



USCIS Proposed New Rule on Biometrics Affects EB-5 Program, and Especially Regional Center Principals

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DHS is in the process of issuing a [proposed regulation](#) that expands the situations when it can require collection of biometrics, which already included fingerprint, photo, and signature and now would include iris image, palm print, and voice print. Under the proposal, USCIS will require biometrics from principals of regional centers, including people who have ownership, control, or beneficial interest in entities that are regional center principals. USCIS probably will require biometrics with any I-924 request or I-924A annual report from any principal from whom biometrics have not already been taken, but USCIS could specially require a principal to submit to biometrics even outside of the filing cycle. Consulates and USCIS already obtain biometrics from EB-5 investors in the process of adjudicating applications for immigrant visa or adjustment of status, and then I-829 petitions. The rule authorizes USCIS to take biometrics from investors filing I-526, but since most of them file from outside the U.S. and become fingerprinted in becoming a conditional permanent resident it seems unlikely that USCIS will actually require biometrics at the I-526 stage.

Under a recently finalized [rule changing many USCIS filing fee amounts](#) taking effect on October 2, biometrics costs will be incorporated into the filing fees. Thus, it appears likely that the \$17,795 fee for I-924, which will remain unchanged, will include the costs of biometrics from regional center principals. The new \$4,465 filing fee for a regional center's I-924A annual report apparently will include biometrics fees. The new \$4,010 I-526 fee would include fees for any biometrics USCIS will require. The new \$1,130 fee for I-485 adjustment of status will incorporate biometrics fees, but now the initial and extension work and travel authorization applications (I-765 and I-131) will require filing fees totaling an additional \$1,000. The new \$3,900 I-829 fee apparently will incorporate biometric fees for the investor and participating family. Before October 2, USCIS will need to issue new instructions to all the forms to clarify the filing fees and whether any separate biometrics fees are required anymore, especially for Form I-829.

Below are excerpts from the 328-page proposal that USCIS has published in advance of its publication in the Federal Register, on Friday, September 11.

Comments to the proposed rule must be submitted within 30 days of formal publication (probably due October 11) through the Federal eRulemaking Portal at <http://www.regulations.gov>, identified by DHS Docket No. USCIS-2019-0007.

[Preamble]

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6. Regional Center Principals under the EB-5 Program

DHS proposes to require biometrics collection and perform biometric-based criminal history and national security background checks, as well as for purposes of identity verification, on all regional center principals, including U.S. citizens and lawful permanent residents, of an intending or existing regional center as part of its determination of whether the regional center will, or is continuing to, promote economic growth in accordance with regional center program requirements. DHS proposes that the biometric collection for background checks also extend, if the regional center principal is a legal entity or organization, to those persons having ownership, control, or beneficial interest in such principal legal entity or organization. Further, DHS proposes that the biometrics requirement may also include additional collections or checks for purposes of continuous vetting. INA section 203(b)(5), 8 U.S.C. 1153(b)(5), authorizes the EB-5 program, and the regional center program was authorized in 1992 in an appropriations act.⁵⁶ The regulations at 8 CFR 204.6 contain the requirements for employment creation aliens under INA section 203(b)(5), 8 U.S.C. 1153(b)(5), including those investing under the regional center program (also known as the Immigrant Investor Program), and criteria for the designation of regional centers.

With respect to the requirements for regional centers, DHS regulations at 8 CFR 204.6 require the submission of a proposal describing how the regional center, an economic unit, will promote economic growth. DHS regulation at 8 CFR 204.6 also requires updated information to demonstrate continued promotion of economic growth in compliance with program requirements once an economic unit is designated as a regional center. As part of these determinations, USCIS considers whether the principals of the intending or designated regional center, and the regional center itself, are bona fide and capable of credibly promoting such economic growth. Background checks using the biometrics of the principals would provide information relevant to this determination such as instances of fraud, financial crimes, or other activities that would demonstrate a lack of ability to promote economic growth. For example, USCIS could consider whether an applicant for regional center principal had convictions for fraud or financial misconduct, as directly bearing on their ability to promote economic growth, as required by 8 CFR 204.6. Using biometrics, USCIS would screen and vet the applicant for regional center principal in an effort to protect the investors in the regional center. ⁵⁶ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 102-395, sec. 610, 106 Stat 1828, 1874 (1992).

