

# EB-5 Capital Redeployment: Investors First!



**WALTER S. GINDIN**

IN-HOUSE IMMIGRATION COUNSEL, CANAM ENTERPRISES

Capital redeployment is one of the most important issues concerning EB-5 investors today. It impacts both existing investors, particularly those subject to EB-5 visa backlogs, and prospective investors, who in addition to evaluating the merits and suitability of an EB-5 investment must now consider the potential reinvestment of their capital following repayment of the original EB-5 investment. This article provides helpful background information regarding current USCIS policy on redeployment and discusses what redeployment options are suitable for investors.

## Redeployment in a Nutshell

Redeployment involves the reinvestment by the qualifying new commercial enterprise (“NCE”) of all or a portion of capital *following* the repayment or disposition of the original EB-5 investment. The requirement that immigrant

investors maintain their capital investment “at-risk” over the two years of conditional lawful permanent residence (LPR) has always been an essential requirement of the EB-5 Program. The concept of redeployment has now been incorporated into the USCIS Policy Manual to address immigrant investors who have not completed their two-year conditional residence period before the original EB-5 investment is repaid to the NCE.

## Why Is There a Need to Redeploy EB-5 Capital?

The Immigration and Nationality Act sets an annual limit on the number of EB-5 visas that may be issued at 10,000. Notably, this number includes both the principal investor and his or her spouse as well as unmarried children under the age of 21. Thus, if every EB-5 petition includes three family members, all 10,000 EB-5 visas would be used up by some 3,300 EB-5 petitions each year. In addition to the overall annual limit of 10,000 EB-5 visas, there is also a per-country cap of 7%, or 700 EB-5 visas. When it appears that the 10,000 EB-5-visa limit will be met in a given fiscal year, and also that a country will use up its individual 700 EB-5 visa allocation, the U.S. Department of State will impose a “cut-off” date for the issuance of EB-5 visas to immigrants from that country. Retrogression, or backward movement of visa cut-off dates, also could occur.

Historically, the overwhelming majority of

the 10,000 annual EB-5 visas (likely over 90%) were allocated to immigrants from mainland China notwithstanding the 7% per country cap. This was possible because global demand for EB-5 visas outside of China was relatively minor, so any “unused” or “leftover” visas from other countries were allocated to Chinese immigrants. As the popularity of the EB-5 Program skyrocketed within China over the last five years, and also grew significantly in other countries such as Vietnam, Korea, and India, the global demand for EB-5 visas has far exceeded the 10,000 annual limit, leading to visa cut-off dates being announced for mainland China starting in May 2015, Vietnam in May 2018, and India in August 2019.

When there were no EB-5 visa backlogs and I-829 Petition adjudication times were relatively short, it was reasonable to expect that the

*Continued On Page 26*

*Continued From Page 25*

EB-5 capital would still be in use in the job-creating enterprise (“JCE”) at the time that an EB-5 investor completed his or her two-year conditional residence period and/or received an I-829 Petition approval.

However, as I-526 Petition adjudication times have increased (now 21-27 months or longer in some cases) and with EB-5 visa backlogs in major markets such as China, Vietnam and India, and projected for other countries in the coming year, the original EB-5 investments will be repaid to NCEs before some immigrant investors have completed or even begun their two years of conditional residency. These immigrant investors, according to the USCIS Policy Manual, must continue to keep their capital “at risk,” and where the original loan has been repaid the NCE must then reinvest the investor’s capital into another investment that meets certain criteria described below.

### Overview of USCIS Policy Guidelines on EB-5 Redeployment

In June 2017, the USCIS updated the Policy Manual to clarify that even after the required number of jobs have been created by the original EB-5 investment, an investor must sustain the investment at-risk throughout his or her two-year conditional LPR period. In this regard, redeployment, or “further deployment” in another investment as it is called in the Policy Manual, must satisfy the capital-at-risk requirement, must be within the scope of the ongoing business of the NCE, and must occur within a commercially reasonable time.

The Policy Manual further states that any redeployment of capital after satisfaction of the job-creation requirement must have the

following three “at-risk” components:

- The immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk;
- There must be a risk of loss and a chance for gain; and
- Business activity must actually be undertaken

While it may be clear that a number of investments may meet these three “at risk” requirements, it is not clear what USCIS would consider compliant with the “scope” of the ongoing business of the NCE. The Policy Manual provides only two examples – namely, (i) where the initial investment was related to construction, then a redeployment into another construction project would comply, and (ii) new issue municipal bonds, such as for infrastructure spending. But USCIS has yet to provide additional guidance or further clarification on its redeployment requirements. While the EB-5 stakeholder community is presently advocating for USCIS to confirm that the scope of permissible redeployment vehicles (for example, to include any investments in marketable securities) is broader than these two examples, the USCIS has yet to do so. It is clear, however, that while USCIS maintains its position that funds must be “at-risk” throughout the initial two-year period of the investor’s conditional residency, the NCE may not simply invest the funds in an interest-bearing account (i.e., money-market account) or similar financial options upon liquidation of the JCE’s interest.

