Creating Jobs Through EB-5 Investment

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Attention:
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Julia L. Harrison, Immigrant Investor Program Office
Kathy Nuebel Kovarik, Office of Policy and Strategy
Mariela Melero, Customer Service and Public Engagement Directorate

RE: Major Issues Facing the EB-5 Industry

Dear Sir and Madams:

Invest In the USA ("IIUSA") is a trade association with over 220 Regional Center members that accounts for the vast majority of the billions of dollars of investment capital and hundreds of thousands of created jobs in diverse communities across the country through the EB-5 Regional Center Program (the "Program"). We respectfully submit this letter to propose means to ***facilitate critical issue resolution*** and to ***highlight current issues*** that we believe impede the Program's efficiency and effectiveness.

I. Facilitate Critical Issue Resolution

We ask that the Investor Program Office ("IPO") engage with EB-5 stakeholders in direct and substantive communication to resolve ongoing programmatic issues. Currently, IPO mostly engages stakeholders through case-specific adjudications. Our members report that such a case-by-case process often takes two or more years to settle. Stakeholder meetings often are extremely limited in scope and have a format that does not facilitate back and forth discussion of generic issues. Direct communication would lead to a more efficient process that would, in turn, reduce processing times while maintaining and improving EB-5 Program integrity.

Some issues involve processing, while others implicate policies that have not gone through proper legislative or regulatory processes, or even general public comment that stakeholders who are not the subject of the adjudications can even know about. To address these issues, IIUSA requests that the IPO engage EB-5 stakeholders in ways that are common in other agencies throughout the federal government. Agencies, including the Securities and Exchange Commission ("SEC"), the Federal Bureau of Investigation ("FBI") and the Internal Revenue Service ("IRS"), have valid processes to interact with stakeholders that maintain the integrity of their missions.

IPO has cited the Federal Advisory Committee Act as the reason it is unable to engage in dialogue. While formation of a Federal Advisory Committee is one possible means of communication, we do not believe a Federal Advisory Committee is mandated by the level of communication we seek, and that exceptions to FACA would apply. As explained on the website of the Office of the General Counsel, there are several exceptions to FACA:

> *Certain types of communications with the public likely will not fall under the FACA. These include, in general:*
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> - *Meetings where only individual (and not consensus) input is sought, such as workshops, town hall meetings, "listening sessions" and similar venues,*
> - *Meetings with pre-existing groups formed by the private sector, such as environmental organizations or trade associations where the group has already formulated the views it wishes to provide to the Government, and*
> - *Meetings where the Government is either giving its views to the private sector, or is assisting the private sector in developing guidance for itself.*
>
> See https://ogc.commerce.gov/page/frequently-asked-questions-about-faca

IIUSA is a trade association that has already-formulated views it wishes to provide to the Government. Therefore, IPO is not required to form an advisory committee to engage with us. Accordingly, we ask the IPO to explore and implement such methods to augment the existing stakeholder meeting process, which can lead to more robust and faster resolution of issues affecting the Program at large.

We think such engagement would also benefit the IPO, by allowing industry leaders an avenue to share more global information and insight that would assist the agency in its adjudications and in its formulations of policies and procedures.

II. Highlight Current Issues

We have compiled a short list of pressing issues in eight key areas that need urgent resolution. Delay, confusion, and inconsistency undermine the integrity of the Program and have real consequences to prospective immigrant investors and the pace of job creation potential that could otherwise be fulfilled. We urge the IPO to focus priority attention on the eight items listed below.

1. Backlog of Adjudications in all Forms

EB-5 program participants have serious concerns about the ever-lengthening adjudication delays in the operation of the Program. These delays undermine not only the reputation of the EB-5 program to prospective immigrant investors, but also undermine the reputation of the U.S. abroad. Delays ultimately dampen investment and job creation in the U.S. economy.

As the DHS Ombudsman's Office noted in its annual report published on June 29, 2017,[1] the IPO is authorized to employ up to 247 full-time employees. Approximately 90 positions remained unfilled as of early March 2017. In our view, even more employees need to be engaged immediately to shorten and maintain adjudication resolution times within established processing time goals.

According to USCIS's processing time chart, as of November 30, 2017, the IPO was currently deciding I-526 petitions filed on December 12, 2015 (24 months), I-829 petitions filed on October 24, 2015 (25 months), and I-924 petitions filed on December 2, 2015 (24 months). Those processing times are only estimates, and vary widely. Many Regional Centers report longer processing times for I-526 petitions, even for projects with already approved I-924 petitions[2]. **[APPENDIX A]**

Moreover, IIUSA member Regional Centers report an increase in requests for evidence (RFEs) on pending I-526 petitions, even for projects with I-526 and I-924 petitions already approved. Many times, the RFEs simply request updated information about a project to assess job creation. That kind of request is not relevant to I-526 adjudications, which concerns whether jobs are *going to* be created, not whether they have *already been* created. Further, if USCIS had faster processing times, such requests would be unnecessary.

In short, the IPO seems to be in a vicious cycle. The longer its adjudications times, the more RFEs it issues to see if a project is going forward. Those RFEs simply lengthen the adjudication processing times.

These problems are affecting all EB-5 projects. The delays are harming the EB-5 program in a variety of ways. Because of USCIS I-924 and I-526 adjudication delays, project developers cannot plan when EB-5 money will be available to their projects, unless they can arrange bridge loans. Meanwhile adjudicators are challenging the duration of bridge financing arrangements that are more than a year, which is shorter than USCIS adjudication times. This is a horrible "Catch 22."

2. <u>Denials for Bridge Financing.</u>

Some IPO adjudicators, either on their own or by policy directive, are incorrectly limiting the circumstances under which EB-5 capital may replace bridge financing. Specifically, USCIS has set forth in adjudications that:

a) Bridge financing must be contemplated before commencement of a project.
b) Bridge financing must have a maturity of less than one year.
c) The amount of bridge financing must be for less than the entire amount of the construction costs of a project.
d) Bridge financing must have a maturity before the anticipated construction completion date.
e) The EB-5 financing terms are not favorable enough to replace bridge financing.

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[1] Citizenship and Immigration Services Ombudsman, Annual Report 2017, at 31 (June 29, 2017), *at* https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf.

[2] As of 4/30/2018, processing times for I-526, I-829 and I-924 were 25-32.5 month, 23-30 months and 17-22.5 months, respectively. The graph in Appendix A reflect December 2017 data and is the most up-to-date graph available from IIUSA at the time of this letter.

f) Back-up financing arrangements used if EB-5 capital does not materialize disqualify EB-5 as the primary repayment source for bridge financing.
g) Bridge loan financing repayment must flow all the way down to the JCE rather than have EB-5 repay the bridge loan provider directly.

