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VIA EMAIL

April 8, 2019

Director L. Francis Cissna
U.S. Citizenship & Immigration Services
20 Massachusetts Avenue NW
Washington, DC 20529

RE: IIUSA Comments on USICS Redeployment Policy for the EB-5 Regional Center Program

Dear Director Cissna:

Invest in the USA (IIUSA) is the national membership-based 501(c)(6) trade association for the EB-5 Regional Center Program (the “**Program**”). Our members include over 200 EB-5 regional centers and 129 other member organizations from the Program’s stakeholder community. Our members' efforts account for the majority of U.S. capital formation and job-creation that has resulted from the Program.

2017 revisions to the USCIS Policy Manual require that, under certain circumstances, a new commercial enterprises (“**NCE**”) operating under the Program redeploy EB-5 investments (the “**Policy**”). It is our understanding that the Policy may have been implemented in response to the visa backlog and estimated 15-year waiting period affecting some EB-5 petitioners (“**Investors**”), which results in a much longer Program compliance period.

We are concerned about the implications and implementation of the new Policy. Specifically, our members are concerned about potential conflicts of interest inherent in the Policy and about adjudication uncertainty for those interpreting and attempting to comply with the Policy. Job-creating entities (“**JCEs**”), as the ultimate recipients of EB-5 investment capital, and NCEs are working to manage repayments from successful Program projects to comply with the Policy, however, there is uncertainty that these good faith efforts will be accepted during USCIS adjudication of Investor’s I-829 petitions, which may not occur for more than a decade based on the current visa backlog.

We respectfully submit this letter regarding the Policy for your consideration.

1. At-risk redeployment of NCE investments is not required by law.

The laws and regulations governing the Program require: (i) that an Investor's investment be "at-risk," as determined when the Investor makes his or her full investment; (ii) that the investment leads to the creation of jobs; and (iii) that the investment be sustained during the period of conditional residency.

It is our understanding that the "at-risk" requirement describes a component of the relationship between the Investor and the NCE. An Investor's investment in an NCE subjects the Investor to risk until the investment is either lost or returned. The only risk Investors are required to undertake is the risk of gain or loss on their investment in the NCE. In other words, risk that the NCE's efforts will be unsuccessful and that the NCE investments will not be returned. USCIS decides whether or not the "at-risk" requirement has been met during I-526 adjudication. In fact, many Requests for Evidence issued by USCIS in I-526 and I-924 adjudications investigate the "at-risk" issue by ensuring, for example, that NCEs do not offer investments that include guaranteed investment redemptions at a set price.

If the JCE is prepared to repay the NCE after jobs have been created in compliance with the Program, the Policy seems to nevertheless require redeployment of EB-5 investments repaid to the NCE by the JCE, even if the NCE does not yet repay its Investors.

We are unaware of the lawful basis upon which the Policy relies to provide for a requirement that an NCE redeploy EB-5 investments into additional "at-risk" business activities after requisite jobs have been created and funds have been returned to the NCE. We do not believe that statute, regulation, or precedent supports the Policy.

If an EB-5 investment results in the creation of jobs and repayment by the JCE to the NCE, we maintain that the investment remains "at-risk" provided it is not returned by the NCE to Investors. It follows that the NCE, as part of its ongoing business activity, may maintain the repaid investments in cash accounts or in liquid financial assets without the added requirement of again meeting and maintaining a new "at-risk" Program requirement until the end of the Investor's two-year conditional residency period.

An investment in the NCE remains "at-risk" until it is returned or lost. Even if the NCE is repaid by the JCE, investment returned to the NCE remains "at-risk," in part, because the NCE may not return the Investor's investment and if it does, the amount of any return is unknown unless and until it is made by the NCE to the Investor. The Program's "at-risk" requirement is simply that the investment in the NCE be sustained, which should allow the NCE the ability to responsibly manage any investment repaid to the NCE by the JCE until it is eligible for return to Investors.

2. If redeployment is required, any NCE redeployment investment should be acceptable.

If the USCIS rejects our position that additional and continued "at-risk" redeployment beyond the NCE level is not required, to the extent such redeployment is required, any investment (including

investment in marketable securities) made after the job-creation requirements have been satisfied should be acceptable.

The Policy states that after the Program's job-creation requirement has been met, the investment is properly at-risk during the sustainment period if four requirements are met: (R1) the investment is used in a manner related to engagement in commerce consistent with the scope of the NCE's ongoing business; (R2) the Investor must have placed the investment at risk for the purpose of generating a return; (R3) there must be a risk of loss and a chance for gain; and (R4) the business activity must actually be undertaken.

In a post-job creation redeployment scenario, we offer three suggestions with respect to analyzing whether these four requirements have been met.

- First, the return requirement (R2) and loss and gain requirement (R3) should be satisfied by the Investor's investment into the NCE. If the investment relationship between the NCE and the Investor, as a limited partner or member of the NCE, during the sustainment period remains subject to the agreements and documents that were approved during I-526 adjudication, which must have met all statutory and regulatory requirements demonstrating "at-risk" investment (e.g. no guarantees, no reserves, no redemptions), the return, loss, and gain requirements should not be subject to re-examination during redeployment.
- Second, the business activity requirement (R4) should be deemed met provided the redeployment activity is undertaken in good faith.
- Third, the scope requirement (R1) should either be deleted or clarified that, for redeployments post-job creation, the NCE may further deploy into any investment which complies with its corporate governance documents at the time of the redeployment.

