22 minutes to complete. Given the importance of the proposed accommodations, DHS assumes that investors will choose to have the form completed by an attorney. The Bureau of Labor Statistics 2009 Occupational Employment Statistics, reports the average hourly wage of an attorney at \$62.03.<sup>4</sup> To account for the additional cost of non-wage benefits such as health insurance, vacation time, *etc.*, we use a factor of 1.43 to burden the wage, resulting in a fully burdened average hourly wage rate for attorneys of \$88.70.<sup>5</sup> Using the fully burdened wage rate for attorneys and the form completion time, DHS calculates the opportunity cost of completing the Supplement at \$32.82.<sup>6</sup> If all 581 principal alien investors to which the proposed rule applies were to file a Supplement, the total cost imposed by this rule would be \$19,068.<sup>7</sup>

DHS believes that most cases would be resolved during this initial determination stage. Though unlikely, the highest cost scenario would be if all 581 alien investor cases were not able to be resolved at the initial stage. In this case, the statute provides that these alien investors would be granted a two-year extension or reprieve after which they have the option of petitioning for reconsideration. At the completion of the two-year extension, the investors would have the option of filing a new Petition by Entrepreneur to Remove Conditions, Form I-829, with associated biometrics collection. Additionally, these investors would be permitted to file the optional Supplement, if appropriate, for consideration of investment activities outside the scope of the original petition. DHS assumes that investors that would take advantage of this benefit of the two-year time extension would most likely file the Supplement along with Form I-829.<sup>8</sup> The time burden to complete both Form I-829 and the Supplement combined is 1 hour, 27 minutes. Assuming investors

would have an attorney complete both forms, DHS calculates the opportunity cost of completing Form I-829 and the Supplement to be \$128.62.<sup>9</sup>

Additionally, investors that choose to take advantage of this benefit by filing Form I-829 would be required to travel to the nearest USCIS Application Support Center (ASC) for the collection of biometrics. While travel times and distances will vary, DHS estimates the average round-trip to an ASC will be 20 miles, and that the average time for that trip will be an hour. It will take an average of one hour for an applicant to wait for service, and to have his or her biometrics collected, for a total of compliance time of 2 hours. According to the Bureau of Labor Statistics, the 2009 average hourly wage for all occupations was \$20.90, which results in \$29.89 per hour in burdened wages.<sup>10</sup> Using a fully burdened wage rate of \$29.89 per hour, USCIS calculates the opportunity cost of complying with the biometric collection to be \$59.78. The opportunity costs associated with providing biometrics and completing Forms I-829 and the Supplement for all 581 investors under the second determination stage would total \$109,460.<sup>11</sup> Investors seeking to benefit under the two-year extension provision would not have their fees waived for Form I-829. The current fees for Form I-829 and biometrics collection are \$3,750 and \$85, respectively. Thus, if all alien investors were to avail themselves of the benefits associated with the two-year extension, this rule would impose over \$2.2 million in fees.<sup>12</sup>

Under the highest-cost scenario, where all 581 investors covered under section 11031 would have to undergo both the initial and secondary determination to have their conditions on permanent residence removed, the total opportunity cost imposed by this rule is \$128,528. Additionally, the rule would impose over \$2.2 million in fees, under the highest-cost scenario.

Section 11032 of Public Law 107-273 also provides benefits for certain individuals and their qualifying family members who applied for admission or adjustment of status on an EB-5 visa prior to the enactment of the legislation.

<sup>4</sup> See <http://www.bls.gov/oes/2009/may/oes231011.htm>.

<sup>5</sup> The calculation to burden the wage rate: \$62.03 × 1.43 = \$88.70. U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2009, viewed online at: <http://www.bls.gov/news.release/eecc.t01.htm>.

<sup>6</sup> 22 minutes/60 minutes = 0.37 hours. 0.37 hours × \$88.70 = \$32.82.

<sup>7</sup> 581 investors × \$32.82 = \$19,068.

<sup>8</sup> According to the form instructions, Form I-829 takes approximately 1 hour and 5 minutes to complete.

<sup>9</sup> 1.45 hours × \$88.70 = \$128.62.

<sup>10</sup> See United States Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2009 National Occupational Employment and Wage Estimates. Viewed online at: <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

<sup>11</sup> The opportunity cost for the second determination is calculated as follows: \$128.62 for forms + \$59.78 for biometrics = \$188.40 total opportunity cost per alien investor. \$188.40 × 581 = \$109,460 in total maximum opportunity cost for second determination.

<sup>12</sup> \$3,835 total fees × 581 = \$2,228,135.