USCIS' internal bridge financing policy appears to have bright lines, which are being applied to adjudications, which are contrary to USCIS' written policy, and which are unknown to petitioners at the time of filing. The IPO must clarify its bridge financing policy for adjudicators so that RCs, NCEs, developers, and investors can confidently plan their projects and financing and not have to endure shocking and upsetting RFE's, NOID's and denials that threaten every investor in many projects. The lack of consistent adjudication, and the application of policies developed without public input or visibility, applied retroactively, threatens the viability of the entire EB-5 program: How can projects start and investors invest, based on today's policies, only to find that the projects and investors are adjudicated based on new policies developed while the petitions wait years for adjudication?

Below are some comments about what that policy clarification should include.

<u>Issue (a):</u> Bridge financing must be contemplated before commencement of a project.

Requirements for the use of bridge financing were set forth in the May 30, 2013 Policy Memorandum in effect when petitions were filed, and are currently articulated in the USCIS Policy Manual published as of June 14, 2017. The language from the USCIS Policy Manual is:

"Generally the replacement of temporary or bridge financing with immigrant investor capital should have been contemplated prior to acquiring the original temporary financing. However, even if the immigrant investor financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing that would be subsequently replaced by more permanent long-term financing, the infusion of immigrant investor financing could still result in the creation of, and credit for, new jobs."

The paragraph quoted above specifically states that bridge financing may be replaced even if EB-5 was not contemplated prior to the original temporary financing. Only *in the case that EB-5 was not contemplated before the bridge financing*, did the Policy Memo and does the Manual require that the bridge financing must be short-term. Petitioners could easily provide evidence that EB-5 financing was contemplated in term sheets or in the bridge financing documents, so it would be easy to determine if the first hurdle was met. The plain text of the Policy Manual allows for EB-5 to replace Bridge Financing if it is either (a) contemplated before acquiring the original temporary financing, ***<u>or</u>*** (b) to be used as a replacement for short-term temporary financing. The discrepancy between USCIS' written policy, and the policy used by adjudicators must be rectified and publicly disclosed before being applied in adjudications.

Issue (b): Some Adjudicators require that bridge financing have a maturity of less than one year.

Some IPO adjudicators' interpretation that short term bridge financing may not exceed one year has never been articulated in any written USCIS guidance, is contrary to the written policy, and is inconsistent with finance industry norms. This interpretation seems to be based on an unexplained reference in Black's Law Dictionary relating to corporate or sovereign debt financing, and not real estate project financing

IIUSA disagrees with these IPO adjudicators' position that "typical bridge loan financing will have a loan term ranging from several weeks to a year depending upon the overall project timeline." The duration of bridge financing depends on the needs of the project and its ability to obtain other capital, which may very well result in a term in excess of one year. And when EB-5 capital is contemplated, the time it takes to realize such capital often and quite understandably takes more than a year, given that it takes some time to organize the project and NCE documents for project approval, two years to get I-924 exemplar and/or I-526 petition adjudication, and time to find EB-5 investors in a competitive global market.

In other contexts, federal agencies have recognized longer durations. For example, in a case dealing with fixed and determinable annual or periodical income, the U.S. Tax Court dealt with facts involving bridge financing. Although not relevant to the outcome of the case, the U.S. Tax Court provided a definition of bridge financing. The Court stated, "Bridge financing is short-term financing that aims to provide money for a transaction. It is meant to be repaid after the borrower closes the transaction and can access the capital markets for a mix of short and long-term debt and equity financing."[3] According to the U.S. Tax Court, then, the characterization of financing as bridge financing is found not in the duration of the loan, but in the borrower's intent to replace the financing when the borrower is able to do so.

The common "construction to permanent" loans used in real estate development often have a construction period of 2 years or more. The construction portion is considered a short term or bridge financing to the permanent financing, and permanent financing is typically not available until the property has stabilized. By industry standards a property is considered to be stabilized when the occupancy rate approximates the average occupancy rate in the market for that property type, which frequently is not achieved until two or three years after commencing operations.

A basic Google search also results in multiple sources that suggest that the duration of bridge financing depends on the needs of the borrower and can last more than one year. For example,

- Wikipedia defines a bridge loan as a "type of short-term loan, typically taken out for a period of 2 weeks to 3 years pending the arrangement of larger or longer-term financing."

[3] Container Corporation v. Commissioner of Internal Revenue, 134 T.C. 122 (2010) at 124.

- Investopedia similarly provides that bridge financing is "an interim financing option used by companies and other entities to solidify their short-term position until a long-term financing option can be arranged."
- Entrepreneur magazine defines bridge financing merely as "an IOU backed by the promise of raising more money in the future."

Sources from the U.S. Tax Court to Wikipedia suggest that the term of a bridge loan depends on the needs of the project. A bridge loan is inherently temporary if the bridge loan is contemplated, from its inception, to be repaid with EB-5 capital. When EB-5 capital is contemplated from the start, "temporary" should mean the period it takes to bring EB-5 capital to replace the bridge. When EB-5 capital was not contemplated (a fairly rare circumstance), what is "temporary" should be determined in relation to the arrangements that had been made, typically to have a short-term financing source to be replaced by a longer-term source that did not materialize.

<u>Issue (c):</u> **The amount of bridge financing must be for less than the entire amount of the construction costs of a project.**

Some IPO adjudicators are drawing another arbitrary distinction with the requirement that the amount of bridge financing be less than the total costs of a project. A project developer may find any number of different funding sources to commence a project. Senior lenders will not fund under a construction loan unless the entire capital stack is committed. A bridge financing arrangement should not be arbitrarily disqualified if a developer is able to find a single source to cover the costs of a project based on being at least partially repaid by EB-5 financing. Further, if there were sufficient job creation, there is no prohibition against EB-5 capital comprising 100% of the capital for a project. It is illogical to limit bridge financing to some amount less than the full costs of a project.

<u>Issue (d):</u> **Bridge financing must have a maturity before the anticipated construction completion date.**

USCIS written policy requires only that construction of a project is undertaken and successfully completed through the use of interim bridge financing that is to be repaid, not with any arbitrary maximum term. The policy does not articulate any requirement that a project must not be completed before EB-5 successfully replaces interim financing, nor should it.

The job-creating goals of the EB-5 program are served if the use of bridge financing and the eventual reimbursement of such financing with EB-5 funds allow a project to successfully proceed and create the jobs required for each investor.

Current USCIS backlogs and adjudication times have resulted in exemplar or I-526 approvals coming after construction of an EB-5 project is completed. Many EB-5 structures require USCIS approval before investor funds can be released to a project. (Note that these funds are still irrevocably committed to a project upon USCIS approval.) Some developers proceed with job-creating projects because of the advantage of EB-5 financing, which will eventually replace bridge financing. But even then, the project construction cycle might be shorter than the process of obtaining project approval, finding EB-5 investors, and those investors finalizing source of funds evidence and filing I-526s. It would defeat the public policy goals of the EB-5 program to prevent these projects from moving forward because of delays in USCIS adjudications and the necessary time to solicit EB-5 investors and file their petitions.