An example of permissible redeployment of a repaid loan of pooled investments into one or more similar loans and certain new issue municipal bonds, provided that the bonds were within the scope of the NCE's business when the Investor filed his or her I-526, is provided by the Policy. Although illustrative, this guidance is unclear and could be interpreted as unduly restrictive and burdensome for NCEs acting in good faith to meet sustainment requirements post-job creation.

The scope of business identified in the approved I-526 record should not be taken under additional review during the post-job creation sustainment period. Policy that requires NCEs to have predicted and identified a redeployment plan and to have included it in its business forecasting such that it would be reflected in the NCE's ongoing business is impractical and, in many cases, may make sustainment impossible for NCEs operating in good faith to comply with the Policy. In the post-job creation stage, any subsequent investment undertaken by the NCE in an effort to satisfy the requirement that the capital remain invested during the sustainment period and in compliance with its governing documents at the time of such subsequent investment should be permitted.

The Policy should specify that redeployment in any investment can include the purchase of another's interest in an asset. This could be accomplished, for example, by eliminating the "new issue"

language in the Policy in reference to municipal bonds and by otherwise broadening the scope of permitted redeployments into any investment. Post-job creation, the Policy should allow for redeployment by the NCE into any investment to allow NCEs to responsibly manage Investor risk, liquidity, and diversification needs.

3. Redeployment investments should be allowed outside of the regional center territory and outside of TEAs.

Post job-creation redeployment by NCEs should be permitted in anywhere within the U.S. There should not be a continued requirement to redeploy investments within the regional center's territory or within a Targeted Employment Area (TEA).

If, however, additional job creation credit is sought, we propose that any regional center in good standing be permitted to sponsor redeployment job-creation, that the TEA character be maintained, and that an economic analysis or other evidence of job-creation for the redeployed investment be provided by the Investor. To further facilitate efficient and responsible redeployment opportunities, unless credit for new job-creation resulting from the redeployment is sought, there should not be a requirement that redeployments be made within a TEA.

4. Clarification in the Policy regarding material change and withdraws is needed.

a. Revisions to NCE and JCE governing documents should be permitted without material change disqualification to accommodate the Policy.

Protracted processing times and delayed visa availability have created a number of unintended consequences that were not foreseeable when many EB-5 investments were structured and the related documentation was prepared. Reinvestment activities and investment term length have grown beyond what was predicted at the time of many original investments. Many NCE governing documents permit the amendment of terms or mechanisms that may redress some of the arising problems, but to do so, regional centers, NCEs, JCEs, and Investors need reasonable assurance that such amendments will not result in a disqualification or revocation due to a deemed material change. With this in mind, USCIS should provide guidance on protocol to amend such terms, or assurance that such changes would not amount to a material change that could impact the immigration status of the Investors.

b. Redeployment prior to issuance of Conditional Permanent Residence should not be considered a material change.

Based on current adjudication timelines and availability of visas, USCIS should clarify that redeployment is permitted even before a petitioner obtains Conditional Permanent Residence.

c. Investors should have the right to withdraw at redeployment without violating the requirement to be irrevocably committed to the investment.

As retrogression continues to prolong visa processing times, Investors are becoming increasingly aware that the new immigration timeline may not meet their family's needs. As such, regional centers and NCEs are faced with questions about when the Investor may abandon his or her petition and receive a return of capital. In accordance with the irrevocability of investment requirement, most Investors do not have a voluntary right of withdrawal and a new question is emerging: When the original EB-5 investment matures, rather than have their EB-5 investment redeployed, may Investors receive documentation that provides for a right to abandon the immigration process and the ability to request the return of their capital? There is concern that abandonment and withdrawal could be viewed as an impermissible right of redemption that could impact all of the Investors in the NCE, and not just those who would seek to abandon their immigration benefits. We seek clarification as to the effect of individual Investor abandonment and withdrawal on the remaining NCE Investors.

5. We look forward to the opportunity to dialogue further about redeployment.

Redeployment is a top operational concern of many of our regional center members. Concerns about the implications and practical implementation of the new Policy, including those outlined in this letter are of particular concern. Where redeployment is required, we seek flexibility in Policy interpretation, clarification, and guidance that will allow Program stakeholders to responsibly and efficiently accomplish redeployment if it becomes necessary after the Investor's initial investment in the NCE and after job-creation requirements have been satisfied.

Opportunities for redeployment will vary widely across the EB-5 industry. We urge the USCIS to clarify that so long as investments remain (i) in the NCE and (ii) subject to the USCIS-approved agreements and documentation governing the relationship between the Investor and the NCE, the NCE may further deploy investment proceeds into any investment, in any geographic area, whether or not within a regional center's territory, whether or not within a TEA post-job creation unless and until it is eligible to return investments to its Investors.

We appreciate your time and consideration and would welcome the opportunity to dialogue further about the Policy, its implementation, and its effect on Program stakeholders.

Sincerely,



Aaron L. Grau
Executive Director
Invest in the USA

CC: Sarah M. Kendall
Julia Harrison