



IIUSA Member Perspective

EB-5 CAPITAL REDEPLOYMENT GUIDANCE ARRIVES IN TIME TO BE USED FOR COVID-19 RECOVERY PROJECTS

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This is a member perspective and the views of the author are their own and do not necessarily reflect the views or position of IIUSA.

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Capital redeployment in EB-5 has been and continues to be one of the most important topics for the industry today. There is an estimated \$15 billion invested into projects all over the US, that could potentially be redeployed. Furthermore, although the full effect of the Coronavirus pandemic on the US economy cannot yet be accurately assessed, what is evident is that the longer the pandemic rages, projections for growth and employment will remain bleak. The second quarter of 2020 has seen increased business closures and layoffs. Federal Reserve Chair Jerome Powell warned in a speech that the economic effects of COVID-19 are severe and that the “*depth and the duration of the economic downturn are extraordinarily uncertain...*” Capital redeployment guidance although arriving extremely late may have come in time to be put to use in repairing a damaged economy.

What is Redeployment of Capital?

Redeployment involves the reinvestment of capital following the repayment or disposition of the original EB-5 investment made through a qualifying new commercial enterprise (“NCE”).

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.¹ The redeployment of capital can only occur (i) after the original purpose for the capital has been achieved as outlined in the business plan, (ii) the jobs have been created and (iii) the capital has been repaid. In the absence of these three steps, the capital is not considered to be eligible for redeployment.

USCIS Policy Manual Revisions, 2017

On June 14, 2017, USCIS published several important revisions to the USCIS Policy Manual. At the forefront were new vague provisions relating to the redeployment of the investor’s capital. At that time, many EB-5 practitioners (including myself²) argued against the compulsory implementation of capital redeployment. USCIS’ provisions were criticized as being vague and not required by

¹ 8 CFR §204.6(j)(2)

² <https://mshahlaw.com/redeployment-version-2-0-serious-issues-uscis-new-policy-manual-changes/>

law. Undoubtedly the redeployment of capital has been a boon for developers, who have been able to finance a second or third venture utilizing the same funds, without any additional marketing or legal costs and, more importantly, without any real oversight. Even with the best-intentioned developer, the potential for harm is immense. In fact, when the redeployment revisions were published in 2017, it could well be argued that in putting forth such provisions with limited guidelines, USCIS had shown a blinkered vision, endangering the program. The revisions without guidance exposed investors to a new vulnerability, opening the doors to litigation and fraud. Confusion on both sides of the Investor-Issuer aisle over issues of redeployment has resulted in a number of civil disputes, including one such unsubstantiated claim that a Regional Center advised investors that: "if they did not approve the Proposal [to permit redeployment], their funds would be left in bank deposits and their capital would not be deemed "at risk" for EB-5 purposes."³

Fast forward to July 24, 2020, in the middle of a pandemic with troubling economic reverberations, the industry has finally received, albeit restrictive, guidelines from USCIS for the redeployment of EB-5 Investor capital. Unfortunately for several projects, the guidelines have arrived several years too late and without the much-needed clarification on the issue of retroactivity, is the industry looking at project and/or investor denials due to an inadvertent misapplication of redeployed capital? How far can funds now be redeployed to assist troubled businesses or alleviate projects unable to obtain financing in a post-COVID world?

DISCUSSION OF THE NEW GUIDELINES

(i) Capital Deployed through a Financial Instrument:

The July 24, 2020 guidelines state that: a new commercial enterprise ("NCE") may deploy capital "directly or through any financial instrument" as long as the requirements are met.

What is a Financial Instrument? Although not defined in the Policy Memorandum, financial instruments are assets that can be traded, providing efficient flow and transfer of capital, such as cash, loans, bonds, stocks. EB-5 practitioners have eluded to the fact that USCIS has reversed its policy on municipal bonds. However, after a careful review of the new policy, it appears that municipal bonds can be included, as they are financial instruments in the Primary Market. *However*, the financial instrument must meet the above requirements of an actual

³ https://eb5projects.com/system/uploads/document/file/679/USIF_RICO_COMPLAINT_Feb_2019.pdf

undertaking of a business activity, making funds available for job creation, and be commercial in nature. Utilization of secondary financial instruments, such as the trading of stocks or purchase of CDs from a brokerage firm, do not meet the requirements as these are purely for financial gain or loss. The purpose is to keep not only the at-risk requirements, but to create business activities for economic growth and job creation, perfect for a post COVID-19 recovery.

(ii) “Reasonable” Amount of Time Defined

Once the job creation requirement has been satisfied, the NCE *“may further deploy capital within a reasonable time”* to satisfy the EB-5 requirements. USCIS has finally defined “reasonable” in this context. The New Policy Memo Update states that the Service will consider 12 months as a reasonable amount of time to redeploy capital but will also consider longer periods of time for a specific commercial enterprise or activity, after reviewing the totality of the circumstances. The latter discretion allows USCIS to consider COVID related delays.

