Defending EB-5 Permanent Residency:
Litigation Strategies After an I-829 Petition Denial

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Congress created the EB-5 immigrant visa program in 1990 to benefit the U.S. economy and create jobs by attracting investments from foreign investors seeking permanent legal status (a "green card") in the U.S. An EB-5 visa offers many advantages to foreign nationals who desire lawful permanent resident (LPR) status in the United States. High net-worth foreign nationals may obtain LPR status via the EB-5 route relatively quickly. Unlike other employment-based visa categories, no sponsorship from a U.S. company is required, and there is no day-to-day obligation to directly operate a business. Accredited investors with sufficient net worth may invest a minimum of $500,000 in a project, become a "limited partner," and delegate to professionals the day-to-day operational tasks of the qualifying business.

The multi-step process the EB-5 program creates, however, means that even privileged EB-5 investors sometimes face the harsh reality of the U.S. immigration system after immigrating here on an EB-5 visa. Under U.S. immigration law, every investor who immigrates to the United States through the EB-5 program receives "conditional" residency, which is valid for only two years. Before those two years expire, the investor must petition USCIS to grant unconditional permanent residency. When USCIS denies an I-829 petition, the results can be devastating: The investor and the investor's family lose their conditional residency and usually face removal proceedings.

This article addresses the administrative and judicial options available to investors whose I-829 petitions are denied.

Primer on the I-829 Petition

The EB-5 program differs from other employment-based preference categories in that a successful EB-5 petition does not lead immediately to full, permanent residency for the foreign investor. Instead, foreign nationals who file an I-526 petition and obtain EB-5 status are initially granted *conditional* residency for two years.[1] To maintain lawful status in the United States and to become a full, unconditional permanent resident, an investor must file a Form I-829 petition to remove the "conditions" on his or her permanent residency. The investor must file the I-829 petition within 90 days of the two-year anniversary of the investor's admission to conditional residency. If USCIS approves the petition, then the investor and any family members included on the petition become unconditional lawful permanent residents.[2] If the petition is denied, however, USCIS terminates the LPR status of the investor and the investor's family, and they become subject to removal from the United States.[3]

The substantive requirements for I-829 petitions are disarmingly and deceptively straightforward. An investor must establish that 1) the investor has "invested, or is actively in the process of investing, the requisite capital"; 2) this investment was "sustained throughout the period of the alien's residence in the United States"; and 3) the investor "is otherwise conforming to the requirements" of the EB-5 statute with regard to job creation.[4] The regulations governing I-829 petitions reiterate these basic statutory requirements and clarify that the investor need only establish "substantial" compliance with the capital investment requirement and that the investor may qualify for removal of conditions if the requisite jobs will be created "within a reasonable time."[5]

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tive requirements, however, masks complexities resulting from the two-step nature of the EB-5 process, the need for fluidity of business decisions during an investor's period of conditional residency, and competing views regarding what precisely the purpose of the removal of conditions part of the process should be.

It is tempting to view the I-829 petition as a second bite at the apple for the government to decide if the EB-5 investment satisfies EB-5's statutory requirements. However, this view of the I-829 petition process was soundly rejected in the seminal judicial decision in the EB-5 area. In *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), USCIS's predecessor sought to deny the I-829 petitions of the plaintiff investors on the ground that their investments did not comply with EB-5 program requirements established by the three EB-5 Board of Immigration Appeals (BIA) precedent decisions issued *after* the investors obtained their conditional residency.[6] There was no dispute that the petitioners' investments complied with the criteria in effect when their I-529 petitions were approved. The government argued that the investments were structured in a way prohibited by the BIA decisions and that, therefore, the investors' respective I-829 petitions must be denied because "I-829 approval proceeds ab initio" and "require[s] a 'fresh demonstration of compliance with statutory standards'" on the part of the investor.[7] The Ninth Circuit rejected this view of the I-829 petition process. It found the government's interpretation "not sustainable" in light of the text and structure of the EB-5 statute and regulations, and held inter alia that "[r]etroactive application of the new rules adopted by the 1998 precedent decisions to [a]ppellants' I-829 petitions is impermissible."[8]