Principal alien investors and qualifying family members seeking to benefit under section 11032 would be required to complete a new Application to Register Permanent Residence or Adjust Status, Form I-485, even though many of these aliens will have previously completed a Form I-485. Additionally, these covered principal aliens and family members would be required to submit biometric information.<sup>13</sup> DHS estimates 109 aliens would be covered under this provision; 31 principal aliens and approximately 78 dependent family members.<sup>14</sup>

Under these circumstances, the fee for Form I-485 would be waived; thus the compliance cost to alien investors and family members is directly attributable to the opportunity cost of completing Form I-485. According to the form instructions, Form I-485 takes approximately 6 hours and 15 minutes to complete. In addition, applicants will also be required to travel to the nearest ASC for the collection of biometrics. Therefore, the total time for each applicant to comply with Form I-485 filing and biometric collection requirements is 8 hours and 15 minutes. Using a fully burdened wage rate of \$29.89 per hour, USCIS calculates the opportunity cost to be \$246.59.<sup>15</sup> If all 109 aliens estimated to be covered under section 11032 were to comply with these provisions, the total opportunity cost imposed by completing Form I-485 and submitting biometrics would be \$26,878.<sup>16</sup> In keeping with current alien investor petition processes, two years after obtaining LPR status DHS would require the principal alien investors to file Form I-829, which would not be considered a cost of this rule. However, under the provisions of the statute, these investors have the option of submitting the Supplement if the principal alien investors wish to request that USCIS count investment activities beyond the scope of their original investment. DHS does consider the costs associated with filing the Supplement to be a cost of this rule. Again, assuming that an attorney would complete this form, if all 31 principal alien investors were to file the Supplement this rule would impose an additional opportunity cost of \$1,017.<sup>17</sup>

<sup>13</sup> Note: Biometric collection is only required for family members who are 14 years of age or older.

<sup>14</sup> DHS assumes average dependents of 2.5 per principal alien based on historical employment-based immigrant petitions. Calculation: 31 principal aliens  $\times$  2.5 = 77.50.

<sup>15</sup> The calculation to burden the wage rate: \$20.90  $\times$  1.43 = \$29.887 per hour. The calculation of opportunity cost: \$29.89  $\times$  8.25 = \$246.59.

<sup>16</sup> \$246.59  $\times$  109 covered aliens = \$26,878.31.

<sup>17</sup> \$32.82  $\times$  31 investors = \$1,017.

Therefore, the total opportunity cost imposed by this rule under section 11032 in completing Forms I-485 and the Supplement and submitting biometrics would be \$27,895. In addition, all covered aliens would be required to submit biometric fees. The current fee for biometric collection is \$85; thus the total fee collection would be \$9,265.<sup>18</sup> In summary, the total costs of the proposed rule are represented by the opportunity cost and fees paid by aliens covered under both section 11031 and 11032, \$156,423 and \$2,237,400, respectively.

In light of the significant qualitative benefits associated with the proposed rule, DHS has determined the benefits justify the compliance costs of the rule. We request public comment on any costs of the rule that we may not have considered.

#### *E. Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### *F. Executive Order 12988 Civil Justice Reform*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### *G. Paperwork Reduction Act*

The information collection requirements (Form I-526, I-829, Form I-485, and Form I-131) contained in this rule have been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB control numbers for these information collections are: 1615-0026, 1615-0045, 1615-0023, and 1615-0013, respectively.

USCIS will be creating a supplement to the Form I-829 to accommodate special information that eligible aliens under Public Law 107-273 must provide to establish eligibility. The supplement will require the conditional resident to provide information regarding all commercial enterprises in the United States in which he or she has invested, the number of jobs created with respect to each commercial

enterprise, and, where applicable, credits for previous investments that were made and jobs that were created.

Accordingly, the Form I-829 is being revised to include the new supplement. This revision is subject to review by the OMB under the Paperwork Reduction Act of 1995. Written comments are encouraged and will be accepted until November 28, 2011. When submitting comments on the information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of Information Collection

(1) *Type of information collection:* Revision of currently approved information collection.

(2) *Title of form/collection:* Petition by Entrepreneur to Remove Conditions.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-829 and Supplement, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals and households. This form provides a uniform petition that enables alien entrepreneurs to request the removal of the conditional basis of their lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1931 respondents for Form I-829 at 1 hour and 5 minutes, and 602 respondents filing the supplement at 22 minutes per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Total reporting burden hours is 2312.

<sup>18</sup> \$85  $\times$  109 covered aliens = \$9,265.

All comments and suggestions or questions regarding the Form I-829 and supplement should be directed to the Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020.

#### List of Subjects

##### 8 CFR Part 216

Administrative practice and procedure, Aliens.

##### 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

#### **PART 216—CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS**

1. The authority citation for part 216 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1154, 1184, 1186a, 1186b; and 8 CFR part 2.

2. Section 216.7 is added to read as follows:

##### **§ 216.7 Removal of conditions pursuant to sections 11031 to 11034 of Public Law 107-273.**

(a) *Removal of conditional basis of permanent resident status for certain aliens pursuant to section 11031 of Public Law 107-273.*

(1) *Definitions.* As used in paragraph (a) of this section, the term:

*Denied initial Form I-829* means an initial Petition by Entrepreneur to Remove Conditions (Form I-829), that the INS or Service director denied on the merits of the petition.

*Initial Form I-829* means a Form I-829 that an eligible alien timely filed before November 2, 2002.