Issue (e): The EB-5 financing terms are not favorable enough to replace bridge financing.

Some adjudicators have questioned whether certain bridge financing met the requirements of the IPO's bridge financing policy by stating that the bridge was not really a bridge if the EB-5 capital replacing the bridge did not have better terms than the bridge. Specifically, an adjudicator questioned why a borrower would use EB-5 capital when the terms of the bridge loan being repaid were, according to the adjudicator, inferior to the terms of the bridge. That does not make sense in a commercial setting. A borrower would have some incentive to use EB-5 capital, and replace the bridge with EB-5 capital, or the borrower would not enter into the transaction. It is impossible and improper for the adjudicator to determine that the adjudicator's business judgment should be relied on to determine if a bridge is appropriate. Rather, if the parties contemplated a bridge would be replaced with EB-5 capital, the parties must have had a business reason for doing so, and the adjudicators should rely on the parties' judgment, not the adjudicator's.

Issue (f): Back-up financing arrangements used if EB-5 capital does not materialize disqualify EB-5 as the primary repayments source for bridge financing.

It is inherently risky for a developer to rely on EB-5 capital. The EB-5 program does not have a permanent authorization and could easily be terminated, so there is an inherent risk to raising EB-5 capital. As a result, a prudent developer who wanted to use EB-5 capital would develop a backup permanent financing plan in case the EB-5 capital did not materialize to replace the bridge financing. The backup financing plan could be written in one loan agreement or in several, but a prudent developer and many commercial banks will require backup financing in case the EB-5 financing does not materialize. Adjudicators, however, either on their own or with direction from policy-makers, have deemed that the existence of a backup financing was evidence that the bridge was not really a bridge financing, but was instead permanent financing. An adjudicator who decides that a bridge does not meet IPO's bridge financing policy, because back stop financing exists, is requiring the parties not to be prudent and not to have a backup financing in case the EB-5 financing does not materialize. Essentially, this adjudication requires the parties to act in a commercially unreasonable manner and is requiring a financial structure which many prudent banks and other bridge lenders would reject in a commercially reasonable setting.

Issue (g): Bridge loan financing repayment must flow all the way down to the JCE rather than have EB-5 repay the bridge loan provider directly.

Some IPO adjudicators have held that EB-5 funds must flow into the bank account of the JCE even if repaying a bridge loan. This creates an unnecessary administrative burden on EB-5 stakeholders.

In ordinary bridge financing arrangements, a replacement lender may repay the bridge lender directly, which reduces administrative processing and the chance of mishandling of the funds. Often, senior lenders for a project will not allow proceeds of any financing to repay anyone except the senior lender. In addition, under certain states' laws, requiring the borrower JCE to directly repay the bridge lender may cause issues regarding the existence of the mortgage and the need to pay additional and significant mortgage recording taxes.[4] USCIS's requirement that EB-5 funds be injected all the way to the JCE means that the bridge lender, the EB-5 NCE, and the senior lender will need to enter into complex repayment arrangements that essentially round-trip the EB-5 funds into the JCE and then immediately have the JCE repay the bridge financing. Requiring the NCE to pay the EB-5 loan only to the JCE, and requiring that the JCE (and only the JCE) pay down the bridge lender, is form-over-substance, and results in a needless, expensive and risky process with no practical or legal significance, and which is not required by USCIS written policy.

USCIS understandably requires that the bridge financing to be replaced with EB-5 capital will have been made available to the JCE. Since the bridge financing requirements establish the nexus between job creation and the EB-5 capital, it is counterproductive to require complex arrangements to prove the round-trip receipt of money into the JCE account and the immediate repayment of the bridge financing. USCIS should accept a direct repayment to a bridge lender from the EB-5 NCE if (i) funds initially flowed from the bridge lender ultimately into the JCE, and (ii) the payment by the NCE repays and/or reduces the obligations of the JCE to the bridge lender. This satisfies the requirement that the funds are "made available" to the JCE, and is further supported by the repayment obligation that the JCE, or its related entity, will have to the NCE.

3. <u>Denials for Third Party Guarantees & Matter of Izummi.</u>

Some IPO adjudicators have decided incorrectly that a guaranty of repayment issued for the benefit of the New Commercial Enterprise ("NCE") is an impermissible guaranty of EB-5 funds that violates *Matter of Izummi*. This position is incorrect because:

a) The EB-5 investors are not a party to the guaranty, which is a contract among the guarantor and the NCE to provide a credit enhancement for the NCE's investment in a job-creating entity ("JCE").
b) As required by Matter of Izummi, the full amount of every EB-5 investor's capital contribution is made available as an EB-5 investment to the JCE/project for job creation.

[4] For example, in New York State certain development incentives may flow through to a single borrower and single mortgage. Therefore, if the NCE pays the EB-5 loan to the borrower JCE, and the borrower JCE then pays the EB-5 capital to the bridge lender to repay the bridge loan, the mortgage may be deemed to have been reduced by the amount the JCE paid to the bridge lender to pay down by the JCE's bridge loan. In that case, the JCE may be required to get an additional mortgage for the amount of the NCE's loan. Getting an additional mortgage is time consuming and complicated, and will require the JCE to pay significant mortgage recording taxes. Alternatively, if the NCE simply pays the EB-5 capital to the bridge lender to repay the bridge loan, the single mortgage remains, there is no requirement to secure an additional mortgage, and there is no obligation to pay additional mortgage recording taxes. As a result of the risk of needing an additional mortgage, it is most common for permanent lenders to pay the bridge loan directly and not to first pay the permanent loan to the borrower for the borrower to repay the bridge.

c) The guaranty itself remains subject to the credit risk of the party providing the guaranty, and is therefore, at risk. A guaranty to the NCE is simply security for repayment, much as collateral in mortgage granted by the JCE is security for repayment, and both the collateral and the guaranty are at risk.

<u>Issue (a):</u> **The EB-5 investors are not a party to the guaranty, which is a contract among the guarantor and the NCE to provide a credit enhancement for the NCE's investment in a job-creating entity ("JCE").**

Where a guaranty arrangement is made between the JCE (and/or a third party guarantor) and the NCE, no individual EB-5 investor is a party to the documents. The individual EB-5 investors are not promised nor guaranteed any return of capital.

The document governing the EB-5 investors' capital is the NCE company agreement, which sets forth the rights and obligations of the investors. If there is no part of the NCE company agreement that provides for guaranteed payment to the individual EB-5 investors as members or limited partners, there is no guaranty of the return of their capital.

The individual EB-5 investors are removed from any sort of guaranty of a return of the NCE's financial support provided to the JCE. The guaranty is to the NCE for the repayment to the NCE. The EB-5 investors have no contractual right to enforce the terms of a guaranty given by any guarantor in favor of the NCE. The General Partner or Manager of the NCE has broad discretionary power to decide whether or not to call on a guaranty. Such power or management does not extend to the EB-5 investors.