The Ninth Circuit found that the I-829 petition is "a procedure intended to confirm that the petitioner fulfilled the plan set out in the I-526 petition."[9] On this view, if USCIS approves the investor's initial petition for EB-5 classification (the I-526 petition), then USCIS should remove the conditions and approve the I-829 petition if the investor followed the "plan" outlined in the I-526 petition. In other words, since USCIS approved the plan's EB-5 compliance at the initial I-526 petition stage, the later I-829 petition is simply intended to confirm that an investor "held up their end of the bargain by fulfilling the terms of their approved I-526 petition[]."[10]

Although the government once vigorously opposed the Ninth Circuit's view of the I-829 petition's purpose, it has since largely adopted it. USCIS's current official policy is that:

> If the alien investor follows the business plan described in the Form I-526, USCIS will not revisit certain aspects of the business plan, including issues related to the economic analysis supporting job creation. Thus, during review of the Form I-829, USCIS will generally rely on the previous adjudication if the petitioner claims to have fulfilled the business plan that accompanied the Form I-526 petition.[11]

In other words, USCIS now recognizes that the I-829 petition is not a vehicle to second-guess its initial I-526 approval. If the investor establishes that the original business plan was "fulfilled" during his or her period of conditional residency, then USCIS's role in adjudicating the I-829 petition is simply to confirm the investor's claim.

Given the nature of EB-5 investments, however, it is not always clear what it means for an investor to "fulfill" the plan outlined in his or her I-526 petition. Consider the following hypothetical scenario:

> A regional center project has pooled capital from multiple investors to finance the construction of a shopping mall that will then lease space to retailers. At the time the I-526 petition is filed, construction is just getting underway and no leases have been signed. In order to estimate the project's job-creation impact, the investor includes the developer's best guess as to the types of retail shops that will occupy the mall and estimates the number of employees that business in those retail categories generally hire. The investor's job-creation estimates are therefore tied to the number of employees that are expected to work at retail establishments leasing space at the mall. USCIS approves the I-526 petition.
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> After the investor becomes a conditional resident, construction on the mall is completed on schedule and the mall is fully leased to capacity. However, the overall mix of retailers that lease space have less demand for full-time employees than was initially forecasted in the I-526 petition. If the number of employees that are hired by the retailers who ultimately leased the space are added up, the number falls short of the 10-jobs-per-investor requirement.

In this scenario, has the investor "followed the business plan described in the Form I-526" such that approval of the I-829 is warranted? In one very real sense, the answer is "yes": the investor's capital was fully committed to the real estate development project, the developer has constructed the mall on schedule, and the mall

was fully leased out to job-creating realtors. The only aspect of the project's initial projections that did not match the projections contained in the I-526 petition is the specific mix of retail tenants that ultimately occupy the shopping mall. But does that fact alone mean that the business plan outlined in the I-526 petition was not "fulfilled" and that the I-829 petition may, therefore, be denied? In the regional center context, where the indirect job-creation projections are based on assumptions about the future that lie outside of the project's direct control, the business plan may be "fulfilled" and the project successful, yet reasonable assumptions about the future that are used to project indirect jobs may not come to fruition. The limits of USCIS's authority to deny an I-829 petition in such a circumstance have not been definitively established.[12]

Conversely, when changes in market conditions or other factors make it impossible for an investor with conditional residency to fulfill the specific plan outlined in the investor's I-526 petition, USCIS previously viewed any significant deviation from the I-526 petition plan during the investor's period of conditional residency as an automatic basis for denial of the I-829 petition.[13] Under this policy, it was not just the case that an investor's fulfillment of the I-526 petition plan was a sufficient condition for I-829 approval, it was a *necessary* condition as well: "The capital investment project identified in the business plan in the approved Form I-526 petition *must* serve as the basis for determining at the Form I-829 petition stage whether the requisite capital investment has been sustained throughout the alien's two-year period of conditional residency and that at least 10 jobs have been or will be created...."[14] USCIS based this policy on the established immigration doctrine of "material change," under which a petition must be approvable on the date of filing, and deficiencies cannot be cured after the fact.[15] USCIS's prior understanding of "material change" was widely criticized by immigration practitioners and scholars,[16] and was the subject of a class action lawsuit by I-829 petitioners who faced denials based on the policy.[17] (The class action ultimately settled, resulting in approval of all of the EB-5 investors' I-829 petitions).

