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Reinvestment of EB-5 Funds in a New Project Can Maintain the "At-Risk" Requirement: Ballard Spahr

One of the more popular topics among EB-5 project owners and practitioners in recent years is the requirement that investors' funds remain "at risk" as a bona fide "investment." Complications arise regarding maintenance of the at-risk requirement, however, when project owners have the opportunity for an early exit through the sale, recapitalization, or refinancing of the project. The importance of this rule has only increased as EB-5 investments from China have been affected by a visa quota backlog.

Historically, the U.S. Citizenship and Immigration Services (USCIS) prohibited the repayment of EB-5 funds before it adjudicated the investor's Form I-526 (Immigrant Petition by Alien Entrepreneur), and also during the period of "conditional residency," when an investor's Form I-829 (Petition by Entrepreneur to Remove Conditions on Permanent Resident Status) is reviewed and decided. USCIS had not expressly prohibited a sale, refinancing, or recapitalization or the redeployment of the EB-5 funds in an at-risk investment prior to I-526 and I-829 approval. Nevertheless, USCIS previously had not provided definitive authorization regarding redeployment of funds until June 14, 2017, when it updated its policy manual, giving some much-needed direction on this issue, as discussed below.

Maintaining the "At-Risk" Requirement

Congress requires the presence of "risk" to validate that a bona fide "investment" occurred. Each EB-5 investor must contribute capital to a "new commercial enterprise" (NCE), which has potential for upside gain as well as downside risk. Consequently, in no event would a project return capital to the NCE before I-526 and I-829 approval in the event of a sale, recapitalization, or refinancing, out of concern that doing so would remove risk, even if the NCE redeployed the funds.

Because of the EB-5 program's popularity, USCIS' adjudication times of I-526 and I-829s have grown from a few months six years ago to 18 months or more currently. Further, visa backlogs have resulted as more investors apply in a particular category or from one country than are available, which further increased the adjudication time and, thus, the time the investment must remain at risk. As a result, the probability of an "early exit" has become more common and accepted. Indeed, practitioners prepare for this possibility by inserting language in the definitive EB-5 loan documents, operating agreements and the private-placement memoranda permitting the NCE to grant permission to the job-creating enterprise (JCE) in the event of a bona fide sale, recapitalization, or refinancing.

Redeployment After a Sale, Refinancing, or Recapitalization

Permitting the project owner to make an early exit and reinvest the EB-5 capital had led stakeholders and legal practitioners to structure such transactions as carefully as possible as well as to advocate for USCIS to allow repayment to the NCE or provide guidance regarding redeployment by the JCE. Many stakeholders and EB-5 practitioners took the view that the adjudication backlog and the needs of project owners called for USCIS flexibility in terms of redeploying funds, provided

that the project had created the jobs as provided in the NCE's business plan.

DRAFT Policy Memorandum 602-0121

To that end, on August 10, 2015, USCIS issued "DRAFT Policy Memorandum 602-0121, Guidance on the Job Creation Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829" (Draft PM). The document was very promising on several points, including recognizing that jobs—once created—are deemed established. The Draft PM stated specifically that the "USCIS will not require that the jobs still be in existence at the time of the Form I-829 adjudication in order to be credited to the petitioner." Further, under the heading "Material Changes," USCIS acknowledged that changes to projects may adversely affect an investor's eligibility; however, flexibility was warranted depending on when the change occurred relative to the investor's residential status in the United States, whether job creation occurred, and whether the change was material. The Draft PM separated its analysis between investors who have not obtained conditional lawful permanent resident status and investors who have obtained conditional lawful permanent resident status.

Investors Who Have Not Obtained Conditional Lawful Permanent Resident Status. Regarding investors who have not obtained conditional lawful permanent resident status, material changes occurring after the filing of a Form I-526 will result in the petitioner's ineligibility. However, non-material changes that occur after the approval of the Form I-526 would not result in the petitioner's ineligibility. A change in fact is material if the "changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision." The Draft PM stated that if the NCE undertakes the commercial activities presented in the business plan and creates the requisite number of jobs, then "the [NCE] may redeploy the capital into another 'at-risk' activity by expanding to a new location or a new industry without causing the petition to be denied or revoked." For the first time, USCIS approved redeployment of the investment into an "at-risk activity" for the remainder of the sustainment period, but no one relied on it to repay the NCE because the guidance was only contained in a draft memo. Nevertheless, the Draft PM gave stakeholders and practitioners some confidence when a JCE redeployed funds because it strongly hinted at USCIS flexibility regarding redeployment.

Investors Who Have Obtained Conditional Lawful Permanent Resident Status. The Draft PM indicated that USCIS will continue to permit an investor who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed—provided that the Form I-526 was filed in good faith.

USCIS Policy Manual Changes Through Policy Alert 2017-01

On June 14, 2017, USCIS updated its policy manual to provide further guidance regarding the job creation and at-risk requirements for Form I-526 and Form I-829 petitions by issuing Policy Alert 2017-01 (the Policy Alert). The Policy Alert builds on prior guidance for adjudicating I-526 and I-829 petitions regarding job creation and the requirement to sustain the EB-5 investment during the conditional residence period. More importantly, the Policy Alert incorporates the Draft PM into the policy manual.

The Policy Alert includes these three highlights:

- An investor must continue to be eligible for the EB-5 visa classification throughout the adjudication of his or her Form I-526 and until receipt of conditional permanent resident status by making an investment that remains "at risk."
- An investment must remain "at risk" throughout the two-year period of conditional permanent

residence to be eligible for removal of conditions on his or her permanent resident status.
- Further deployment of an investor's capital may be used to meet the capital at-risk requirement under certain circumstances.

The policy manual sets forth the following at-risk requirements in cases of reinvestment of EB-5 funds:

- The 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.
- Business activity must actually be undertaken.

Once the job creation requirement has been met, the capital is properly at risk if it is used in a manner related to engagement in commerce, which the policy manual described as the exchange of goods or services "*consistent with the scope of the NCE's ongoing business*." (Emphasis added).

The phrase "consistent within the scope of the NCE's ongoing business" is not well defined in the policy manual, but it does offer an example of an NCE whose scope of ongoing business was to loan pooled investments to a JCE for the construction of a residential building. The NCE, upon repayment of a loan that resulted in the required job creation, may redeploy the repaid capital into similar loans to other entities.

Similarly, the policy manual authorizes the NCE to reinvest the repaid capital into certain new issue municipal bonds—such as for infrastructure spending—provided that investments are within the scope of the NCE in existence at the time the petitioner filed his or her Form I-526. The policy manual does not address whether investment in new issue municipal bonds must occur in the primary issuance of the bonds or whether an NCE may invest in municipal bonds through a secondary market. Likewise, the policy manual does not explain how narrowly it would interpret an NCE's scope of ongoing business. In the above example, if the NCE redeployed the investments to a mixed-use residential building or single-family residential units instead, it is not clear whether doing so would be too far of a departure from the NCE's scope of ongoing business. Ballard Spahr will continue to monitor these issues and circulate additional updates.

Ballard Spahr's EB-5 Group brings together attorneys experienced in securities, private equity, business and finance, real estate, tax credits, and corporate law to assist clients with utilizing the EB-5 Program to accomplish their goals. The EB-5 Program has led to more than $15 billion of foreign investment in the United States and more than 220,000 jobs.

Ballard Spahr LLP

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are urged to consult your own attorney concerning your situation and specific legal questions you have.