VIA EMAIL: publicengagementfeedback@uscis.dhs.gov 11/13/2018

USCIS Office of Public Engagement
Immigrant Investor Program Office (IPO)
20 Massachusetts Ave NW
Washington, D.C. 20529

RE: Response to Policy Manual Update on Debt Arrangements

Dear USCIS Office of Public Engagement:

Invest In the USA ("IIUSA") is the trade association for the EB-5 Regional Center industry. We have over 280 Regional Center members that account 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 in response to the USCIS Policy Alert on "Immigrant Investors and Debt Arrangements" released on October 30, 2018 (the "Update").

The process for release of this Policy Update needs improvement. The policy changes made in the Update are substantial and should have gone through the Administrative Procedures Act ("APA") process. At the very least, USCIS should afford stakeholders more than 10 business days to comment on substantive changes in policy. EB-5 in practice requires adhering to complicated rules. USCIS should engage with stakeholders in an interactive setting to understand the full implications of policy changes before publishing any such changes, especially changes that are proposed to take effect immediately. We believe such an interactive process could help USCIS achieve its objectives, establish meaningful policy and enable the EB-5 Program to run with integrity.

Petitioner Options

We want to clarify that an option exercisable by a petitioner to request his distributable, pro-rata share of NCE assets or then-current net asset value, is not an impermissible debt arrangement.

In the Update, USCIS describes options for redemption that are exercisable by the petitioner as impermissible if the options "grant the petitioner the option to require the new commercial enterprise to redeem all or a portion of his or her equity at a specified time or upon the occurrence of a specified event (for example, once the conditions are removed on the petitioner's permanent resident status) ***and for a specified price (whether fixed or subject to a specified formula)***."

An option to exit an investment ***at the then-current Net Asset Value*** at some specified time or based on some specified event is a common arrangement for investments. If the option is to exit at the current value, the investor has borne the risk of loss and a chance for gain as required in the Policy Manual.

We are concerned that USCIS will interpret its own policy prohibiting "a specified formula" to disqualify common distribution waterfall arrangements in most NCE governing documents. These waterfalls provide no guaranty of returns, simply an allocation of the profits, losses and distributable assets of the NCE. Absent distribution waterfalls, there would be no governing term about how much money investors in the NCE may eventually receive. If USCIS views distribution waterfalls as a prohibited formula, it would effectively disqualify every petitioner in any investment vehicle.

With the increasing visa backlog, some EB-5 petitioners may choose to abandon their immigration process after the initial investment is repaid to the NCE by the JCE. They may wish to receive their distributable portion of the NCE assets as, and when, available. NCE governing documents should allow such investors to seek their distributable share. To the extent the distributable share is based on gains or losses incurred by the NCE, USCIS should clarify that offering such an arrangement does not disqualify petitioners who remain in the NCE simply because the NCE offers the option to those who wish to exit.

Petitioners should have the option to request their investment back based on whatever gain or loss the NCE has realized to the extent the NCE has distributable assets. Such petitioners would be deemed to withdraw from the NCE, no longer sustain their investment, and would then have to withdraw from the immigration process if they have not completed their individual sustainment period. However, such option arrangements should not disqualify the petitioners in the NCE since they are not impermissible debt arrangements. The legal definition of debt in this context would require that the NCE pay a "sum-certain" in money. A redemption based on the then-current value of an investment is not debt.

The logical progression of allowing for such redemption options at NAV serves a public policy interest: To the extent petitioners choose to withdraw (at their NAV), the EB-5 visa backlog would reduce even though the job-creating goals of the EB-5 Program had already been realized.

To be irrevocably committed to the initial job-creating investment is enough. If the petitioner later choses to exit the NCE investment, they would have to abandon his immigration process. The simple option of abandoning immigration should not disqualify someone from being considered approvable when filed.

Finally, in the same considerations of allowing an investor to request their investment back should be offered to a petitioner whose application is denied. Due to the fact that they are unable to seek an immigration benefit, they should not continue to satisfy immigration related requirement of not allowing for a redemption agreement.

Effective Date

We urge the Agency to consider making any policy changes effective beginning at some future date (e.g., January 2019) for all new project exemplars or I-526 filings relating to new project raises. This change in policy must consider and give deference to projects and petitions associated with those projects that are currently mid-stream. Changes required by the Update could be deemed material changes to NCE offering materials or other NCE operating documents, which might require obtaining consent from existing investors or, worse, offering a right of rescission. Such a requirement would frustrate the public policy goals of the program by disrupting job-creating projects.

If USCIS applies the policy to all adjudications immediately, it will affect projects and investors in several ways:

1. Investors with pending petitions would be forced to choose either (a) to accept terms they did not contemplate when they originally invested or (b) to rescind their investment and withdraw from the immigration process.
2. NCEs that face investor rescission might not likely have the liquidity to refund investors to the extent job-creating investments were already made.
3. NCEs could not pursue new investors for existing projects that are still fundraising because changes required to the offering materials would either jeopardize the immigration process of existing investors or allow for existing investors to rescind.
4. Even if NCEs stopped raising money for projects, existing petitioners could face denials if NCE governing documents or votes by existing NCE investors prohibit changes required by the Update.

We don't believe an NCE can change the rules for only investors going forward and not for investors who have already subscribed. If an investor subscribed to a project under certain terms before the Update, under old policy guidance, and their I-526 has not yet been adjudicated, the terms they already agreed upon should not be changed mid-filing.

If the Agency does require that are requiring that old and new filings related to an existing NCE filing comply with new Policy, we encourage the Agency not to deem any required document changes relating to the policy update as material.

Conclusion

We appreciate USCIS for accepting our comments to the Update. We continue to urge the Agency to use the APA process to make significant changes to EB-5 policy. We share the Agency's goal of protecting innocent investors, who have gone through our legal immigration process with significant diligence, from unintended consequences of changes to policy during their path to residency. We look forward to continuing IIUSA's engagement with USCIS and IPO in the months and years ahead.

Sincerely,

Aaron Grau
Executive Director, Invest in the USA