In the end, USCIS retreated from its absolute prohibition on "material changes" to the I-526 petition business plan during an investor's period of conditional residency. Under current policy:

> USCIS will permit an alien who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed. An individual investor can, at the prescribed time, proceed with his or her Form I-829 petition to remove conditions and present documentary evidence demonstrating that, notwithstanding the business plan contained in the Form I-526, the requirements for the removal of conditions solely based on failure to adhere to the plan contained in the Form I-526, the requirements for the removal of conditions have been satisfied.[18]

However, this policy contains certain caveats. First, the investor must establish that he or she "filed the Form I-526 in good faith." Thus, this investor must demonstrate that the changes to the business plan were not already contemplated when the I-526 was actually filed. The investor may, therefore, be required to document the reasons for and timing of the changes to the business plan to establish why the changes were necessary and that they were conceived of and executed *after* the investor obtained conditional residency. Second, when an investor departs from the I-526 petition plan, USCIS may not accord deference to those altered aspects of the I-526 petition plan.[19]

Legal Options Available to an EB-5 Investor Upon Denial of I-829

The denial of an I-829 petition is a devastating outcome — it derails investors and their families from what likely seemed a surefire path to LPR status and eventually, U.S. citizenship. The investor suddenly faces the frightening prospect of appearing before an immigration judge and defending against possible deportation from the United States. Fortunately, immigrant investors faced with an I-829 petition denial have a number

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of legal options at their disposal to challenge the denial. The remainder of this article discusses the available options and the factors attorneys should consider when counseling clients with an I-829 petition denial.

Administrative Review

There are two administrative avenues to challenge an I-829 petition denial. First, the investor may file with USCIS a motion to reopen or reconsider. Second, if the government initiates removal proceedings, then the investor may seek de novo review of the I-829 petition denial.

Options to challenge an I-829 petition denial with USCIS are quite limited. An investor can appeal the denial of an I-526 petition to the Administrative Appeals Office (AAO), but an investor denied of an I-829 petition has no right to this appeal.[20] As such, the only administrative mechanism for challenging the denial of an I-829 petition with USCIS is to file a motion to reopen or reconsider the decision.[21] A motion to reopen must present new, previously unavailable facts that overcome the stated grounds for denial of the I-829 petition.[22] A motion to reconsider, by contrast, must establish that USCIS committed an error of fact or law based on the existing record before it.[23] Both motions are filed on Form I-290B, and are due 30 days after the issuance of the I-829 denial.[24] If an investor believes that both reopening and reconsideration are warranted, he or she may file a combined motion seeking both. All evidence and legal argument must be submitted contemporaneously with the motion.

In addition to review within USCIS, by statute, an immigrant investor whose I-829 petition is denied may obtain review of the denial of removal of conditions in removal proceedings.[25] Thus, an investor with a denied I-829 petition who has been placed in removal proceedings has an opportunity to present his or her case individually before an immigration judge.

An investor may obtain review of the investor's I-829 petition before an immigration judge only *if USCIS actually places the investor in removal proceedings*. By regulation, USCIS must initiate removal proceedings upon the denial of an I-829 petition.[26] But USCIS has not always consistently applied this regulatory requirement.