Until USCIS provides additional guidance upon the issue, NCEs contemplating redeployment investments should consider whether such

investments fall within the “scope of [their] ongoing business” by examining the stated purpose of the NCE and the full range of activities it is required and/or authorized to undertake. For example, where an NCE’s organizational documents authorize it to engage in a wide range of activities, such as acquiring securities, equity interests, loans, notes, bonds, etc., then the NCE may be able to select from a fairly broad range of redeployment investment options. Alternatively, if the NCE’s organizational documents provide for a narrower focus, such as investing solely in real estate projects, then the range of possible redeployment investments may be more limited.

With any redeployment investment, the NCE must be able to redeploy within a “commercially reasonable period of time.” The American Immigration Lawyers Association has noted and objected to the vagueness of this requirement, and requested further guidance.

### What Redeployment Options Are Currently Available in the EB-5 Marketplace?

Given the absence of additional clarification from USCIS on its redeployment policy, it is not surprising that most of the current EB-5 redeployment platforms mirror the two examples that are explicitly mentioned in the USCIS Policy Manual – namely, investments into real estate assets and/or investments in municipal bonds.

Redeployments into real estate assets can take several forms – for example, as short-term bridge loans; as longer-term debt arrangements; or as equity investments. Because each of these options entail capital lockout periods, investors should take into consideration the timeframe of their respective redeployment periods when evaluating a particular real estate reinvestment.

*Continued On Page 27*

### *Continued From Page 26*

Real estate investments can also offer higher yields (which some investors may prefer), however they can also carry the same, if not greater, amount of risk as the original EB-5 investment. As such, it is important that EB-5 investors closely evaluate and perform due diligence on any real estate-based redeployment vehicle to understand its terms and assess its financial viability. It may be lucrative for EB-5 regional center operators to redeploy investors' capital into another EB-5 project for 5-7 years at the expense of investors' interests; however, this practice is not required by the USCIS guidelines.

Certain new-issue municipal bonds are another example of a permissible redeployment vehicle according to the USCIS Policy guidelines, provided that they are within the scope of the NCE's ongoing business at the time of the investor's original investment. Municipal bonds are issued by local governments, territories, or their agencies. They are generally used to finance public projects, including schools, airports, roads, utilities, and other infrastructure-related repairs. While municipal bonds may offer lower yields as compared to a traditional real estate investment, municipal bonds nevertheless tend to entail less economic risk and are usually more liquid. Municipal bonds are therefore one of the suitable options for investors seeking capital preservation and repayments shortly following their satisfaction of EB-5 Program requirements.

It is also important to note that because many NCEs were formed prior to the issuance of the USCIS's policy guidance on further deployment in June 2017, it is very likely that any redeployment contemplated under the NCEs organizational documents is either not described with the requisite specificity and/or

not entirely reflective of the specific guidance and examples in the Policy Manual. Therefore, it is very likely that NCEs will need to properly describe the redeployment investments and seek investor approval in order to redeploy their repaid capital. In these instances, EB-5 investors should always compare the pros and cons of any proposed redeployment vehicle to evaluate whether it suits their specific immigration and financial goals, and regional centers should be prepared to explain and thoroughly document each proposed reinvestment. The main priority for both investors and regional centers should always be securing immigration benefits and preserving redeployed capital in accordance with EB-5 Program requirements.

### **The Investor-focused Approach to Redeployment**

Ultimately, the goal of practitioners and regional centers in the EB-5 industry is to ensure that investors complete their immigration goals and preserve their capital investments. This "investor-first" mindset should guide any approach to developing redeployment strategies. A conservative redeployment platform should provide different investment options intended to suit the needs of its specific investors but still meet USCIS requirements.

Optionality is important to investors and their families, each of whom have different immigration and investment preferences and risk tolerance. Therefore, recognizing that some investors simply may not wish to pursue redeployment following the disposition of the original EB-5 investment, regional centers may wish to offer such investors the opportunity to withdraw and receive a capital repayment. However, these investors must understand the immigration consequences of this decision,

which can result in the possible denial of the I-829 petition.

Alternatively, for investors who elect to redeploy and for whom liquidity is the most important criteria, a redeployment platform which offers new issue municipal bonds that mirror key characteristics of the original EB-5 investment is an excellent option. When choosing this approach, NCEs must navigate the variety of municipal bonds in the marketplace, across numerous sectors such as health care, housing, industrial development, higher education, etc.

Finally, for redeploying investors who prefer higher returns, some regional centers may offer redeployment platforms that offer the opportunity to invest in conservatively structured mezzanine loans to qualifying real estate developers or longer-term preferred equity real estate investment offerings, depending on an individual investor's redeployment period. The goal should be to seek out conservatively structured investments that will best protect investors' capital. Offering other EB-5 projects as redeployment investments to investors may create an unnecessarily high risk to investors, and is simply not required by the regulations.

Once USCIS provides more policy guidance regarding what is permissible to meet the redeployment requirements, other methods of redeployment may provide more and better options to investors, and practitioners should continue to closely monitor all legislative and policy changes/updates, in order to best inform redeployment strategies in the future. ■

*A special thank you to Erin Corber for her assistance in writing this article.*