The Evolution of Retrogression to Redeployment - Accessing Redeployment Options in 2017 Redeployment: What, How and Now What?

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Retrogression, the buzzword in EB-5 for the last couple of years, has now given birth to a new buzzword - Redeployment. This article will explore the evolving and interconnected concepts of retrogression and redeployment, including how we got here, the pros and cons of several potential solutions to satisfy U.S. Citizenship & Immigration Services ("USCIS") requirements for redeployment and new possibilities for deal structuring.

HOW WE GOT HERE. The demand for EB-5 visas from Chinese petitioners has far exceeded the available supply. The monthly Visa Bulletin published by the Department of State sets an I-526 filing cutoff date of September 1, 2014 for Mainland China-born investors that can commence the final stage of the permanent residence immigration process by either filing for an Adjustment of Status or for Consular Processing. This delay is referred to as retrogression.

Under current policies of USCIS, as stated in its Policy Manual updated on June 14, 2017 (the "Policy Manual"), every EB-5 investor is required to retain their investment capital "at risk" in the New Commercial Enterprise ("NCE") until such time as that EB-5 investor has been in the U.S. for two years on conditional resident status. The two years commences on the date the EB-5 investor entered the U.S. after the consular interview or obtained a change of status if the EB-5 investor was already in the U.S. under a different visa (the "Sustainment Period").

According to the Citizenship and Immigration Services (CIS) Ombudsman's office, currently it may take a Mainland Chinese-born investor ten years or more to obtain permanent residency under the EB-5 program. As the typical EB-5 loan in today's market has a five year term with two one-year extension options, there is a precarious gap during which EB-5 funds are essentially in limbo. If the EB-5 capital is repaid to the EB-5 investor, that EB-5 investor will no longer fulfill USCIS' requirement for the Sustainment Period, thus disqualifying the investor from approval at the I-829 stage to obtain a permanent green card.

POTENTIAL SOLUTIONS: In the Policy Manual, USCIS confirmed that redeployment of EB-5 funds is permitted and **will not**, in many cases, result in a material change. USCIS also indicated that the redeployment of EB-5 funds must be "within the scope…of the business" of the original NCE and the funds must be redeployed in a manner "related to engagement in commerce," which apparently precludes any purely passive investment, such as an investment in marketable securities. For this reason, if the NCE simply holds the money in a bank or securities account after the repayment of the EB-5 loan, the EB-5 investor will not have met the sustainment requirement and presumably would be unable to obtain his or her conditional immigrant visa or, if already a conditional resident, will be unable to remove conditions on residency.

Although experts agree that there is no definitive answer as to how USCIS will determine that a reinvestment is within the scope of the NCE's business, based upon the language in the Policy Manual, it seems likely that a redeployment of proceeds from the NCE's original investment into a form of investment authorized in the NCE's partnership agreement or operating agreement will meet the requirement that the reinvestment be within the scope of the NCE's business.

One option favored by developers of EB-5 projects is to recycle EB-5 funds into a new project being constructed by the developer. While this is a convenient solution for devel-

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NYC Ritz-Carlton Luxury Hotel Development opers, there are securities and reputational risks for an NCE to consider if subsequent developer projects do not succeed or have a different risk profile than the initial project. After all, when an EB-5 investor chooses an EB-5 project, they spend a lot of time choosing one project over another by analyzing the risk factors of each project. Is it fair that they now be placed into a project not of their choosing but instead chosen by the developer? In addition, a solution of this type seems to provide EB-5 investors a lack of liquidity and no diversification. Once funds have been recycled into a new development project, there is no assurance that they will be available for payback to an EB-5 investor at the end of their Sustainment Period.

Since redeployment does not require job creation, if the initial project has been completed and the required jobs have been created, this presents an opportunity to redeploy EB-5 funds into pooled operational and performing real estate assets without any ongoing development risk. If these loans and investments, or pool of loans or investments, are each secured by a real estate asset, they will be similar to the type of loan or investment in which the initial EB-5 investment was made originally. This option should satisfy the Policy Manual requirement that redeployment be into an investment that is "within the scope of the NCEs business." When choosing such an investment, the NCE should select an investment that has a strong track record so that the redeployment will provide a low level of risk to the EB-5 investors while they continue to await processing of their applications. The NCE should also seek out an investment that allows flexibility and liquidity by providing that each individual EB-5 investor can request redemption of their funds through a flexible redemption option and that allows for repayment as each EB-5 investor satisfies their Sustainment Period.

One example of such an investment involves an investment into a bridge fund facility, with third party fund administration and investment advisory services. The fund provides short term bridge loans to owners of multi-family and healthcare properties underwritten for take-out with permanent financing from government agency programs including HUD, Fannie Mae or Freddie Mac. These loans are secured by proper-

ties across more than one asset class and in multiple locations, thus the fund provides diversification which helps reduce risk to the EB-5 investors. As an example of a redemption option that provides liquidity, this fund provides that each EB-5 investor can be repaid upon completion of their Sustainment Period, thus providing that an EB-5 investor can be repaid promptly once USCIS permits the return of the EB-5 at risk funds.

By redeploying into an investment or fund that has a strong track record, is "within the scope of the NCEs business" and provides the EB-5 investors with liquidly tied to satisfaction of the Sustainment Period, an NCE mitigates the risks to the general partners or managers of the NCE of potential claims of breach of fiduciary duty, violation of U.S. securities laws and legal liabilities associated with redeployment of the NCE's funds into a new investment. In addition, not only does reinvesting EB-5 proceeds into a fund with the characteristics described above allow for investment into a secure, diverse, liquid and compliant redeployment option, the NCE can receive real returns. The example stated above provides for a 4% preferred return to the NCE, paid quarterly to the extent of available cash flow of the fund and net of fees. While the preferred return is not guaranteed, it is structured such that the developer will incur the first 10% loss.

POTENTIAL FOR CHANGES IN STRUCTURING: Having the option of a secure, diverse, liquid and compliant redeployment program also makes it possible for sponsors and developers to confidently structure shorter loan terms and to take advantage of market cycles. Some asset classes, such as condominiums, are not suited for five or seven year loan terms due to the ability of a developer to exit (sell or refinance the property) soon after the sale of units. Even for a multi-family or hotel project, the option to repay the loan after seven years is clouded by the at-risk requirements of capital. Redeployment provides flexibility, allowing for a sale or refinance of a project at the most opportune time, knowing that the EB-5 loan can be repaid and the proceeds redeployed into a safe and liquid investment program until EB-5 investors may be repaid.

Another option for developers with their own regional center is to simply structure a longer loan or preferred equity position which would negate the need for a redeployment strategy. This option works well for the developer as they can recycle the capital to two or three projects; however, it would seem that this may not be the safest and best solution for the EB-5 investor. First, if the developer and the regional center are related entities, this creates a conflict of interest and, as with the recycling of proceeds discussed above, the EB-5 investor's capital could arguably be at greater risk in this type of arrangement as the EB-5 investor can be placed into projects that they have not had the opportunity to vet or approve.

In conclusion, the evolution of retrogression to the need for a redeployment vehicle is a new issue for the EB-5 industry. There is no indication that processing times will decrease, so including a redeployment strategy in the original Private Placement Memorandum, Business Plan and Limited Partnership Agreement/Operating Agreement for each project is highly recommended. In choosing a redeployment option, while it is important to take into consideration the policies of USCIS, it is also important to consider the needs and concerns of the EB-5 investors and to make certain that the redeployment option chosen provides them with a USCIS compliant, safe and liquid option while they await for the final adjudication of their visa.

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