Assuming USCIS has initiated removal proceedings, the investor "may request a review" of USCIS's decision to deny the I-829 petition.[27] This seemingly innocuous language, "may request review," provides investors with a powerful weapon to challenge their I-829 petition denial. Although the statute speaks in terms of "review," the Board of Immigration Appeals has made clear that "review" by an immigration judge of a decision by USCIS entails a de novo determination on the petition — not "appellate-style" review based on the record before USCIS.[28] Although the decision establishing this principle concerned review of USCIS's decision in the context of removal of conditions in a marriage case, the statutory language at issue was identical to language that governs review of denied I-829 petitions. Thus, an investor may introduce new evidence that may take the form of additional documents and facts or expert testimony, and the immigration judge must admit and consider any evidence that is probative as to whether the investor has satisfied the criteria for removal of conditions.

An additional point in the investor's favor in review of the I-829 denial in removal proceedings is that the burden of proof falls on DHS to establish that the investor has *not* satisfied the I-829 petition requirements.[29] Although DHS need only prove failure to comply by a preponderance of the evidence, placing the burden on DHS means that the government must come forward with evidence to meet its burden. In most instances, DHS will rely on the grounds for denial advanced by USCIS and the filings made before USCIS — what is called the "administrative record." As discussed below, however, the removal proceedings do not limit DHS, or the investor, to the documents contained in the record before USCIS.

Finally, it is important to note that removal proceedings are conducted within a division of the Department of Justice, known as the Executive Office for Immigration Review (EOIR), not within the Department of Homeland Security, which is USCIS's parent agency. This fact is significant because while authority to implement the INA is delegated by statute to DHS, "determination and ruling by the [a]ttorney [g]eneral with respect to all questions of law shall be controlling."[30] Because the attorney general by regulation has delegated the EOIR to adjudicate immigration matters, this means that rulings by immigration judges, the Board of Immigration Appeals, and — ultimately — the attorney general through the certification process — constitute the definitive interpretation of the requirements of the statute governing the removal

of conditions. Immigration judges, therefore, are not bound by USCIS policy statements, for example, those contained in the May 30, 2015, EB-5 policy memorandum. Any nonstatutory USCIS policy that forms the basis for USCIS's denial of an I-829 petition does not bind the immigration judge in removal proceedings.

Litigating an I-829 denial in removal proceedings is a world away from preparing an I-829 petition for adjudication by USCIS. The differences begin with the adjudicator. The USCIS adjudicators who handle I-829 petitions are specialized officers within the Immigrant Investor Program Office that handle EB-5 petitions exclusively. The I-829 petition process before USCIS is nonadversarial, and is based entirely on a paper record (with possible one-time interviews of investors in the future). In contrast, immigration judges are responsible for handling a wide variety of immigration-related subject matter; they do not have specialized training in EB-5 matters. Indeed, the *only* time immigration judges may be confronted with EB-5-related issues is in the context of reviewing an I-829 petition denial. Further, the proceedings before an immigration judge are adversarial, with a "trial attorney" representing DHS whose job it is to argue that the investor's I-829 petition was properly denied and that the investor should be deported from the U.S.

In addition, a specialized set of rules and procedures govern removal hearings.[31] Attorneys who represent investors in immigration court present witnesses in support of the petition; cross-examine government witnesses; present oral argument and written briefs; seek subpoenas for government or other witnesses who may not voluntarily appear to testify; and generally take advantage of all of the rights accorded to individuals in removal proceedings.[32]

Another consequence of referral to removal proceedings, apart from the fact that the immigration judge has the authority to make an independent judgment on I-829 petitions, is that this process provides the investor's attorney with the opportunity to present evidence that becomes available only *after* USCIS denies the I-829 petition. For example, if USCIS denies an I-829 petition because the investor failed to demonstrate sufficient job creation, the attorney representing the investor in the deportation case may present new evidence to the immigration judge demonstrating that the jobs were, in fact, actually created. Additional types of evidence that may be introduced before the immigration judge include witness testimony and expert witness opinions (*e.g.*, professional economists who can testify as to the job-creation project methodology used and any errors in USCIS's analysis).

Removal proceedings are initiated when DHS files a notice to appear (NTA) with the Office of the Immigration Judge. As mentioned above, the I-829 regulations require DHS to issue the NTA upon denial of the I-829 petition. The NTA outlines the allegations and charges on which DHS contends that the immigrant is removable from the United States. The stakes are high. If the I-829 petition is denied, the basis for removal will be the termination of the investor's conditional residency, and consequent lack of lawful status to remain in the United States.