In the EB-5 regional center program, the applicant is the entity seeking regional center designation. “Principals” of a regional center are collectively any persons or entities that own, are in a position of executive managerial authority over, or are otherwise in a position to control, influence, or direct the management or policies of, the regional center entity. In the event that the principal of the regional center entity is a legal entity or organization, USCIS will require biometrics from all persons having ownership, control, or beneficial interest in that legal entity or organization. To identify potential national security concerns relating to regional centers and the individuals who operate them, biometric-based background checks on principals would provide USCIS with relevant information on the people who control the regional centers and interact

with immigrant investors and the credibility of the projects they sponsor. USCIS already conducts background checks on regional center principals based on Social Security numbers.

Biometric-based background checks would also help USCIS verify identities of principals, because there are identified trends of regional centers engaging in fraud.⁵⁷ USCIS tracks when regional centers are terminated; a list is publicly available from USCIS.⁵⁸ With respect to regional center termination, mandating biometrics and ⁵⁷ See U.S. Government Accountability Office (GAO), GAO-15-696, Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits (2015), available at <https://www.gao.gov/products/GAO-15-696>; GAO, GAO-16-431T, Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits (2016), available at <https://www.gao.gov/products/GAO-16-431T>; and GAO, GAO-16-828, Immigrant Investor Program: Progress Made to Detect and Prevent Fraud, but Additional Actions Could Further Agency Efforts (2016), available at <https://www.gao.gov/products/GAO-16-828>. ⁵⁸ See Regional Center Terminations, <https://www.uscis.gov/working-united-states/permanentworkers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regionalcenter-terminations> (last visited Apr. 7, 2020). conducting biometric-based background checks would strengthen USCIS' ability to determine whether a regional center, including through its principals, continues to serve the purpose of promoting economic growth in compliance with program requirements. See 8 CFR 204.6(m)(6).

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E. Interviews

DHS also proposes to amend its regulations to remove 8 CFR 216.4(b)(1) and (2), and 216.6(b)(1) and (2) because the four sections are purely operational and superfluous given the statutory requirements and regulatory revisions at proposed 8 CFR 103.2(b)(9). See INA sections 216 and 216A; 8 U.S.C. 1186a and 1186b. The proposed changes would not alter regulatory eligibility requirements, but rather would clarify certain interview procedures for conditional permanent residents to reduce potential redundancies and ensure greater uniformity within USCIS operations.

1. Alien Spouses [omitted]

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2. Alien Investors

When seeking the removal of the conditional basis for status under INA section 216A, 8 U.S.C. 1186b, INA section 216A(c)(1)(B), 8 U.S.C. 1186b(c)(1)(B), generally requires petitioners who file a USCIS Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (Form I-829) to be interviewed before final adjudication of the petition, although DHS may waive the interview requirement in its discretion. INA section 216A(d)(3), 8 U.S.C. 1186b(d)(3). USCIS recently updated 8 CFR 216.6 to make certain technical changes in the EB-5 Immigrant Investor Program Modernization, Final Rule. See 84 FR 35750. Under current regulations,

USCIS reviews the petition to remove conditions and the supporting documents to determine whether to waive the interview. 8 CFR 216.6(b)(1). If the eligibility requirements for removal of conditions in 8 CFR 216.6(c)(1) have been satisfied, USCIS may waive the interview and approve the petition. 8 CFR 216.6(b)(1). If the eligibility requirements for removal of conditions in 8 CFR 216.6(c)(1) have not been satisfied, USCIS may require that an interview of the investor be conducted. 8 CFR 216.6(b)(1). In addition, under current 8 CFR 216.6(b)(2), unless waived, an interview is conducted by a USCIS immigration officer at the office that has jurisdiction over the location of the investor's commercial enterprise in the United States, the investor's residence in the United States, or the location of the adjudication of the petition, at the agency's discretion.

DHS proposes to modify 8 CFR 216.6 in this rule, because DHS is seeking to reduce redundancy and make its interview and waiver procedures more uniform and consistent across adjudications, as permitted by law. DHS proposes to remove current 8 CFR 216.6(b)(1) because it is redundant with INA section 216A(d)(3), which allows DHS to waive the interview requirement in its discretion in such cases as may be appropriate, and it is not necessary to codify the reason such a waiver may be appropriate in regulations. In addition, proposed 8 CFR 103.2(b)(9)(ii) provides that an interview may be waived by DHS (for an entire population or on a case-by-case basis) solely at its discretion. As the decision whether to waive the mandatory interview is purely discretionary, and the regulation simply reiterates this discretion, the regulation serves no purpose, especially since determining whether the eligibility requirements for removal of conditions in 8 CFR 216.6(c)(1) were established is central to the adjudication of the petition itself.

