IIUSA Member Perspective: After Years of Waiting, USCIS Finally Clarifies EB-5 Redeployment Requirements

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On July 24, 2020, USCIS issued updates to the Policy Manual clarifying requirements for the redeployment of EB-5 investment capital. Although the clarification is welcome, it is several years late. Investors, regional centers, and project developers have been asking USCIS for guidance for years, and have been redeploying EB-5 capital to the best of their ability in the absence of guidance. Unlike USCIS guidance on several other issues, this new guidance does not specify that it applies only to redeployments on or after the date of publication. This means the possibility of retroactive application is strong.

The updated guidance provides that EB-5 capital may be redeployed through the original New Commercial Enterprise (NCE), the entity that the investors originally invested in, within the territory of the regional center, as long as it is redeployed "in commerce," and consistent with the NCE's ongoing purpose of conducting lawful business activity. Redeployment does not have to be within a TEA, even if the original investment was in a TEA. Further, USCIS considers one year as a reasonable time to redeploy the capital.

Redeployment has become necessary in EB-5 due to increasing visa wait times, retrogression, and USCIS processing times in order to meet the USCIS policy requirement that EB-5 funds must be invested at-risk throughout an investor's two-year conditional residence period. Typical EB-5 regional center investments are structured as a loan or investment by the NCE into another job creating entity ("JCE"). Those loans or investments typically had a 5-year term which was initially based, in part, on an estimate of how long an investor would take to get through the immigration process. An investor cannot get his or her money back before the end of his or her two-year conditional residence period, which does not begin until he or she obtains a conditional green card. Because of visa backlogs and long USCIS processing times, this can occur anywhere from three to fifteen years after the investment. USCIS policy states that it is not enough for the money to be invested into the NCE. It must remain deployed- at risk- for the whole time. This means if a loan is repaid to the NCE after 5 years, but investors still have years to go before the end of their conditional residence period, the money cannot sit in an account. It must be placed back at risk.

Before today's guidance, it was unclear what was sufficient to satisfy USCIS requirements. However, today's guidance provides that the money can be redeployed in nearly any business activity, so long as it is in commerce, and not a purely financial activity. USCIS has stated that investment in securities or financial instruments on the secondary market (i.e. buying stock on a stock exchange or simply maintain a brokerage account). While at-risk, this would not meet the "in commerce" requirement. However, USCIS appears to be taking a broad view of what kind of activities would otherwise qualify. USCIS has also said that it will allow amendment to NCE operating or partnership agreements to change the scope of the NCE's business to allow deployment in any lawful business activity.

Today's guidance also answered another critical question: how long does the investor have to redeploy EB-5 funds? USCIS has stated that it will consider one year a reasonable time to redeploy capital and may consider longer periods if the delay was out of the control of the investors, NCE, and regional center.

Unfortunately, this guidance may come too late for some. Stakeholders have been asking USCIS for clarification on these issues since at least 2015. A number of redeployments have already occurred, not all of which are within the same regional center territory or will meet the revised definition of "in commerce."

As a refresher, redeployment can (and must) occur only after the investor has made the initial investment, 100% of the money has been deployed to the job creating entity, the original business plan has largely been completed, the jobs have been created, and the money is available to be returned or has been returned to the NCE. Redeployments that do not meet these requirements may be deemed a material change that would result in the denial or revocation of investor I-526 petitions for any investor who has not yet become a conditional resident.

If you are an investor in need of guidance or review of your current redeployment options, or guidance on your litigation options, please contact Daniel Lundy at dlundy@klaskolaw.

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