Fortunately, however, it is USCIS's policy to extend the conditional resident status of I-829 petitioners until such time as the investor is issued a final order of removal in immigration proceedings. Thus, "[i]f the Form I-829...has been denied but no final order of removal has been entered," USICS will "collect the expired [p]ermanent [r]esident [c]ard and follow established procedures for providing a temporary extension of the alien's conditional resident status."[33] Thus, local field offices are directed to provide individuals with a denied I-829 petition who are in removal proceedings with temporary I-551 stamps of six months' validity. These stamps serve as evidence of the investors' continued conditional permanent resident status, which allow the investor to travel abroad and evidence their

lawful status. This mitigates the harm to the investor.

The immigration judge's order is not final until the losing party has had an opportunity to appeal the decision to the Board of Immigration Appeals. Absent either a decision by the attorney general to certify the BIA's decision for personal review, or a decision by top DHS officials to certify the decision (both of which are extremely rare, and unprecedented in the EB-5 arena), the BIA's decision is the final administrative decision on the I-829 petition.[34]

Federal Judicial Review

There are two possible pathways in federal court to challenge the denial of an I-829 petition. If the I-829 denial is litigated before the immigration judge and the Board of Immigration Appeals, and if USCIS's I-829 denial is sustained and the investor ordered removed, then the investor may file a petition for review of the order directly with the federal circuit court of appeals with jurisdiction over the place where the removal hearing was conducted.[35] Otherwise, the investor may file directly in district court a challenge to USCIS's denial of the I-829 petition. This article discusses in more detail the second pathway to federal judicial review.

One difficult aspect of litigating an I-829 petition denial directly in district court is that the government generally wages a tough battle against the investor's right to challenge the decision in district court at all. The government typically argues that investors must exhaust in removal proceedings review of an I-829 petition denial, and that any federal court challenge to the denial an investor makes must be made in the form of a petition for review of a final removal order. Although courts are generally unsympathetic to the government's argument,[36] the government continues to raise issues related to jurisdiction and exhaustion to argue that district court challenges to I-829 denials should be dismissed. Attorneys who bring a district court action should, therefore, expect the government to file early on a motion to dismiss for lack of jurisdiction.

Deciding on a Litigation Strategy

After USCIS denies an investor's I-829 petition, the investor, the investor's attorneys, and other interested parties (such as the regional center that sponsored the project) are under tremendous pressure to decide how to respond. There is no easy answer to decide the appropriate course of action, and innumerable factors will influence the decision. The following is a nonexhaustive list of factors to consider:

• *The Nature of the Denial* — Perhaps the single most important factor when determining the appropriate course of action to challenge an I-829 petition denial is an evaluation of the grounds USCIS has advanced for the denial and the adequacy of the existing record to challenge those grounds.

If USCIS's basis for denying the I-829 petition is very fact intensive, then it is critical for the investor and the investor's attorney to evaluate the existing record to determine if the evidence already submitted to USCIS provides sufficient grounds to contest USCIS's findings. If the existing record is inadequate, then there are serious advantages to filing a motion to reopen and/or pursuing review in removal proceedings. The former option is particularly helpful if the relevant evidence to rebut USCIS's factual findings was previously unavailable; otherwise, *any* new evidence may be admitted in removal proceedings. In such a circumstance, jumping directly into district court may be unadvisable, as the record already before USCIS generally binds the court and limits opportunities to introduce new evidence.