*Qualifying Form I-526* means an Immigrant Petition by Alien Entrepreneur (Form I-526), that INS approved after January 1, 1995 and before August 31, 1998.

*Second petition to remove conditions* means a petition to remove conditions (Form I-829 or successor form) and any supporting documentation that an alien must file following an initial adverse determination.

(2) *Eligible Aliens.* Eligible aliens are those aliens described in section 11031(b) of Public Law 107-273 except:

(i) Any otherwise eligible alien who has been placed into deportation or removal proceedings and who is deportable or removable on grounds other than the denial of Form I-829;

(ii) An eligible alien who has obtained lawful permanent resident status (whether subject to conditions or not) on a basis unrelated to the conditional resident status at issue in the initial Form I-829. Such alien's dependent spouse and children will also no longer be deemed eligible aliens;

(iii) An eligible alien who makes or has previously made a written request to withdraw his or her initial Form I-829 will no longer be deemed an eligible alien upon the written notice by USCIS acknowledging the withdrawal request. Such alien's dependent spouse and children will also no longer be deemed eligible aliens. The conditional resident status of such alien(s) will terminate as of the date of the notice; or

(iv) Any alien who has abandoned his or her conditional residence by filing the Abandonment by Alien of Status as Lawful Permanent Resident form (Form I-407 or successor form) or an attestation in writing asserting the alien's abandonment of his or her status, regardless of whether he or she withdrew the petition to remove conditions on lawful permanent resident status or obtained lawful permanent resident status by any other means.

(3) *Treatment of pending deportation or removal proceedings.* DHS has agreed to the administrative closure of any pending deportation or removal proceedings, including proceedings reopened pursuant to section 11031(b)(2) of Public Law 107-273, in order to make the determinations required under this paragraph. DHS will file a motion to re-calendar the proceedings with the Executive Office for Immigration Review after USCIS has issued an initial determination on the eligible alien's denied initial Form I-829 and, if applicable, after USCIS has issued a second determination on the eligible alien's second petition to remove conditions.

(4) *Initial determination.* USCIS will make determinations on the initial Form I-829 pursuant to section 11031(c)(1) of Public Law 107-273 based on the evidence previously submitted with Form I-829 and without requesting additional evidence or an interview.

(i) *Favorable determination.* Upon a favorable determination on the initial Form I-829, USCIS will remove the conditional basis of his or her status (and that of the alien's spouse and/or children if their status was obtained under section 216A of the Act) effective on the second anniversary of the alien's admission for permanent residence, if the alien is not in deportation or removal proceedings. If the alien is in deportation or removal proceedings,

regardless of whether he or she is physically present in the United States, DHS must file a motion to recalendar proceedings with the immigration judge. A favorable determination is one in which USCIS has determined that the alien has met the job creation and capital investment requirements, and the initial Form I-829 did not contain material misrepresentations.

(ii) *Notice and opportunity for rebuttal of adverse determinations.* If USCIS makes an adverse determination on the initial Form I-829, USCIS will provide the alien with written notice of the determination pursuant to section 11031(c)(1)(F) of Public Law 107-273. The notice will provide the alien with 12 weeks from the date of the notice to submit evidence in writing to rebut any adverse determination. If the adverse determination is based upon failure to satisfy the capital investment or the job creation requirements, the notice of adverse determination must include a statement notifying the alien of the opportunity to submit information relating to capital investment and/or job creation in commercial enterprises not identified in the initial Form I-829. To request consideration of job creation and capital investments based on additional commercial enterprises, the alien must file a supplement to the petition to remove conditions with the alien's written rebuttal. The alien must also submit supporting evidence with the supplement, as described in 8 CFR 216.7(a)(5)(i)(C). If an eligible alien seeks to submit evidence of a commercial enterprise not identified in the initial Form I-829, the amount of the required investment shall be calculated as provided in proposed 8 CFR 216.7(a)(5)(iii). During the 12 week rebuttal period, the alien (and the alien's spouse and/or children) remains a conditional resident. USCIS will determine whether to reverse the adverse determination at the conclusion of the 12 week rebuttal period whether or not a rebuttal response is received.

(iii) *Notice following opportunity to rebut.* If USCIS reverses the adverse determinations following the opportunity to rebut, USCIS must send the alien written notice stating the decision to reverse the adverse determinations. In addition, the procedures in 8 CFR 216.7(a)(4)(i) applicable to favorable determinations apply. If USCIS does not reverse the adverse determinations, the procedures in 8 CFR 216.7(a)(4)(iv) and (v) apply. In the case of multiple investors, jobs will be allocated among the investors in accordance with 8 CFR 204.6(g).

(iv) *Notice following rebuttal period affirming adverse determinations for*

*aliens with pending deportation or removal proceedings.* Following the alien's opportunity to submit rebuttal evidence, if USCIS does not reverse the adverse determinations with respect to an alien who is in deportation or removal proceedings, USCIS will send written notice to such alien with this decision, the reasons therefor, and the determinations regarding the number of qualifying jobs created and amount of capital investment made as provided by paragraph (a)(4)(v)(D) of this section and the date described in section 11031(c)(1)(D) of Public Law 107-273 that USCIS applied to each determination (if applicable). Subject to paragraph (a)(4)(vi) of this section, DHS will move to recalendar deportation or removal proceedings.