(iii) Commercial & Geographical Scope

The funds must be redeployed into a commercial activity consistent with the purpose of the NCE. The Policy Update also allows for amendments to the offering documents to incorporate the specific business activity, which could potentially expand the scope of the capital redeployment. The new policy further stipulates that the redeployment must be with the same NCE and regional center, and within the regional center’s geographical scope, including any amendments to the regional center’s geographical scope that were approved prior to the redeployment. The good news is that the redeployment does not need to remain in the same job-creating entity (“JCE”) or in a targeted employment area.

POTENTIAL ISSUES WITH THE NEW RULES

(i) COVID-19 and Restrictions on Regional Center and Geography

Redeployment is restricted to the geographic territory of the same regional center. This restriction may prevent a regional center coming to the rescue of a project that falls outside of the regional center’s territory. Any amendment to the regional center’s geographical boundaries must be approved prior to the redeployment of the EB-5 capital.

(ii) USCIS’ Lack of Understanding Business Necessity

Even without the global pandemic, USCIS has been issuing RFEs, NOIDs and NOITs, showing a lack of understanding for the realities of business. Further, USCIS has not considered the

potential effects that could follow by limiting regional centers and NCEs for redeployment. As we have seen and continue to see, USCIS has been terminating regional centers, many for inactivity, even though a project has not concluded its EB-5 requirements. How can the Service expect redeployment of funds within the same regional center if the regional center is terminated, even if for good cause? This only means that the NCE must choose another regional center, and this calls for further questions, such as will USCIS accept another regional center, or what if there are no regional centers within the geographical scope?

In addition, what if the developers or NCE lack the resources or ability for further projects or developments within the specific geographical scope?

(iii) Retroactivity?

The issuance of the new guidelines certainly emphasizes how the original guidelines were at best ambiguous. As a direct consequence, several projects have already redeployed capital not in accordance with the new rules. What is the effective date of the new policy? USCIS provided an answer to this question on its website just a few days after the announcement of the new guidelines—July 27, 2020. The Service will apply the July 24, 2020 Policy Manual updated guidelines to all pending Forms I-526 and I-829 as well as future petitions. USCIS *“determined that any potential impacts to investors would be minimal because the updated guidance merely clarifies continuing eligibility requirements. This clarification does not change any substantive requirements.”*⁴ Should USCIS insist upon retroactively applying the new rules to pending cases, we are looking at yet more litigation to decide what will happen with the NCE’s who have already undergone capital deployment contrary to the new guidelines.

CAPITAL REDEPLOYMENT SHOULD BE UNDER THE AUSPICES OF THE DEPARTMENT OF COMMERCE

As stated earlier, capital redeployment dollars could potentially amount to more than \$15 billion. Has USCIS the ability to maximize the economic impact of these dollars which could have far reaching effects? We would argue that USCIS is unsuited to grasp the realities of the business world. Project related issues, including capital redeployment, should be handled by the Department of Commerce and not USCIS.

⁴ <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-further-deployment>

About the Authors:

Mona Shah, Esq. U.K. born, Mona Shah is a dual-licensed attorney and former British Crown Prosecutor. Shah has over 27 years of legal experience with extensive knowledge of all facets of U.S. immigration law. Her expertise ranges from specialist business law to complicated, multi-issue federal deportation litigation before the U.S. Courts of Appeal. Recognized as one of the industry leaders in EB-5, Shah has received many accolades for her work, including being voted a top 25 EB-5 attorney in the U.S. six years in a row; Top lawyer by Who's Who International; and Top attorney of North America. A part-time adjunct professor at Baruch College, Shah is also a published author, a Lexis Practice Editor and co-editor of the Trade & Invest magazine (BLS Media). Shah regularly speaks worldwide and has been interviewed by mainstream news channels, including Fox Business News and Al Jazeera, and quoted in major newspapers, including the New York Times. hosts and produces EB-5 Investment Voice Podcast series (115+ episodes). Shah is a member of the Presidential Advisory Board and Public Policy Committee of IIUSA.

Rebecca S. Singh, Esq. As an advanced EB-5 practitioner, with a litigation background, Rebecca works with project developers as well as individual entrepreneurs. She is responsible for analyzing, crafting and preparing project documents. Rebecca trouble shoots for other attorneys and is well versed in USCIS compliance. She is also highly proficient at investor petitions, counseling clients through all stages of the EB-5 program. She has successfully filed complex source of funds issues from clients worldwide. Rebecca also has extensive EB-5 marketing experience, authoring numerous published articles, appearing and producing podcasts and other media streams, and traveling internationally for global conferences. Rebecca is a member of the Presidential Advisory Board and Public Policy Committee of IIUSA, and has been voted as a Top 5 EB-5 Rising Star in the U.S.