IIUSA Member Perspective: EB-5 Redeployment Policy "Clarified" Retroactively

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USCIS has updated its Policy Manual to retroactively "clarify" its policy on the parameters for "new commercial enterprises" (NCEs) to "redeploy" capital of EB-5 investors after the capital is returned from the original job creating enterprise (JCE). Most restrictive and problematically retroactive are the requirements that the redeployment be made within the jurisdiction of the sponsoring regional center and the prohibition on purchasing financial instruments in secondary markets. These positions will generate worthy litigation on the part of investors whose capital already was reinvested.

Background

Developers receiving EB-5 capital have tended to negotiate the ability to repay the capital as early as 5 years, while investors born in mainland China have piled up for waits of more than a decade for visa numbers. Happily, in 2017 USCIS recognized that investors only needed to "sustain the investment" (avoiding getting repaid by the NCE) to the due date for filing the I-829 petition rather than years later when USCIS has adjudicated the I-829. USCIS also recognized that the NCE could receive return of its EB-5 capital from the JCE before that and as soon as the point when all the necessary new jobs had been created by the project. But USCIS said that capital returned to the NCE before the investor could receive it needs to be redeployed in other "commercial activity" with no clarification what that meant and whether the redeployment needs to be within the regional center's jurisdiction or within a Targeted Employment Area. With tens of billions of repayments to NCEs becoming repaid and needing redeployment, the lack of guidance left NCEs and investors groping for sensible approaches and sometimes at odds with each other.

Policy Clarifications and Implications

In its July 24 Policy Manual update, USCIS finally provided clearer guidelines for redeployment, as follows:

1. Must be made through the original NCE. This affects investors who have suffered fraud or disappearance of NCE managers, because they must somehow gain control of the NCE to accomplish the redeployment in order to try to meet the requirements of sustaining the investment and creating the necessary jobs. Such investors cannot just receive distribution through a bankruptcy or receivership and reinvest individually.
2. Need not be in a Targeted Employment Area. Unfortunately, USCIS did not specify that TEA is not needed if the original investment did not create enough jobs for the investors and more need to be credited through the redeployment, so this issue remains unclear.
3. Must be within the jurisdiction of the originally sponsoring regional center as of the time of redeployment. This may justify regional centers seeking to expand their geographic scope as broadly and soon as possible in order to expand the geographic area in which redeployment can be made. Under the Policy Manual's structure, the new requirement to use the original regional center's sponsorship and geographic jurisdiction even for redeployment seems to apply to investors only before they are admitted to conditional permanent residence, and it appears there is a strong argument that the requirement would not apply after the investor is so admitted, at which point the "material change" of a regional center switch or even termination of designation no longer affects I-829 eligibility.
4. Must be within a commercially reasonable time, which USCIS now states is understood to be a year, although longer times might be shown to be reasonable under the totality of circumstances.
5. Must generate "commercial activity" and must not involve purchase of financial instruments on the secondary market. The update eliminated a prior example of a qualifying investment in "new issue bonds" for a public works project, but apparently USCIS still would approve such redeployment along with other "new" uses of capital such as into a REIT explicitly for new construction or renovation. As with original EB-5 investments, USCIS believes that redeployment cannot merely replace someone else's interest in assets, unless it fits the USCIS policy allowing EB-5 capital to be used to replace "temporary bridge financing." This seems to question the qualification of some "redeployment solutions" promoted in good faith by some reputable industry players.
6. May involve "any activity … consistent with the purpose of the NCE to engage in the ongoing conduct of lawful business." This appears meant to eliminate notions from the original guidance that the redeployment needs to be within the scope of the NCE's original documents as filed with the investor's I-526 petition. It seems that a scope issue can be remedied with an amendment of the relevant documents before the redeployment occurs, which might require investor agreement depending on the entity's governance provisions.

Assessment

This guidance reflects a good faith effort by USCIS to provide much needed clarification of its policy concerning redeployment of EB-5 capital during long waits for visa numbers. But many NCEs had to go ahead and make redeployment arrangements under the prior guidance, which most importantly did not reasonably convey that the redeployment must be in the approved regional center area and that investment in secondary financial instruments would not qualify. USCIS should revise the guidance to apply especially those limitations only to redeployment that occurs after July 24, 2020, the date the new guidance was issued. Otherwise, litigation on these points will be inevitable after much gnashing of teeth.

USCIS should clarify whether and how regional centers are supposed to report about redeployment in their annual reports on Form I-924A, which currently does not request anything about redeployment.

Moreover, USCIS should make allowances for victims of fraud and other mishandling by NCEs and allow them to accomplish redeployments through some proxy for the NCE over which they might not be able to gain legal and practical control.

Finally, the prohibition on redeployment through purchase of secondary financial instruments is unnecessarily limiting for investors who already created the requisite jobs through an economic risk. While they may need to keep their capital invested in the U.S. economy through the end of their conditional residence, in doing so they should be able to enjoy options of greater diversification and liquidity through secondary instruments.

Click here to view an electronic comparison of the revised Policy Manual concerning Investors to the most recent November 2019 version to see the exact changes made by USCIS.