<u>Issue (b):</u> **As required by Matter of Izummi, the full amount of every EB-5 investor's capital contribution to the NCE is made available to the JCE/project for job creation.**

USCIS has questioned whether the individual investors commit the full amount of their EB-5 capital contribution to an NCE and whether the full amount of EB-5 capital will be made available to a JCE for job creation. Specifically, USCIS questioned whether a guaranty to help a JCE repay an EB-5 loan to the NCE, in case of a default or other loss, prevents any of the individual EB-5 investors from placing the full amount of their EB-5 capital "at-risk" as required under the EB-5 program.

A guaranty to the NCE does not prevent the NCE from injecting the full amount of capital into a project. Indeed, a guaranty is offered as consideration and a credit-enhancement <u>*only if*</u> the NCE injects the full amount of capital into a project. When filing their I-829 forms after the period of conditional lawful permanent residence, EB-5 petitioners will demonstrate that the full amount of cash flowed all the way to the JCE. Whether or not there is a guaranty, whether or not the guaranty is called, or indeed whether or not the JCE repays the NCE, the EB-5 petitioners will be able to demonstrate that all of their capital was injected into the JCE.

<u>Issue (c):</u> **The guaranty itself remains subject to the credit risk of the party providing the guaranty, and is therefore, at risk.**

Most importantly, the full amount of the commitment is at risk as there is no assurance that the JCE will be able to repay the EB-5 loan/investment. If the guaranty is called, the guarantor, itself, might not be able to repay.

A guaranty is *not* impermissible because the investment is still held at risk. By definition, a guaranty "denotes the contract of guaranty or the obligation of a guarantor" (*see* Black's Law Dictionary). Just as a JCE could fail to meet its repayment obligations, so could a guarantor. There is a different set of risks, and the intention of a guaranty is to reduce the risk to the NCE, but the EB-5 money is still at risk.

A guarantor on a loan is normal financing and banking practice. USCIS needs to analyze the nature of the guaranty because despite the label, one still needs to analyze how the third-party's debt/liquidity ratios can actually be met if the guaranty is ever called upon. The guaranty does not remove all the risk, but rather is intended as added security to reduce the risk, and it may or may not actually reduce the risk. The 2013 Memo specifically states, "The law does not specify what the degree of risk must be; the entire amount of capital need only be at risk to some degree." The Policy Manual did not repeat that language, but it is no less true, and a guaranty does not eliminate risk to the NCE or the NCE's investors.

While EB-5 investors must make an at-risk investment, the NCE can still take sensible or normal business measures to protect its business assets such as requiring credit enhancements from the JCE/borrower to minimize the risk of default when the EB-5 loan matures.

Any guaranty from any third-party individual or entity is not an assurance of repayment and carries with it commercial risk, thereby leaving the investors' equity investment in the NCE fully at-risk, in full compliance of the law and regulations relating to EB-5.

4. <u>Fully Financed Projects and Common Project Financing Structures</u>

Some IPO adjudicators are issuing RFEs for projects calling into question normal financing practice for real estate construction projects. Specifically, some RFEs have stated that:

a) Project financing plans that do not have executed term sheets for all sources of financing are not credible.
b) Typical mezzanine loan financing structures call into question whether the EB-5 funds will be injected into the JCE.
c) EB-5 capital lent by the NCE to the JCE together with other lenders (structured as a participating loan or with a participation agreement) may not be deemed a loan to the borrower.

<u>Issue (a):</u> Project financing plans that do not have executed term sheets for all sources of financing are not credible.

USCIS has issued RFEs and NOIDS for business plans that describe credible sources of finance for a project. I-924 petitions requesting exemplar approvals are often submitted more than a year in advance of the start of a project. This lead time is needed due to USCIS adjudication times (see item 1 above). Project sponsors rarely have signed term sheets for all sources of financing so early in planning for a project.

The Burden of Proof standard for approval of a petition is outlined in the USCIS Policy Manual, Vol 6, Part G, (November 30, 2016) Chapter 2(E):

"E.) Burden of Proof

The petitioner or applicant must establish each element by a preponderance of the evidence. The petitioner or applicant does not need to remove all doubt. Even if an officer has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads to the conclusion that the claim is more likely than not (that is, probably true), the petitioner or applicant has satisfied the preponderance of evidence standard."

By requiring signed term sheets, USCIS is imposing a higher standard than required by the Policy Manual. As a practical matter, senior lenders and other sources of finance will want to know the sources of other elements of the capital stack before issuing a term sheet. If the EB-5 source cannot be structured nor explored before asking for the term sheets, job-creating projects face a chicken-and-egg problem that is not resolvable.

USCIS can conclude generally that construction financing assumptions for a project are reasonable without requiring signed term sheets or closed loans. The requirement for fully financed deals leads to a necessary conflict with the USCIS stance on bridge financing: If a project must be fully financed and underway to receive exemplar approval, but bridge financing is only acceptable under limited circumstances, no project will be able to benefit from the eventual injection of EB-5 capital.

The preponderance of the evidence standard allows USCIS to question whether the capital stack is sufficiently credible so that the eventual jobs will be created. To be credible, this standard should not require fully executed loan documents or even a signed term sheet for the non-EB-5 sources of capital. Separately, EB-5 investors make the decision about whether to take the risk of investing in an NCE that will invest in a project whose entire capital stack is in the early stages.

<u>Issue (b):</u> Typical mezzanine loan financing structures call into question whether the EB-5 funds will be injected into the JCE.

Some IPO adjudicators have questioned whether EB-5 funds will flow to the ultimate JCE when an NCE uses typical financing structures including mezzanine loans. In project financing with multiple sources of capital, it is common for each source of capital to benefit from different forms of collateral. To accomplish this, a JCE will often have multiple tiers of ownership, and the NCE will lend to an upper tier (i.e., mezzanine) entity, which will, in turn, send the loan proceeds downstream, ultimately to the JCE, which is the entity most closely associated with job creation. Often senior bank lenders refuse to allow any other loan into the project, so that the only way to protect the NCE with security may be for the NCE lender to be secured with a pledge of the borrower/owner's ownership interest in the project.

As an example, in the Capital Trust, Inc No-Action letter issued by the SEC on May 24, 2007,[5] the SEC staff opined that mezzanine loans represent an interest in the entity holding real estate similar to a loan such that the mortgage loan exemption to the Investment Company Act could apply. The various upstream entities are established by the different lenders and other sources of finance to facilitate their priority of repayment, but the underlying investment rationale remains an investment in real estate. For EB-5 purposes, the analogy is that the loan to the upstream entity represents an injection of EB-5 capital into the downstream entity, the JCE.

Some IPO adjudicators have issued RFEs and NOIDs claiming that financing into mezzanine entities calls into question whether the EB-5 funds will make it to the JCE. This is an improper reading of typical financing structures.

<u>Issue (c):</u> EB-5 capital lent by the NCE to the JCE together with other lenders (structured as a participating loan or with a participation agreement) may not be deemed a loan to the borrower.

