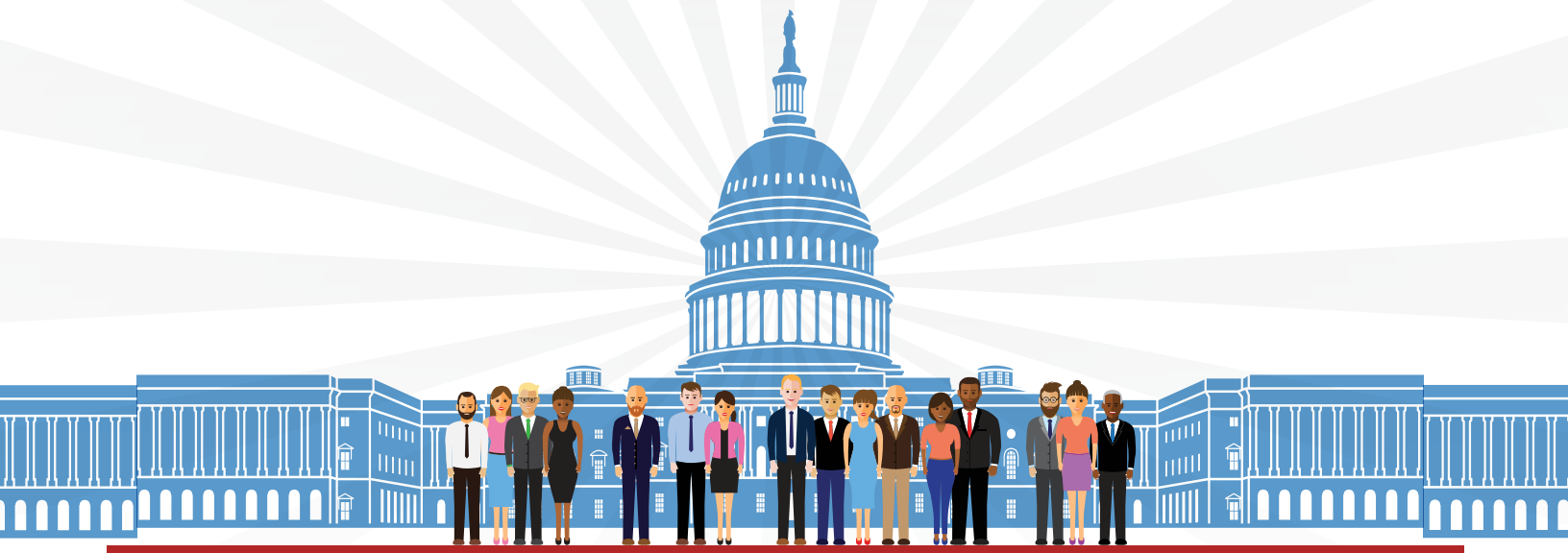

A New Administration Shows Changes in EB-5 Policy Interpretation:

IIUSA Public Policy Committee Responds

NICOLE MERLENE
ASSOCIATE DIRECTOR OF PUBLIC POLICY, IIUSA

ADAM GREENE
PRESIDENT, LIVE IN AMERICA FINANCIAL SERVICES, IIUSA PUBLIC POLICY COMMITTEE CHAIR AND BOARD MEMBER

2017 has been a busy year for EB-5 in Washington D.C., and IIUSA's diverse deliberative body, the Public Policy Committee (the "PPC"), has been hard at work. Below is a summary of the committee's work this past year:

COMMENT ON CAPITAL REDEPLOYMENT POLICY

In June, the U.S. Citizenship and Immigration Services ("USCIS") released an update to its Policy Manual (the "Manual") in Volume 6, Part G in relation to "Job Creation and Capital At Risk Requirements for Investors". As we learned recently from the Citizenship & Immigration Services (CIS) Ombudsman report to Congress, mainland Chinese investors are navigating through the EB-5 process for an estimated 10 years. It is unclear if an investor's investment is required to remain "at risk" both after the requisite two years passes and if the requisite job creation requirements are met. In the case of a potential capital liquidation event, having investments roll into multiple projects that, in some cases, are not specifically contemplated at the time of the initial investment had left a door wide open for unnecessary risk.

The Manual updates that had the greatest impact on policy changes were statements that "capital is properly at risk if it is used in a manner related to engagement in commerce (in other words, the exchange of goods or services) consistent with the scope of the new commercial enterprise's ongoing business." Additionally, "The new commercial enterprise may also further deploy the repaid capital into certain new issue municipal bonds, such as for infrastructure spending, as long and investments into such bonds are within the scope of the new commercial enterprise."

IIUSA believes that USCIS lacks authority to make Program policy changes via revision of a policy memo, and these changes must result from legislation, regulations, or precedent court decisions. Nonetheless, the PPC responded to address policy interpretations and to recommend changes to avoid any ambiguities or unintended consequences.

One major issue that was addressed in the Manual change was whether or not invested capital was mandated to remain at risk after the period of conditional residency. IIUSA questioned the premise that the investment would need to remain at risk after job creation requirements were met. If still required to be at risk, IIUSA argued that, if USCIS considers municipal bond positions to be an investment that is "at risk", it follows that even bank accounts and U.S. Treasury obligations are at risk because they provide opportunity for gain and risk of loss. Other investments that should qualify as "at risk" include investments in real estate investment trusts, or money market accounts, which were shown to carry significant risk during the 2008 financial crisis.