(v) *Notice following rebuttal period affirming adverse determinations and termination or continuation of status for eligible aliens not in removal proceedings.* Following the alien's opportunity to submit rebuttal evidence, if USCIS does not reverse the adverse determinations with respect to an alien who is not in removal proceedings, USCIS will send written notice to such alien with this decision, the reasons therefor, and a statement of USCIS's determination regarding the number of qualifying jobs created and capital investment made, as provided by paragraph (a)(4)(v)(D) of this section, and the date described in section 11031(c)(1)(D) of Public Law 107-273 that USCIS applied to each determination (if applicable).

(A) *Termination if adverse determination based on material misrepresentation.* Subject to paragraph (a)(4)(vi) of this section, if the adverse determination is based, in whole or in part, on material misrepresentation as defined in 8 CFR 216.7(c)(1), the alien's lawful permanent resident status and that of his or her spouse and/or any children (if such status was obtained on a conditional basis under section 216A of the Act) will be terminated effective on the date of the notice required by 8 CFR 216.7(a)(4)(ii). If the alien appeals the adverse determination to the BIA or federal courts pursuant to 8 CFR 216.7(a)(4)(vi), then termination is effective on the date of the highest appellate body's decision. DHS will notify the alien to surrender his or her Form I-551. The alien may seek review of the decision to terminate in deportation or removal proceedings.

(B) *Adverse determination based on failure to establish capital investment and/or job creation.* Subject to paragraph (a)(4)(vi) of this section, USCIS will extend the conditional residence of an eligible alien (and that

of the alien's spouse and/or children if their status was obtained under section 216A of the Act) for a two-year period upon an adverse determination that is not based on a material misrepresentation. The notice provided under 8 CFR 216.7(a)(4)(v) will include notification of the extension of conditional residence.

(C) *Start date for continuation of conditional residence.* The extension of an alien's permanent resident status on a conditional basis and that of the alien's spouse and any children (if such status was obtained under section 216A of the Act) will begin on the date of the decision following the opportunity for rebuttal or the last day of the rebuttal period if the alien does not submit rebuttal evidence. If the alien seeks administrative or judicial review of the adverse determination pursuant to 8 CFR 216.6(a)(vi), the two-year extension will commence on the date of the highest appellate body's decision. If the alien is in deportation or removal proceedings, then the date of the immigration judge's decision to continue conditional residence will mark the starting point for the new two-year period. Such decision cannot be made before the alien exhausts all avenues of administrative or judicial review.

(D) *Determination and crediting of qualifying jobs created and capital investment made.* The number of qualifying jobs created and capital investment made as determined by USCIS in the initial determination will be credited for purposes of the second determination under 8 CFR 216.7(a)(5).

(vi) *Administrative and judicial review.* An alien may seek administrative review with the BIA of an adverse determination. While the appeal to the BIA and judicial review of such appeal, if any, is pending, the alien's conditional permanent resident status and that of his or her spouse and/or children (if such status was obtained under section 216A of the Act) will continue.

(5) *Second determination.* (i) *Filing petition to remove conditions.* To remove the conditional basis of the permanent resident status of an eligible alien whose conditional resident status was continued for a new two-year period, the alien must meet the requirements for removal of conditions in section 11031(c)(2) of Public Law 107-273 and in this section. The alien must file a second petition to remove conditions, with the supplement to request consideration of additional commercial enterprises (if applicable), and in accordance with the form instructions, within the 90-day period

before the second anniversary of the continuation of the conditional basis. The second petition to remove conditions must be accompanied by the required fee and any supporting documentary evidence necessary to establish that the alien meets the requirements in section 11031(c)(2) of Public Law 107-273 for removal of conditions and in this section, including, but not limited to the following:

(A) If an adverse determination was based on failure to meet the job creation requirement of section 11031(c)(1)(A)(ii) of Public Law 107-273, evidence of the number of qualifying jobs created since conditional resident status was continued and the beginning and ending dates of the jobs. Evidence may include, but is not limited to, payroll records, tax documents, and Employment Eligibility Verification (Forms I-9 or any successor forms).

(B) If the adverse determination was based on failure to meet the capital investment requirement of section 11031(c)(1)(A)(iii) of Public Law 107-273, evidence of the alien's capital investment in one or more commercial enterprises since conditional resident status was continued establishing that the alien is in substantial compliance with the capital investment requirement described in section 216A(d)(1)(B) of the Act as of the date of USCIS' second determination. Such evidence may include, but is not limited to, audited financial statements, federal tax returns, bank statements, bank wire transfers, or escrow agreements, or other probative evidence.