The use of participation agreements, or syndicated loans, is a very common financial mechanism that is often necessary to finance larger projects. Specifically, in commercial real estate financing it is very common for multiple lenders to pool their capital into a single loan to the borrower. This is especially true in larger developments where the debt required is larger than the amount a single lender is allowed to lend. Commercial banks, for example, have legally mandated "loan limits" on the amount a single bank can lend to a single borrower (or a borrower's related companies), or into a particular economic activity or asset class, and similar limits on their ability to make larger loans. Lenders will also often restrict the amount they will lend to a single borrower or into a single asset class in order to limit their credit risk.

As a result of these limits on the size loans a single bank will make, it is very common in larger transactions for banks to "participate" or "syndicate" a large loan to a group of lenders. In this loan structure, one of the lenders is designated as the "Lead Lender" and the other lenders are designated as "Participants" or "Participating Lenders". For example, if the borrower requires $100 million loan for a project, there may be a Lead Lender and 4 Participating Lenders, each of which lends $20 million to the developer, in the form of a single $100 million loan.

In addition to meeting the legal and practical limits for the amount a single lender can lend to a borrower, there are other practical reasons for a participation loan structure. First, the borrower will have one set of loan documents and one Lead Lender with whom to work to service the larger loan during its term, which is dramatically more cost effective than requiring several different sets of legal agreements, closings and bank relationships. In the event of an issue arising during the term (e.g., a default by the borrower), the Lead Lender will negotiate many (though generally not all) the issues regarding the loan (usually done in concert with the other lenders).

[5] See https://www.sec.gov/divisions/investment/noaction/2007/capitaltrust052407-3c5c.pdf.

The Participating Lenders also benefit. They are able to make loans with other banks, and thereby diversify their portfolio and limit their overall credit exposure to a single borrower. Furthermore, in the event of a default, the Lead Lender and Participating Lenders have a participation agreement that governs how to manage the default. If the banks each lent individually, each bank would have to act independently in the event of a default, which would be extremely chaotic and inefficient for all the parties. Finally, knowing that the NCE will lend a portion of the total loan, together with other participants, is often cited by lenders as a reason they are able to make the total loan.

An NCE that makes a loan to a JCE as a Participating Lender can meet the requirements of the EB-5 program. The NCE would participate with other Participating Lenders in a single, large loan to the JCE. Usually the NCE would make its loan of EB-5 capital by purchasing an interest in the larger loan (as do all the Participating Lenders). The NCE's capital is made available to the JCE initially as a payment to the Lead Lender who funds loan proceeds to the JCE borrower. (See Issue 2(g) above for reasons why such a payment should be allowable.) The NCE would then receive payments (interest and, eventually, principal) on the EB-5 loan from the JCE as agreed to in the loan documents. The JCE would be obligated to repay the NCE as the JCE is obligated to repay all the lenders. In the event of a default, the NCE would look to only the JCE for repayment, and not to the Lead Lender or any of the other Participating Lenders (only the JCE is obligated to repay the NCE).

The NCE's EB-5 loan, made as a participating loan to a JCE with other lenders, can meet the requirements of the EB-5 program. Loan participations are an efficient and common means of lending EB-5 capital to a single JCE in situations where the loan amount is larger than a single lender is willing or able to lend.

5. Site Visits

We suggest that USCIS give the regional center or NCE advance notice about site visits so that regional center or NCE personnel can be present at the site to answer questions. The site visit officers should also receive proper training about the EB-5 Program and indirect job creation methodologies so they could better direct their inquiries.

As announced in numerous USCIS stakeholder calls over the last two years, USCIS has begun site visits to supplement its EB-5 adjudications. IIUSA strongly supports USCIS efforts to insure integrity and the concept of site visits. Based on information from our Members, IIUSA has been told the following:

- Site visits are at the job creating entity (JCE) site, not the regional center or new commercial enterprise site.
- Site visits are unannounced.
- Site visits appear to be in connection with Form I-829 adjudication, not I-924 or I-526 adjudication. Regional center compliance reviews, on the other hand, may take place at any time.
- Site inspectors verify information in the petition and existence of the business(es).
- Site inspectors take photographs and interview personnel at the site.

- Site visits are conducted by Fraud Detection and National Security (FDNS) directorate, not by Investor Program Office (IPO), itself.
- The FDNS officer creates a Compliance Review Report after the inquiry, which becomes a part of the record.
- Site visits are part of a larger USCIS verification program aimed at sites employing religious workers, H-1B workers, and L-1 workers.

Based on recent experience, site inspectors appear to be unfamiliar with the project record. Here are some sample questions asked at a site visit, to individuals at site who are not in a position to have any experience or knowledge of the EB-5 program, the program's requirements, or the EB-5 transaction involving the site:

a) "How are EB-5 funds being put to use?"

b) "How much EB-5 has been drawn and used by the company?"

c) "How are jobs being created?"

d) "How many workers are on site?"

e) "What is the business of the company? How many employees does the company have?"

f) "How many facilities are in the U.S.?"

It is evident that the site inspectors are focused on job creation and actual employees. This can be a problem if the inquiry is made to individuals who are in no way connected to the EB-5 transaction with the JCE, and particularly if the questions address the indirect jobs associated with the project.

Concerns about Orientation of EB-5 Site Visits:

In other types of petitions, USCIS site inspectors are accustomed to visiting named employers on a worker petition. The inspected business therefore knows or should know that it is on record with USCIS and that USCIS may conduct a site visit.

In the EB-5 context, however, the project site business or businesses may have no idea that any EB-5 capital was used, or even know what EB-5 is. Consider a large-scale construction project involving an office tower and retail on the ground floor. USCIS site inspector arrives and begins questioning retail and office tenants with the questions listed above. The tenants have no idea why they are being asked these questions and would understandably be alarmed or at minimum, confused, about why they are being asked these questions by fraud investigators at USCIS. They would not know whether they were required to answer the questions, how best to answer if they even have knowledge enough to answer, and more likely than not, their answers might be unrelated to USCIS' objectives and might cause significant and unnecessary concerns to all parties. Consider these questions being put to a cashier at a retail clothing store.

Other problems center around project site location. A Greenfield project's only "address" may be a census tract. If a site inspector is unsuccessful in finding the location, one imagines what Compliance Review Report might say: "Project site not found," "Project site unverifiable," or perhaps even "Project site nonexistent."

A similar problem arises from the type of business. For example, a manufacturing plant is not a retail store and may not be set up to receive visitors. What if the entryways are shut for safety? How would a site inspector gain entry or make his presence known? Again, one imagines darkly what the Compliance Review Report might say on that: "Site doors shut," "Could not find entryway," or "No sign of commercial activity." In that instance, no one may know that the site inspector was even there so that someone can explain how the facility works.