If, however, the most plausible bases for challenging the I-829 petition denial are fundamentally *legal* challenges, then there are substantial advantages to litigating the case in district court. That is especially so where if USCIS and immigration judges lack the authority to consider the specific legal challenges raised.[37]

• *The Number of Investors Affected* — In a regional center project with multiple investors, USCIS may deny all I-829 petitions for investors in the project based on the same rationale. Indeed, it is likely to issue denial notices that are identical except for the investor's name and receipt number. In this circumstance, it may prove advantageous to litigate the identical issues on behalf of all affected investors in a single district court action, rather than adopt a piecemeal approach. While there is an administrative mechanism for consolidating the proceedings of multiple respondents in removal proceedings, this procedure "is generally limited to cases involving immediate family members."[38] Additionally, consolidated removal proceedings may prove unwieldy when they involve tens or possibly hundreds of investors, each of whom may have independent alternative claims for relief.

In contrast, in district court, it is easy to include all denied investors as plaintiffs in a single lawsuit, heard by a single judge, in which the sole issue is the validity of USCIS's decision to deny the investors' I-829 petitions. Additionally, in district court it may be possible to seek relief on behalf of all affected investors through a class action lawsuit in which a handful of investors serve as named plaintiffs who represent all similarly situated investors with denied petitions.[39]

• *Timing* — Understandably, investors often do not want to wait until they are ordered deported to challenge the government's erroneous interpretation of the law before receiving a definitive answer from a federal court. Due to substantial backlogs in immigration courts, moreover, it typically takes many months or *years* before an immigration judge will make a decision on an I-829 petition in removal proceedings. For many investors, the delay in litigating an I-829 petition denial is a determinative factor in favor of proceeding in district court.

• *Expense* — For a stand-alone EB-5 investor, litigating an I-829 petition denial before an immigration judge is probably less expensive than challenging the decision in federal court. On the other hand, if a num-

ber of investors within a regional center project are denied, it may be significantly less expensive to fight *all* of the investors' cases in a single federal lawsuit than to litigate each individual's case before an immigration judge.

If investors and their attorneys believe they have a strong case, they should consider an additional factor. Under the Equal Access to Justice Act (EAJA), the prevailing party in a lawsuit against the government may recover a portion of attorneys' fees and costs associated with the lawsuit provided that the government's position was not "substantially justified."[40] In order to qualify, the investor's net worth must not exceed $2 million at the time the lawsuit was filed.[41] Only fees and costs associated with the federal litigation are eligible. Thus, in cases where the prospects of prevailing are high and the potential plaintiffs have sufficiently low net worth, the potential recovery of fees and costs may mitigate the long-term costs of litigating in district court.

Conclusion

The denial of an immigrant investor's I-829 petition entails nothing less than potential banishment from the investor's newly adopted country. Given the severity of the consequences, it is imperative that investors and their attorneys quickly develop a solid strategy to preserve the investor's immigration objectives. It is our hope that the discussion in this article may assist investors and practitioners with developing such a roadmap.❑