(C) Regardless of the bases for the adverse determination, evidence of any commercial enterprise that the alien wants USCIS to consider (except any evidence previously submitted in connection with the initial Form I-829 or initial determination), including, but not limited to, its formation and current ownership and such other evidence as:

(1) Audited financial statements, or other probative evidence of the alien's capital investment in the commercial enterprises to be considered;

(2) Articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and

(3) Certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to that effect.

(D) In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), evidence that the

commercial enterprise maintained the number of existing employees at no fewer than the pre-investment level for the period following admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Form I-9 or any successor form).

(ii) *Termination of permanent resident status for failure to file petition.*

(A) Failure to properly file the second petition to remove conditions within the 90-day period before the second anniversary of the continuation of the conditional basis will result in the automatic termination of the alien's permanent resident status and the initiation of removal proceedings unless such late filing is excused under paragraph (a)(5)(ii)(B) of this section. No appeal will lie from this decision. USCIS will send a written notice of termination and, as appropriate, issue an NTA or file a motion to re-calendar proceedings with the immigration judge pursuant to 8 CFR 216.7(a)(4)(iv). The alien may request a review of the determination in proceedings.

(B) The second petition to remove conditions may be considered, at USCIS's discretion, to be filed prior to the second anniversary of the continuation of the alien's conditional resident status and accepted as a late petition if USCIS determines that failure to timely file was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge (whether by issuance of an NTA or motion to re-calendar) in removal proceedings and USCIS excuses the late filing, USCIS will restore the alien's conditional permanent resident status and adjudicate the petition on the merits pursuant to this paragraph. If the second petition to remove conditions is not filed until after jurisdiction vests with the immigration judge and USCIS excuses the late filing, DHS and the alien may file a joint motion with the immigration judge to administratively close or terminate proceedings as appropriate. USCIS will then restore the alien's conditional permanent resident status and adjudicate the petition on the merits pursuant to this paragraph.

(iii) *Consideration of capital investments that are both in and out of targeted employment areas when making determinations on the petition.* If an eligible alien requests consideration of capital investments in commercial enterprises that are both located within a targeted employment area, and not located in a targeted employment area as defined by 8 CFR 204.6(f), USCIS will calculate the

prorated percentage of the alien's capital investment in commercial enterprises located in a targeted employment area and the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises that are not located in a targeted employment area. USCIS will combine the prorated percentages when making a determination as to whether the alien substantially complies with the capital investment requirement.

(iv) *Crediting of jobs previously created and prior capital investments.* USCIS must credit the number of jobs created and prior capital investments made as determined at the initial determination.

(v) *Favorable determination and removal of conditions.* Where the alien is not subject to deportation or removal proceedings, USCIS will remove the conditional basis of an eligible alien's status and that of his or her spouse and/or children (if such status was obtained under section 216A of the Act) effective on the second anniversary of the continuation of conditional residence and notify such alien(s) in writing upon a favorable determination on the petition to remove conditions. Where the alien is subject to deportation or removal proceedings, USCIS will notify the alien in writing of the favorable determination and DHS will file a motion to re-calendar proceedings.

(vi) *Adverse determinations.*

(A) *Notice and opportunity for rebuttal of adverse determination.* If USCIS makes an adverse determination on the petition to remove conditions, USCIS will provide the alien with written notice of the determination and allow 12 weeks from the date of the notice for the alien to submit evidence in writing to rebut. If the alien submits evidence sufficient to rebut the adverse determination, USCIS will notify the alien in writing and the case will be treated as a favorable determination as provided in paragraph (a)(5)(v) of this section.

(B) *Termination if adverse determination.*

(1) *Failure to submit rebuttal evidence.* If the alien does not submit rebuttal evidence within the 12-week period, the alien's conditional resident status, and that of his spouse and children (if such status was obtained on conditional basis under section 216A of the Act) will be automatically terminated after the expiration of the 12-week period. USCIS will provide written notice to the alien(s) of the automatic termination and require the alien(s) to surrender any Form(s) I-551 to USCIS. DHS will, as appropriate, issue a Notice to Appear, or file a

motion to re-calendar proceedings with EOIR. There is no appeal of the decision to terminate conditional resident status, but the alien may request a review of the adverse determination in deportation or removal proceedings.

(2) *Insufficient rebuttal evidence.* If the alien timely submits rebuttal evidence, but USCIS determines that the evidence is not sufficient to rebut the adverse determination, USCIS will terminate the conditional resident status of the alien and that of his or her spouse and/or children (if such status was obtained on a conditional basis under section 216A of the Act) if the alien is not in deportation or removal proceedings. If the alien is in deportation or removal proceedings, USCIS will provide written notice to the alien(s) of the decision, and the reason(s) therefore. The alien and the alien's spouse and children (as appropriate) will be required to surrender any Forms I-551 to USCIS. DHS will, as appropriate, issue an NTA or file a motion to re-calendar proceedings with the immigration judge. There is no appeal of this decision, but the alien may request a review of the adverse determination in deportation or removal proceedings.