While USCIS has assured stakeholders that regional centers should not be alarmed, we have seen issues already arising with inspectors questioning startled tenants, arriving at wrong addresses, and asking questions seemingly targeted toward finding direct employment which is an irrelevant measure of job creation in most regional center projects based on indirect job creation.

6. Redeployment.

In June 2017, IIUSA provided comments on the recent updates to the USCIS Policy Manual (the "Manual") regarding "Job Creation and Capital At Risk Requirements for Investors" (Volume 6, Part G) published on June 14, 2017. **[APPENDIX B]**

Greater clarification is required with respect to (i) whether redeployed funds should be allowed to lead to more job creation (though should not be required); (ii) specifically what qualifies as "at-risk;" (iii) what are acceptable time frames for redeployment; and (iv) how deference should be applied to approved project redeployment strategies. As processing times continue to increase, without greater detail and guidance, the Manual revisions will present a great number of foreseeable challenges to the adherence to the redeployment requirements, as interpreted by USCIS.

Due to the visa backlog, China-born investors might expect a decade-long wait to obtain their conditional permanent residency. As a result, under the current policy, NCEs that have received EB-5 investment from China-born investors will manage the EB-5 investment in one or more redeployment projects in the next decade. Lack of clear guidance from the USCIS could lead to grave consequences for the EB-5 investors who, even after contributing to the successful execution of the job-creating project and satisfaction of job-creation requirements, would still face risk and uncertainty for a decade that they may lose their eligibility for permanent residency. This would happen if USCIS deems that redeployment of funds did not qualify under the "at-risk" or other requirements when adjudicating an I-829 more than a decade after an EB-5 petitioner invests.

USCIS needs to clarify that, at least once enough jobs have been created (in the TEA(s) and RC areas originally planned), redeployment need not be within such TEA or RC area and need not be "approved" or "sponsored" by the RC or any RC and need not create any more jobs. USCIS expressly acknowledged in the Nov. 7 meeting (and published comments of Ms. Harrison) that there is a trickier question about this when not all the necessary jobs have been created and said it is working on the issue. IIUSA requests an update on IPO's views on this issue.

USCIS also needs to clarify its vague comments about the need for redeployment to be within the "scope of the I-526 record" before the investor has been admitted as a conditional resident. First, as long as sufficient jobs have been created already, there should be no such limit on scope of redeployment investment, as there is no reason or legal basis for drawing this line, and USCIS needs to appreciate how complicated this policy would be to pick and manage redeployment investments for NCEs with investors from different countries (including China) who have subscribed at different times and who face different waits for visa numbers, since different investors will be crossing the CPR threshold at different times.

And if USCIS refuses to relax this "scope of I-526 record" exception, it needs to provide much more clarity on its meaning. First, what if the NCE's organizing agreement allows it to redeploy in any industry with wide discretion to the manager/GP? Technically that defines the scope of the I-526 record, because that agreement was filed with the I-526. But NCEs need confirmation of this interpretation.

We appreciate that USCIS in the most recent policy manual recognizes that retrogression and the need for redeployment may not have been contemplated at the time of formation of many NCEs now facing this issue and we want to confirm our understanding of the current policy manual which states:

> If the organizational documents for a new commercial enterprise contain a liquidation provision, …[T]**the documents may generally be amended to remove such a provision in order to allow the new commercial enterprise to continue to operate through the regional center immigrant investor's period of conditional permanent residence.** Such an amendment **would generally not** be considered a material change because facts related to the immigrant investor's Form I-526 eligibility would not change. (Policy Manual p. 36)

Offering documents with a liquidation provision obviously did not contemplate redeployment, or the concept of an ongoing business, and thus neither would not have been described in the original I-526 record. However, the policy manual by this language, allows an amendment to the offering documents to correct the problem – so that the NCE can maintain the business through the investors' sustainment period. Based on this language regarding the liquidation provision, it would seem that USCIS has correctly determined that an amendment (which may be necessary as a matter of partnership or securities law in any case), for the purpose of allowing the NCE to continue the at-risk investment of its limited partners is not a material change, and that the issue of "scope of the NCE's business" ***can for immigration purposes,*** be addressed/cured by an amendment to a single purpose LPA.

If USCIS takes a narrow approach on the issue of scope, it needs to clarify how to determine if an investment falls within the scope of the I-526 record - ostensibly that it is similar to the original project(s). Is an investment in a real estate investment trust (or fund of such) sufficiently similar to an original investment in a hotel or commercial building? What about investment in a fund that includes real estate assets, but does not invest exclusively in real estate? If the original investment was in one or more restaurants, exactly what types of redeployment investments would be acceptable? What about an investment in food commodities?

And what is the meaning of USCIS' mentioned example of an investment in first-issue bonds for a government construction project? Is such an investment deemed sufficiently similar to any kind of original project? Why would that be so? The more one tries to understand any lines to draw in regard to the "scope of the I-526 record," the more exposed is the lack of any rational or legal basis in the requirement of similarity. USCIS should abandon this notion and recognize that, at least once the jobs have been created in the original project(s), there is no limit on the types of redeployment as long as it is at risk, regardless of the immigration progress of the participating investors.

Finally, USCIS needs to recognize the breadth of redeployment investments that would be "at risk" in "commercial activity." This should be recognized to include investment in the broad array of passive investment vehicles available to investors through publicly traded stocks, bonds, mutual funds, hedge funds, private equity funds, etc. - all of which are at risk even though they may be structured intentionally to reduce risk. IIUSA's position remains that the investment need only be sustained, but not remain at risk after an investor's requisite job creation requirements have been met.

7. I-526 and I-829 Data Publication

IIUSA and its members have long advocated for transparent operations of USCIS, the IPO, and the EB-5 Regional Center Program. However, the publishing of I-526 and I-829 approval and denial statistics by USCIS[6] in June 2017 was both irresponsible and damaging for the program and individual Regional Centers. In just the first two days of being aware this information was publicly available, it was brought to our attention that the data was deeply inaccurate.

Every Regional Center member we spoke with indicated that the data published on the USCIS website for their specific Regional Center did not match the reality of their actual approvals and denials. This includes several Regional Centers who had never received a denial, yet data showed they had several, or other Regional Centers who had multiple approvals in one year, but USCIS records reflected far fewer. If this is the case for a small sampling of Regional Centers, it is likely the case for the vast majority of the Regional Centers included in the list.

Given the gross discrepancy between the USCIS data and Regional Centers' track records, we appreciate that this information was removed from the website in a timely manner. However, the publishing of the data still caused a major market disturbance. Until USCIS has taken the necessary steps to confirm all data with Regional Center records and rectify discrepancies, this should remain off its website. Even though the data was removed, the information was downloaded by an unknown number of stakeholders and will remain in the public domain, continuing to cause ongoing damage to the businesses on the list.