Most importantly, USCIS should consider the real-life hurdles that come with compliance of the new policy. Practically, it is impossible to redeploy immediately as NCE managers seek the appropriate investment vehicle for redeployment, and there should be flexibility for a timeframe that is considered within reason. Regional Centers should also be allowed to make amendments to their private placement memorandums ("PPMs") to comply with updated Manual requirements without the amendment being considered a material change, which would put all current EB-5 investors at risk.

LETTER TO USCIS ON VARIOUS ISSUES FACING THE INDUSTRY

Since the Manual update, and since the turnover to the Trump administration, EB-5 stakeholders have seen drastic changes in petition

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adjudications and the way that the Investor Program Office ("IPO") handles agency policy changes.

In the past few years, there has been an unsettling disconnect between the EB-5 industry and IPO. To bring us back to a place where we can have any substantive conversations with IPO, we suggest the implementation of something akin to a Federal Advisory Committee, similar to what many other government agencies already have in place.

The Public Policy Committee is preparing a comprehensive letter to USCIS, other administration officials and Congress to highlight EB-5 Program issues and to ask for a cooperative approach in addressing them. It is expected that this letter will be delivered to the aforementioned entities by the time of publishing of this article. Some issues existed before the installation of new USCIS personnel, but are still worth reiterating:

- First and foremost, long adjudication times and the massive backlog that we have seen for those coming from Mainland China have caused a huge fall in demand that has potential to harm the U.S. economy.
- Second, unclear guidance on redeployment, discussed above, can cause severe disruption for many investors.
- Third, a continued concern about IPO publishing Regional Center form I-526 and I-829 statistics: Not only was much of the data incorrect, but there was no effort to confirm any of the data with Regional Centers before publishing. A lack of due diligence was flagrant and deserves to be acknowledged as a misstep.

New issues that have been cause for requests for evidence ("RFEs") or notices of intent to deny ("NOIDs") have also appeared with greater frequency. These include:

BRIDGE FINANCING

IIUSA members have seen RFEs and NOIDs questioning the use of EB-5 capital to replace bridge financing. USCIS holds that bridge financing must be contemplated before the commencement of a project and must have a maturity of less than one year. IIUSA refutes both of those premises. In the Manual, there is only requirement that bridge financing be short-term in duration if EB-5 was not contemplated before the bridge financing. This implies that EB-5 may replace bridge financing if it is either (i) contemplated before the temporary financing, or (ii) used as a replacement for short-term financing.

USCIS's interpretation that bridge financing must last less than a year is also misguided, as many financing players know, and precedents demonstrate that bridge financing may last longer than one year. Not only is USCIS's interpretation misguided, but also likely impossible. With adjudication times averaging around 20 months, this is practically infeasible due to long wait times by the agency.

THIRD PARTY GUARANTEES

USCIS has issued NOIDs for projects that are structured with a guarantee made by a third-party entity affiliated with the project. USCIS has stated that a repayment guarantee of a loan provided solely to the NCE is a de facto guarantee to each investor that is prohibited by EB-5 Program rules. USCIS logic is flawed because there is no guarantee that exists which requires a repayment to any investor. Investors have no privacy, the guarantee arrangements are made strictly between two separate legal entities: the NCE and third -party guarantor entity. Each investor's capital contribution remains fully at-risk for the duration of the project development and is subject to normal business risk. Further, if the loan is repaid, even if satisfied by the Guarantor, investors in the NCE may need to remain invested and have the NCE redeploy the capital and remain at risk.

SITE VISITS

Site visits have also caused a bit of confusion and concern for projects sites. USCIS site visits are unannounced, making it difficult for Regional Centers to properly prepare project sites for questions from USCIS interviewers asking employees of a project questions they would not be expected to know and who may have no knowledge of EB-5 at all. Some of these questions include where an individual investor's funds have been put to use in the project, or where indirect job creation is being made. At Stakeholder Engagements and other public appearances, IPO described site visits as "drive by" visits, with little to no interaction with those at the project site. This has not been the case based on feedback from members who have experienced Site Visits and IIUSA has requested more information to better inform those on the ground as to best practices for dealing with a site visit.

THIRD PARTY MARKET STUDIES AND PROJECT PRO FORMAS

An increase in RFEs and NOIDs has surfaced for adjudicator's interpretations of third party market studies as well as project pro forma. Third party market studies are not required, but are allowed to be used to prove items such as financial projections. They are used as a verification of the information being presented. In some cases, adjudicators have asked for verification of these third party studies, essentially asking for verification of the verification evidence. There is little to no guidance from USCIS about what is required of these studies and deference should be provided to the findings of a professional third party specialist. On the issue of project pro forma, there is also little guidance as to what is required. Specific line items such as loan amortization schedules may have not been included, which USCIS claims could make the project infeasible and therefore a NOID could be issued. While we agree that as much data should be included as required in a comprehensive business plan, this should be explicitly written out for clarification to avoid any unnecessary RFEs or NOIDs.

CONCLUSION

As the tides continue to turn both at USCIS and on Capitol Hill, the IIUSA Public Policy Committee will continue its efforts to represent our members to the best of our ability in advocating for practices that will help promote the U.S. economy in an efficient and impactful manner. We are eager to hear of any other issues you have seen from USCIS recently. If you would like to get involved on this committee, email *advocacy@iiusa.org.*