(6) *Death of eligible alien and effect on spouse and children.* If the principal eligible alien dies during his or her period of conditional residence, the spouse and/or children of such alien will be eligible for removal of conditions if it can be demonstrated that the conditions for removal of conditions have been met, regardless of whether the alien, spouse, or children individually or collectively met such conditions.

(b) *Removal of conditions for aliens granted adjustment of status pursuant to 8 CFR 245.25 or admitted as a conditional resident based upon an immigrant visa granted pursuant to section 11032 of Public Law 107-273.*

(1) *Applicability of 8 CFR 216.6.* Unless otherwise provided in paragraphs (b)(2) and (b)(3) of this section, 8 CFR 216.6(a) through (d) apply to aliens whose conditional resident status was obtained on the basis of an adjustment of status application approved pursuant to 8 CFR 245.25 or an immigrant visa approved on the basis of section 11032 of Public Law 107-273.

(2) *Petition.* An alien who was granted the status of an alien lawfully admitted for permanent residence on a conditional basis pursuant to section 11032 of Public Law 107-273, must file a petition to remove conditions (Form I-829 or any successor form) in accordance with 8 CFR 216.6(a) and the

form instructions and, if appropriate, the supplement to the form and its instructions. In lieu of 8 CFR 216.6(a)(4), such an alien must include the following documentary evidence with the petition to remove conditions and supplement:

(i) Evidence that all eligible enterprises, considered together, in which the alien invested created full-time jobs for not fewer than 10 qualifying employees, and that such jobs exist or existed on either of the dates described in section 11032(e)(3) of Public Law 107–273. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(ii) In the case of a “troubled business” as defined in 8 CFR 204.6(e), evidence that the number of existing employees is at no fewer than the pre-investment level for the conditional resident period. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(iii) In the case of an investment within an approved regional center, evidence that the alien’s investment created full-time jobs, either directly or indirectly, for not fewer than 10 qualifying employees. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(iv) Evidence of the dates on which the jobs existed;

(v) Considering the alien’s investment in all enterprises on either of the dates cited in section 11032(e)(3) of Public Law 107–273 or on both such dates, evidence that the alien is or was in substantial compliance with the requirement to invest or is actively in the process of investing the requisite capital. If the petition to remove conditions is based upon commercial enterprises located both within and outside of a TEA, the investment amount must comply with proposed 8 CFR 216.7(a)(5)(iii). Such evidence may include, but is not limited to, audited financial statements, federal tax returns, bank statements, bank wire transfers, escrow agreements, or other material evidence;

(vi) Evidence of any commercial enterprise in the United States in which the eligible alien made a capital investment and the formation and current ownership structure of such commercial enterprise including, but not limited to:

(A) Articles of incorporation, certificate of merger or consolidation,

partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and

(B) Certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to that effect.

(C) *Determination on petition.* USCIS will make a determination on the petition to remove conditions in accordance with section 11032(e)(2) of Public Law 107–273, in lieu of section 216A(c)(3) of the Act and 8 CFR 216.6(c)(1).

(c) *Definitions.* (1) *Material misrepresentation.* Under this section, a material misrepresentation includes a statement or representation in an eligible alien’s petition to remove conditions, as originally filed or supplemented, or any accompanying documentation which is determined, as a matter of discretion, to be both false and a statement or representation to which importance would reasonably be attached for determining whether to grant the petition, without regard to the petitioner’s or any other person’s intent or to whether or not there was detrimental reliance upon the statement or representation. Material misrepresentation also includes any omission of fact that has the effect of making any material representation in the petition to remove conditions or accompanying documentation false.

(2) *Substantial compliance with the capital investment.* For purposes of paragraphs (a) and (b) of this section, substantial compliance with the capital investment requirement means that the alien has invested nearly all of the requisite amount, with evidence that any balance is legally obligated for final disbursement within a reasonable period of time of the date on which the initial petition to remove conditions (Form I–829 or successor form) was filed (not applicable to petitions to remove conditions under paragraph (a)(6) of this section); 6 months after that date in the case of petitions to remove conditions under paragraph (a)(5) of this section only; or the date upon which the determinations are made. Funds that cannot be counted toward compliance with the capital investment requirement include funds returned to the alien in the form of guaranteed interest payments or as redemption for his or her interest, or otherwise diverted, as these funds would not have been made available to the commercial enterprise for the purposes of creating qualifying jobs.

(3) *Full-time.* The term “full-time” means a position that requires at least

35 hours of service per week at any time, regardless of who fills the position. Such a position must be required by the commercial enterprise at all times and filled by one or more qualifying employees as defined by 8 CFR 204.6(e).

#### **PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE**

3. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; Title VII of Pub. L. 110–229; 8 CFR part 2.

4. Section 245.25 is added to read as follows:

#### **§ 245.25 Adjustment of status of certain alien entrepreneurs under section 11032 of Public Law 107–273.**

(a) *Definitions.* As used in this section, the term:

*Application for adjustment of status* means a Form I–485, Application to Register Permanent Residence or Adjust Status (or successor form) and any supporting documentation.