One thought on the discrepancy in denial numbers was that petition withdrawals were being counted towards denials. In many cases this still does not completely account for the data inaccuracies, but nonetheless should be addressed and categorized as a separate statistic, as a

[6] https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers.

withdrawal is very different than a denial. A withdrawal is often unrelated to the qualification of the petition, such as death or loss of interest of an investor.

Another issue that has risen was that there was only a one-year timeframe. In some cases, a regional center closed out multiple projects two to three years ago and received many I-829 approvals, but only just started a new project that shows only a handful of I-526 approvals. The disconnect is in this area is glaring for some of our members who have been long time participants in the Program.

It is inherently confusing to publish statistics on I-526 adjudications without indicating whether the denial dealt with project issues or investor issues. Potential investors might want to be aware generally of a rate of I-526 denials based on investor issues (source of funds), but this should not be a factor in their decision on which investment opportunity to pick sponsored by which regional center. Also, some project denials that might have resulted in denial might have been cured on refilings, and the data should be presented in some way that allows investors to understand the circumstances (admittedly, this might be quite difficult, but that difficulty speaks to whether it is fair to publish the data maintained).

Regional Centers should be given the opportunity to review the data USCIS intends to publish and provide any supporting information to remedy incorrect data before it is made public. We suggest that USCIS contact each Regional Center individually and allow for a 60-day response window from the Regional Center to verify the data. If there are discrepancies between the Regional Center data and USCIS data, USCIS should issue a RFE and work together with the Regional Center to ensure data accuracy and consistency.

This imprudent publishing of data had an immediate negative effect on Regional Centers. Investors, agents, and attorneys contacted Regional Centers, with deep concern about the amount of denials reflected for I-526 and I-829 petitions and continued to receive communications for several weeks, even after the data was removed from the USCIS website. The incorrect data flagged concerns for investors and potential investors about Regional Centers' viability and credibility and created a false sense of dishonesty on the part of the Regional Center in its marketing of projects and track record. All of this unfairly stalls and potentially halts a Regional Center's ability to bring capital to their projects that are creating jobs and improving local American economies.

Because it matters how this information is subsequently released, IIUSA has diligently developed a process by which we collect this data, break it down, painstakingly analyze it and ultimately disseminate it, but not without first seeking input from stakeholders. We pride ourselves as a data-driven organization, so our staff has spent countless hours collecting and analyzing data. We respectfully request that USCIS disclose, in detail, the process it undertakes for data integrity before releasing this information.

8. <u>Third Party Market Studies.</u>

IIUSA members have begun to see some cases of RFEs or NOIDs requiring underlying data, assumptions, and methodology supporting market studies by well-respected independent third-parties, even with multiple third-party reports. This is essentially asking for verification of the verification. USCIS should afford reasonable deference to the opinions and findings of professional third-party specialists, many of whom are locally based. Requiring such detail upon detail goes beyond requiring preponderance of the evidence for a risk-based investment. Adjudicators should be trained to accept reasonable evidence on this issue.

<u>Conclusion</u>

We appreciate your consideration of these issues. We believe each of the issues outlined are important policy issues that merit direct discussion among USCIS and stakeholders. It is inefficient to establish policy for these and other issues through multiple RFEs or NOIDs, which are, themselves, often inconsistent. A meaningful exchange to work through the issues with EB-5 program stakeholders will help to create rational policies that will facilitate compliance with Program rules and fulfill the Program's potential for job creation. We are eager to discuss these issues in any forum you deem appropriate.

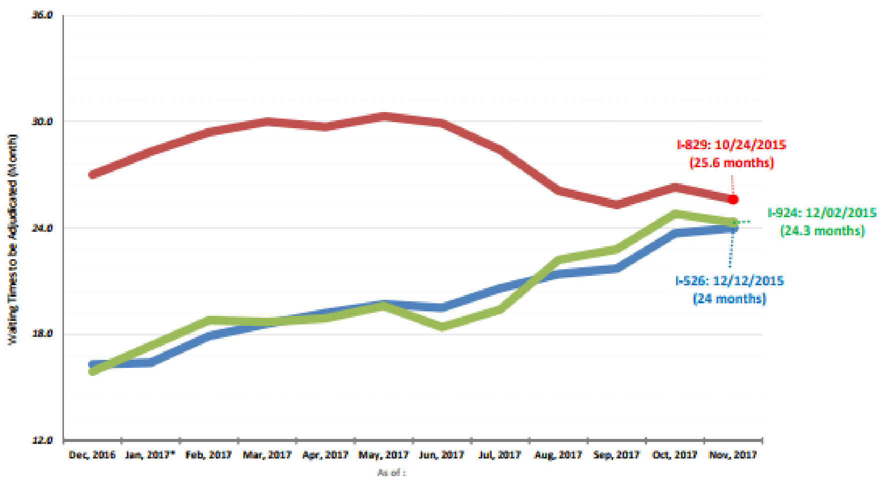
Sincerely,

Robert Kraft
IIUSA President

APPENDIX A

Processing Times 12-Month Trends

Average Waiting Times for USCIS to Adjudicate I-526/I-829 Petitions and I-924 Applications (Dec 2016 - Nov 2017)



** Note: Processing time of I-924 applications in January 2017 is excluded due to the potential data error.*

Data source: USCIS Processing Times web page: https://egov.uscis.gov/cris/processTimesDisplayInit.do;jsessionid=bacXD1OC9RCyFagQNRyeu

Prepared by: Lee Li, Policy Analyst, IIUSA

DATA INSIGHTS:

As of November 30, 2017, average waiting times for EB-5 related adjudications are highlighted as following:

Form I-526 processing time continued to increase from the previous month and reached to 24 months;

Form I-829 adjudication time had a slight decline from 26 months in Ocotber to 25 month as of 11/30/2017; and

Form I-924's adjudication on average could still take over 2 years.

APPENDIX B

Creating Jobs Through EB-5 Investment

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June 28, 2017

VIA EMAIL – publicengagementfeedback@uscis.dhs.gov
U.S. Citizenship and Immigration Services ("USCIS")
Customer Service and Public Engagement Directorate

RE: USCIS Policy Manual: Job Creation and Capital At-Risk Requirements for Investors

To Whom It May Concern:

Thank you for the opportunity to provide comments on the recent updates to the *USCIS Policy Manual* (the "Manual") regarding "Job Creation and Capital At Risk Requirements for Investors" (Volume 6, Part G) published on June 14, 2017. This letter is being submitted on behalf of Invest In the USA ("IIUSA"), the industry trade association for the EB-5 Regional Center Program (the "Program"), which has over 280 Regional Center members that account for a vast majority of the billions of investment capital flowing through the Program to projects in diverse communities across the country. See www.iiusa.org for more information.

IIUSA believes that USCIS lacks authority to make Program policy changes via revision of an operational policy memo, as such changes must result from new statutes or regulations, or precedent decisions. However, we provide comments below to address policy interpretations in these revisions and to recommend changes to avoid ambiguities and unintended consequences. The revisions as interpreted by USCIS could negatively impact and interfere with the Program's intended purpose of generating economic activity that create U.S. jobs at no cost to the taxpayer.