Additionally, for both alien spouses and investors, DHS is proposing to remove current 8 CFR 216.4(b)(2) and 216.6(b)(2) regarding interview location because the statute already sets parameters for the location of the interview, requiring the interview to be conducted at a location convenient to the parties involved. See INA section 216(d)(3), 8 U.S.C. 1186a(d)(3); INA section 216A(d)(3), 8 U.S.C. 1186b(d)(3). Furthermore, proposed 8 CFR 103.2(b)(9) will address interview requirements generally, making 216.4(b)(2) unnecessary. DHS is also proposing to remove current 8 CFR 216.6(b)(2) so that interviews may be conducted at the locations listed above or at other locations convenient to the parties, taking into account workload, operational needs and capabilities as they evolve.

Lastly, 8 CFR 216.4(b)(3) and 216.6(b)(3) will be redesignated as proposed 8 CFR 216.4(b) and 216.6(b) respectively. Proposed 8 CFR 103.2(b)(9)(iv) provides that failure to appear for a scheduled interview without prior authorization may result in a variety of consequences, including termination of conditional permanent resident status. Under proposed 8 CFR 216.4(b) and 216.6(b), failure to appear for an interview in connection with an alien spouse or investor petition, when requested by USCIS, will result in automatic termination of the alien's permanent resident status. DHS proposes that the petitioners may, before the interview, request, for good cause, (such as, for lack of proper notice of the interview) that the interview be rescheduled or withdraw the petition. Proposed 8 CFR 103.2(b)(9)(v). However, the provisions at proposed 8 CFR 216.4(b) and 216.6(b) would still permit petitioners to request rescheduling or waiver of the interview, for good cause, if the petitioners failed to appear. With respect to a showing of exceptional circumstances for good cause in the asylum context, USCIS proposes to maintain the

status quo. The exceptional circumstances standard is vital to the asylum context as it is a part of the existing regulations, an important tool to referring missed interview cases to an immigration judge without adjudication, and is also applied when an applicant misses a hearing before the immigration judge and is ordered removed in absentia – an order which can only be re-opened by showing exceptional circumstances.

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The third new population component accrues to the set of forms described as Phase III forms, in which biometrics is not broadly collected on currently, but that DHS plans to routinely collect on in the future. DHS obtained the total average filing volume for this set of forms, and annotates the discussion with one particular form, Application for Regional Center Designation Under the Immigrant Investor Program, (Form I-924). As explained in the preamble, DHS will collect biometrics for the principals of regional centers. Regional center principals are typically key leaders in the center, but information concerning them are not captured in formal DHS databases, but rather in individual adjudication reports involving the business plans. DHS was able to sample 130 Annual Certification of Regional Center (Form I-924A) filings from 2017 and found that the average number of principals per regional center is 2.6, which we round up to three. The average filing figure is 428, which is the annual filings for the Forms I-924 and I-924A, which results in a population of 1,284.96.

[Proposed regulation changes]

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§1.2. Definitions.

* * * * *

Biometrics means the measurable biological (anatomical and physiological) or behavioral characteristics of an individual, including an individual’s fingerprints, palm prints, photograph (facial image), signature, iris (iris image), voice (voice print), and/or DNA (partial DNA profile) (subject to the limitations in 8 CFR 103.16(d)(2).

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DNA means deoxyribonucleic acid, which carries the genetic instructions used in the growth, development, functioning, and reproduction of all known living organisms. * * * * *

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§ 103.2 Submission and adjudication of benefit requests.

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(9) *Appearance for interview.* (i) DHS may require any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit or other request, or any group or class of such individuals submitting requests, to appear for an interview at any time. Such appearance may also be required by law, regulation, form instructions, or Federal Register notice applicable to the request type.

(ii) An interview may be waived by DHS, for an entire population or on a case-by-case basis, solely at its discretion.

(iii) Each individual required to appear under this paragraph will be provided notice of the date, time, and location of an interview.