*Eligible alien* in this section means an eligible alien as described in section 11032 of Public Law 107–273.

*Form I–485 that is no longer pending* means that the qualifying Form I–485 was subsequently terminated for abandonment or denied by the Immigration and Naturalization Service on or before November 2, 2002.

*Qualifying Form I–485* means a Form I–485 filed before November 2, 2002.

*Qualifying Form I–526* means a Form I–526, Immigrant Petition by Alien Entrepreneur, that INS approved after January 1, 1995 and before August 31, 1998.

(b) *Procedures for eligible aliens and their spouses and children.*

(1) *Requesting consideration for eligibility determinations.* An eligible alien must request USCIS to consider his or her qualifying Form I–485 for approval under section 11032 of Public Law 107–273 and must demonstrate that he or she meets the requirements in section 11032 of Public Law 107–273 and this section. Failure to follow the procedures in paragraph (b) of this section or to demonstrate eligibility will result in denial of the qualifying Form I–485 in accordance with paragraph (e) of this section. An eligible alien must:

(i) In accordance with the form instructions, file (without fee) a newly completed application for adjustment of status (Form I–485 or succeeding form) with supporting documentation signed and dated after the effective date when

this rule is published as a final rule and on or before 180 days from the effective date when this rule is published as a final rule;

(ii) Include payment of a biometrics fee with each application for adjustment of status; and

(iii) Appear as requested by USCIS for the capture of biometric information and, if USCIS determines it to be necessary, an interview.

(2) *Overseas aliens.* Aliens who are not physically present in the United States may submit an application for adjustment of status from outside the United States to facilitate a determination whether they are eligible aliens. Such aliens, upon request, must appear for the submission of certain biometric information at the DHS office located outside the United States having jurisdiction over the alien's foreign residence.

(3) *Forms I-485 that are no longer pending.* An alien whose Form I-485 is no longer pending must include with his or her submission in paragraph (b) of this section written evidence demonstrating that the reason an Application to Register Permanent Resident or Adjust Status (Form I-485) is no longer pending is either because he or she failed to satisfy the job creation requirement in section 203(b)(5)(A)(ii) of the Act or departed the United States without advance parole. A copy of a decision denying a Application to Register Permanent Resident or Adjust Status (Form I-485) on either of these bases satisfies this requirement. Acceptable secondary evidence includes, but is not limited to an alien's sworn statement together with: travel records; payroll records; alien's request for withdrawal of the Application to Register Permanent Resident or Adjust Status (Form I-485).

(4) *Revoked qualifying Immigrant Petitions by Alien Entrepreneur.* An alien whose qualifying Immigrant Petition by Alien Entrepreneur (Form I-526) was revoked must include with his or her submission, as described in paragraph (b) of this section, evidence demonstrating that the reason for the revocation was that such alien failed to satisfy the job creation requirement in section 203(b)(5)(A)(ii) of the Act. A copy of a decision revoking an Immigrant Petition by Alien Entrepreneur satisfies this requirement. Acceptable secondary evidence includes, but is not limited to the alien's sworn statement accompanied by additional documentation, such as a letter to INS responding to a notice of intent to revoke and documents filed by the alien related to an appeal of the

revocation of the Immigrant Petition by Alien Entrepreneur.

(5) *Spouse and children.* Applications for adjustment of status by an alien's accompanying spouse and children must be filed with the alien's application for adjustment of status. If the spouse and children are following to join the alien, then their applications for adjustment of status must be filed no later than USCIS's determination of the alien's eligibility. The applications must contain supporting documentation of eligibility, including but not limited to evidence of the current relationship between the alien and spouse and children such as a marriage certificate and birth certificates.

(c) *USCIS determinations.* Following receipt of the required documentation and information in paragraph (b) of this section, USCIS will make a determination on whether an alien is an eligible alien, and whether the alien and any spouse and children, as applicable, qualify for adjustment of status to that of a conditional resident in accordance with section 11032 of Public Law 107-273 and this section. If USCIS determines that the alien does not qualify for conditional residence, it will deny Form I-485 for aliens in the United States and terminate processing of the request for benefits under this section for aliens who are residing outside the United States in accordance with paragraph (e) of this section.

(1) *Permanent residence on other grounds.* USCIS will make a determination that an alien does not qualify for conditional residence under section 11032 of Public Law 107-273 if he or she obtained permanent resident status on other grounds.

(2) *Departing the United States while qualifying Applications to Register Permanent Resident or Adjust Status are pending.* If an eligible alien with a pending, qualifying Application to Register Permanent Resident or Adjust Status (Form I-485 or any successor form) departed the United States after November 2, 2002 without advanced parole, USCIS will make a determination that the alien does not qualify for conditional resident status under section 11032 of Public Law 107-273 and will deny the Application to Register Permanent Resident or Adjust Status.