1. Program Rules and Regulations Unclear on Whether Investments Must Remain "At-Risk"

The laws and regulations governing the Program require that (a) an EB-5 petitioner's investment be at risk in the investment that creates jobs, and (b) that the investment be sustained for the period of conditional residency. Strong legal arguments have been made that USCIS has improperly inferred that these first two requirements also imply that the investment must remain "at risk" until the end of the initial two-year conditional residency requirement.[1] The "risk" that investors are required to take, of gain or loss on investments, and the possibility that the new commercial enterprise ("NCE") will not return investments, is the only risk mandated by statute,

[1] See: http://www.klaskolaw.com/eb-5-investor-visas/uscis-policy-manual-changes-on-sustainment-at-risk-redeployment-and-regional-center-terminations-good-bad-and-ugly/ and http://mshahlaw.com/redeployment-version-2-0-serious-issues-uscis-new-policy-manual-changes/.

regulation or precedent decisions. IIUSA is not aware of any lawful basis for requiring an NCE to redeploy investors' fund in any other "at risk" business activity after requisite jobs have been created. The entire construct that investment must remain "at risk" during the full period of sustainment – even after job creation requirements have been met – is unsupported by the legislative language or intent.

In the event the initial investment successfully creates jobs and is then is repaid to the NCE, the investment need only remain "sustained", but not "at risk". This would allow for the NCE to hold the money in cash or risk-free financial assets until the end of the initial two-year conditional residency period.

IIUSA believes that if USCIS is intent on imposing new redeployment requirements which have the unintended potential of disenfranchising existing projects and their investors, and creating hurdles to compliance by new projects and investors, it should create new regulations in accord with the Administrative Procedures Act. IIUSA does not believe it is appropriate to create new policy and new rules via revisions to the Manual, with minimal time for public input from stakeholders.

Notwithstanding IIUSA's position that the investment need only be sustained, but not remain at risk, we provide further thoughts on the USCIS policy interpretations below.

2. Redeployed Funds Should be Allowed to Lead to More Job Creation

USCIS must make clear that, after the requisite job requirement has been met, based on economically viable job creation methodologies, whether the job creation occurs before or after commencement of the sustainment period, investors have no further job creation requirements. USCIS should also clarify that any jobs resulting from redeployment ***are eligible*** for counting towards EB-5 job creation requirements, because it is central to the Program's purpose of maximizing regional economic development through foreign direct investment targeted at U.S. job creation.[2]

3. Additional and Specific Guidance on "At-Risk" Needed

The Manual now states that the period of sustainment of an investment "at risk" begins at the initial date of conditional permanent resident ("CPR") admission and ends two years later. There could be complete redemption to the EB-5 investor while an I-829 is pending (which is essential given current processing times and growing backlog). The redeployment of capital can also be an issue for investors with I-526's still pending, where job creation has occurred, and there is an opportunity for liquidation and redeployment consistent with the NCE business plan.[3] USCIS should allow for redeployment in these instances, as well.

There are many confusing statements in the new Manual text. IIUSA mentions them in the hope that they may be clarified. The new language in the Policy Manual provides that "capital is properly at risk if it is used in a manner

[2] Since 2008, IIUSA estimates over $20 billion in foreign direct investment has been invested in the United States through the EB-5 Program that supports hundreds of thousands of U.S. jobs.

[3] According to USCIS data published in April 2017, the average processing time for I-526 petitions is over 19 months (with more than 22,000 pending), and for I-829 petitions is over 30 months (with more than 7,700 pending). See: https://egov.uscis.gov/cris/processingtimesdisplay.do, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2017_qtr2.pdf, and https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I829_performancedata_fy2017_qtr2.pdf.

related to engagement in commerce (in other words, the exchange of goods or services).” However, the Manual later provides that an NCE may redeploy into real estate development loans, or potentially “certain new issue municipal bonds, such as for infrastructure spending.” The language is not clear and will lead to lengthy adjudication processes and litigation. USCIS should state simply that an NCE may reinvest in any type of business or security. IIUSA questions the interpretation that the capital must remain at risk (see above), and believe that even bank accounts and U.S. Treasury obligations provide opportunity for gain and risk of loss. A NCE should be allowed to allocate capital to these investments or any other type of investment that is consistent with its governing documents and all relevant securities and other laws.

The scope of a NCE’s ongoing business must be broadly interpreted to appropriately reflect the job-creating purpose of the Program. Ongoing business can range from a loan to a construction project, a municipal general obligation bond, an equity investment to a real estate investment trust (“REIT”), stocks, or possibly even in a money market account. “Similar scope of the new commercial enterprise’s ongoing business” as given in examples should be made with the same investment vehicle, but not necessarily to the same type of entity or industry and should not require similar repayment time requirements. For example, if a loan is made to a commercial real estate project and is subject to redeployment, those funds should be able to be placed in a money market account for a period of time that would satisfy the sustainment requirement.

4. <u>Timeframes for Redeployment Must Be Clarified</u>

The Manual does not provide guidance for how quickly capital must be redeployed by a NCE. Practical considerations will make it impossible for capital to be redeployed immediately as NCE managers seek an appropriate investment. Accordingly, USCIS must provide reasonable timeframes for a NCE to redeploy funds to ensure appropriate time for consideration of investment decisions and communication with investors on redeployment strategy. This is yet another example of guidance in the Manual that must be clarified to ensure there is guidance that ensures business does not suffer from unintended consequences that could have been avoided through appropriate incentives to parties involved in the EB-5 investment.

5. <u>Amendments & Deference in Redeployment Context</u>

Most importantly, IIUSA strongly believes that amendments made in an action to comply with any policy change should not be considered material for purposes of associated immigrant investors. Moving forward USCIS should allow for redeployment strategies to be laid out and approved in any exemplar or initial investor filings and be afforded deference, consistent with policy around all other aspects of the business plan. Whether investors, business, Regional Centers, or any other EB-5 stakeholder – certainty around decisions made by USCIS is essential to the success of the Program.

6. <u>Consequences of Regional Center Termination</u>

It is appreciated that under the updated Manual, investors are able to retain their position in line without an impact on their I-829 or claims to job creation if they have obtained conditional residence before the termination of a regional center. IIUSA believes that USCIS should give the same benefit to investors who still have pending I-526s. Those waiting on a visa number or otherwise not yet admitted will lose their place in the visa number queue, likely causing a child to “age out” of eligibility, all due to matters out of their control, perhaps not even project related. These equally innocent investors, particularly with waiting lines nearing 20 months for I-526s, should be afforded the opportunity continue with their visa status uninterrupted by transferring to another project or under other circumstances in line with the economic development goals of the Program.

Thank you for considering these comments. We welcome any questions and look forward to ongoing engagement on this increasingly important policy issue.

Sincerely,

Peter D. Joseph
Executive Director