(iv) Failure to appear for a scheduled interview without prior authorization from USCIS may result in denial, administrative closure, dismissal of the applicable immigration benefit request or other request, waiver of the right to an interview, or termination of status, if applicable. USCIS may reschedule the interview at its discretion.

(v) Any individual required to appear under this paragraph or any individual authorized to file an application, petition, or benefit request on behalf of an individual who may be required to appear under this paragraph may, before the scheduled date and time of the appearance, either:

(A) For good cause, request that the interview be rescheduled; or

(B) If applicable, withdraw the application, petition, benefit request, or any other request as provided in 8 CFR 103.2(b)(6).

(vi) For an asylum application or asylum-related benefit, see 8 CFR 208.10.

* * * * *

(13) *Effect of failure to respond to a request for evidence or failure to submit evidence or respond to a notice of intent to deny.* If the petitioner, applicant, or requestor fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons. If other requested material necessary to the processing and approval of a case are not submitted by the required date, the application, petition, benefit request, or any other request may be summarily denied as abandoned.

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5. Revise § 103.16 to read as follows:

§ 103.16 Biometrics services.

(a) *Collection*—(1) Required unless waived. Any applicant, petitioner, sponsor, derivative, dependent, beneficiary, or individual filing or associated with benefit requests as defined in this chapter, or any other request or form of relief, must submit biometrics to DHS unless the request

is exempted or the requirement is waived by DHS. DHS may waive the requirement in accordance with paragraph (a)(5) of this section, a Federal Register notice, or as otherwise provided by law or regulation. This section applies only to individuals submitting applications, petitions, or requests to USCIS, including United States citizens, without regard to age.

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(7) *Reschedule submission.* DHS or its designee may reschedule the biometrics collection at its discretion, or where, before issuing the biometrics notice, DHS received a valid change of address request but the biometrics notice was not sent to the updated address.

(8) *Reschedule timing.* An individual may reschedule their biometrics collection appointment prior to the appointment, for any cause, one time.

(b) *Failure to appear for biometrics collection.* If an individual fails to appear without good cause when DHS or its designee scheduled a biometrics appointment:

(1) *Waiver of rights.* DHS will, as appropriate, deem any right to an interview waived, deny, reopen, refer to the Executive Office for Immigration Review, dismiss, and/or take any other administrative action on any associated pending immigration benefit or other request; or

(2) *Revocation.* DHS may terminate, rescind, or revoke the individual's immigration status, petition, benefit, or relief, where authorized by law.

* * * * *

(c) *Updates to biometrics*—(1) During adjudication. Unless waived or exempted, any applicant, petitioner, sponsor, beneficiary, or individual filing or certain individuals associated with a benefit or other request as described in this chapter, including U.S. citizens and lawful permanent residents, must appear as requested to submit biometrics to DHS upon notice while the benefit or other request is pending with DHS.

(2) *After approval.* Any individual alien may be required to submit biometrics again for purposes of continuous vetting, unless and until he or she is granted U.S. citizenship. A lawful permanent resident or United States citizen may be required to submit biometrics if he or she filed an application, petition, or request in the past and it was either reopened or the previous approval is relevant to an application, petition, or benefit request currently pending with DHS. Regional center principals and, if the principal is a legal entity or organization, persons having ownership, control, or a beneficial interest in the principal legal entity or organization, including U.S. citizens, may also be required to submit biometrics again for purposes of continuous vetting.

(d) *Use and retention*—(1) Biometrics other than DNA. DHS may store biometrics, other than raw DNA, submitted by an individual as required by this section and use or reuse these biometrics to conduct background and security checks, verify identity, produce documents, determine eligibility for immigration and naturalization benefits, or as necessary for administering and enforcing immigration and naturalization laws. Biometrics collected, other

than DNA, may be shared with appropriate federal, state, and local law enforcement; or intelligence community entities; foreign governments, as authorized by law and/or international agreements.

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PART 216 – CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

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

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

§ 216.4 [Amended]

34. Section 216.4 is amended by removing paragraphs (b) introductory text, (b)(1) and (2) and redesignating paragraph (b)(3) as (b).

§ 216.6 [Amended]

35. Section 216.6 is amended by removing paragraphs (b) introductory text, (b)(1) and (2) and redesignating paragraph (b)(3) as (b).