[1] 8 U.S.C. §1186b; INA §216A.
[2] INA §216A(c)(3)(B).
[3] INA §216A(c)(3)(C) (emphasis added).
[4] INA §216A(d)(1).
[5] 8 C.F.R. §216.6(a)(4).
[6] *Matter of Izummi*, 22 I. & N. Dec. 169 (Assoc. Comm'r 1998); *Matter of Ho*, 22 I. & N. Dec. 206 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I. & N. Dec. 158 (Assoc. Comm'r 1998).
[7] *Chang*, 327 F.3d at 927.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 929.
[11] *See* USCIS, *EB-5 Adjudications Policy*, PM-602-0083 at 26 (May 30, 2013).
[12] There are, however, strong reasons to believe doing so would be consistent with the purposes underlying the removal of conditions process. One reason is that Congress modeled the I-829 petition process after a similar process for recent spouses of U.S. citizens and LPRs designed to prevent and deter marriage fraud. *See generally* INA §216. Indeed, the removal of conditions process for immigrant investors was included under a section described as a provision for "Deterring Immigration-Related Entrepreneurship Fraud." *See* S. Rep. No. 101-55 at 16. Denying the I-829 petitions of immigrant investors who "sold businesses, uprooted from their homelands, and moved to the U.S." in reliance on USCIS's approval of their I-526 petitions (*see Chang*, 327 F.3d at 928), when those investors have invested the required funds and followed through with their investment plan seems inconsistent with the anti-fraud purpose of the removal of conditions process.
[13] Donald Neufeld, Acting Associate Director, Domestic Operations, *Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions* 5 (Dec. 11, 2009).
[14] *Id.* (emphasis added).
[15] *See id.* n. 3 (citing *Matter of Katigbak*, 14 I. & N. Dec. 45 (Comm'r 1971)).
[16] *See, e.g.*, Joseph P. Whalen, *Eligibility at the Time of Filing Misapplication of Very Specific I&N Decisions Holdings and Principles to Too Many Circumstances*, IMMIGRATION DAILY, *available at* http://www.ilw.com/articles/2011,0301-whalen.shtm.
[17] *See Arnott v. USCIS*, 290 F.R.D. 579 (C.D. Cal. 2012).
[18] EB-5 Memo at 25.
[19] *Id.* at 25-26.
[20] 8 C.F.R. §216.6(d)(2). The AAO has jurisdiction to reconsider an I-829 petition denial only if USCIS certifies its decision to the AAO for review. However, there is no legal mechanism for an investor to request certification of a decision.
[21] 8 C.F.R. §103.5.
[22] 8 C.F.R. §103.5(a)(iv)(2).
[23] 8 C.F.R. §103.5(a)(iv)(3).
[24] 8 C.F.R. §103.5(a).
[25] INA §216A(b)(2).
[26] 8 C.F.R. §216.6(d)(2) (providing that USCIS "shall issue an order to show cause" — the predecessor of the Notice to Appear — initiating removal proceedings upon the issuance of an I-829 petition denial); *see also* Policy Memo, USCIS, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear*, PM-602-0050 (Nov. 7, 2011) at 2, published on AILA InfoNet at Doc. No. 11110830 (noting that "USCIS will issue an NTA" upon I-829 petition denial because it is required by regulation).
[27] INA §216A(b)(2).
[28] *Matter of Del Orden*, 25 I. & N. Dec. 589, 593-94 (BIA 2011).
[29] INA §216A(b)(2).
[30] 8 U.S.C. §1103(a)(1).
[31] *See generally* INA §240.
[32] INA §240(b)(1).
[33] ADJUDICATOR'S FIELD MANUAL §25.2(k).
[34] When litigating an I-829 petition denial in immigration proceedings, investors and their attorneys should be aware of other forms of relief for which the investor may qualify in the event the immigration judge affirms the denial of the I-829 petition. For example, some EB-5 investors left their home country to escape political oppression or other forms of persecution. These investors may be eligible to apply for asylum or withholding of removal. Additionally, some investors (or now-adult children of investors) may have married a U.S. citizen or LPR during their period of conditional residency, and may, therefore, be eligible to obtain permanent resident status as an immediate relative of a U.S. citizen or through a family-based preference category. Other, somewhat less comprehensive alternatives include DHS's exercise of prosecutorial discretion (in which DHS agrees to join in a motion to administratively close the removal proceedings), or a grant of voluntary departure. While a detailed discussion of these alternative forms of relief (and others) is beyond the scope of this article, it is important for investors and their attorneys to bear them in mind.
[35] INA §242(a).
[36] *See, e.g., Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2001) (rejecting the government's position that "EB-5 sets forth an administrative process requiring that appeals of the rejection of I-829 petitions take place solely through removal hearings, and thus that the district court had no jurisdiction to hear [the investor's] claim"); *Lee v. USCIS*, No. 10-cv-1423-DOC, 2011 WL 10858556 at *3-6 (C.D. Cal. June 2, 2011).
[37] *See Chang*, 327 F.3d at 924 (finding jurisdiction in part because the claims raised in the case "lie outside the scope and jurisdiction of the immigration judges and the BIA").
[38] *See* IMMIGRATION COURT PRACTICE MANUAL §4.21(a).
[39] *See, e.g., Arnott v. USCIS*, 290 F.R.D. 579 (C.D. Cal. 2012).
[40] 28 U.S.C. §2412(d).
[41] 28 U.S.C. §2412(d)(2)(B).

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