(3) *Eligible aliens and accompanying spouse and children who are not physically present in the United States.* Following receipt of a new Application to Register Permanent Resident or Adjust Status (Form I-485 or any successor form) (including medical examination in accordance with 8 CFR 245.5 and the instructions to the

Application to Register Permanent Resident or Adjust Status) and biometric fee in accordance with paragraph (b) of this section, USCIS will send written notice to the eligible alien requiring an appearance by the alien and any accompanying or following to join spouse and children for biometric capture and an interview at the USCIS office located outside the United States having jurisdiction over the alien's foreign residence. If USCIS determines that the alien qualifies as an eligible alien and for conditional resident status under section 11032 of Public Law 107-273, USCIS will send the eligible alien written notice of USCIS' determination and require the alien and accompanying or following to join spouse and children to return to the United States by obtaining parole, described in 8 CFR 212.5, and, if granted parole, arrive in the United States by the date stated in the parole document. To request parole, the alien must file, by mail and with fee, a signed and completed application for parole on an Application for Travel Document, Form I-131 or successor form, in accordance with the form instructions. The alien and accompanying or following to join spouse and children may be requested to appear at such office for biometric capture or an interview in connection with the parole request. If the eligible alien, or his or her spouse and children, is not granted parole by USCIS or is not paroled upon his or her arrival to the United States, USCIS will deny his or her Application to Register Permanent Resident or Adjust Status in accordance with paragraph (e) of this section.

(d) *Approval.* Upon a determination by USCIS that the alien qualifies for conditional resident status under section 11032 of Public Law 107-273, USCIS will approve the eligible alien's qualifying Application to Register Permanent Resident or Adjust Status (Form I-485 or any successor form) and that of his or her spouse and children physically present in the United States, provided that USCIS has not revoked the alien's approved Immigrant Petition by Alien Entrepreneur (Form I-526 or any successor form), and all qualifying Applications to Register Permanent Resident or Adjust Status are pending or have been reopened. USCIS may not approve such Applications to Register Permanent Resident or Adjust Status until the Department of State allocates an immigrant visa number. Upon approval of the qualifying Application to Register Permanent Resident or Adjust Status, USCIS will grant the alien and his or her spouse and children, the status of an alien lawfully

admitted for permanent residence on a conditional basis under section 216A of the Act as of the date of such approval. USCIS will send written notice of the decision to the eligible alien.

(e) *Denials and terminations.* (1) If USCIS determines that the eligible alien does not qualify for conditional resident status under section 11032 of Public Law 107-273, USCIS will deny the eligible alien's qualifying Application to Register Permanent Resident or Adjust Status (Form I-485 or any successor form) and any Applications to Register Permanent Resident or Adjust Status of his or her spouse and children considered under this section. USCIS will send the eligible alien written notice of the denial and reasons for the denial. A denial of the qualifying Application to Register Permanent Resident or Adjust Status is not subject to appeal, but can be reviewed by an immigration judge in removal proceedings.

(2) If USCIS determines that an alien who is not physically present in the United States is not an eligible alien, USCIS will terminate processing of the request for benefits pursuant to this section. If USCIS determines that an alien who is overseas does qualify as an eligible alien, but that the spouse or child of the eligible alien does not qualify for benefits pursuant to this section, USCIS will terminate processing of the request for benefits. There is no administrative appeal of this decision.

(f) *Petitions revoked on a basis other than failure to meet job creation requirement.* If USCIS revoked the Immigrant Petition by Alien Entrepreneur (Form I-526 or any successor form) due to grounds of ineligibility other than failure to meet the job creation requirement, USCIS will not disregard the revocation under Public Law 107-273 and will deny the application for adjustment of status if it is pending.

**Janet Napolitano,**  
Secretary.

[FR Doc. 2011-24619 Filed 9-26-11; 8:45 am]

**BILLING CODE 9111-97-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2011-1022; Directorate Identifier 2011-NE-20-AD]

RIN 2120-AA64

#### Airworthiness Directives; BRP—Powertrain GMBH & CO KG 914 F2, 914 F3, and 914 F4 Reciprocating Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Isolated manufacturing deviations have been reportedly found on the threads of a certain batch of fuel pressure regulators, Part Number (P/N) 887130, installed on Rotax 914 F series engines.

This condition, if not corrected, could lead to a fuel leak and in-flight fire which would necessitate an engine shut-down, possibly resulting in a forced landing, with consequent damage to the aeroplane and injury to occupants.

These affected fuel pressure regulators may have non-conforming threads in the banjo bolt fitting for the fuel return line to the fuel tank from original manufacture. These non-conforming threads could result in fuel leakage during engine operation. We are proposing this AD to prevent fuel leaks, which could result in an in-flight fire and damage to the aircraft.

**DATES:** We must receive comments on this proposed AD by November 14, 2011.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202-493-2251.

### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: 800-647-5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

#### FOR FURTHER INFORMATION CONTACT:

Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: [mark.riley@faa.gov](mailto:mark.riley@faa.gov); phone: 781-238-7758; fax: 781-238-7199.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2011-1022; Directorate Identifier 2011-NE-20-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78).

##### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011-0082, dated May 10, 2011 (referred to after this as "the MCAI"), to correct an unsafe