AMERICAN IMMIGRATION LAWYERS ASSOCIATION

June 28, 2017

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Manual, Volume 6, Part G: Investors
Job Creation and Capital at Risk Requirements for Adjudication of Form I-526 and Form I-829

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the new USCIS policy guidance regarding the job creation and capital at risk requirements for Form I-526, Immigrant Petition by Alien Entrepreneur, and Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, found in Volume 6, Part G: Investors of the USCIS Policy Manual ("Policy Manual").[1]

Founded in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Policy Manual and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

As an initial matter, we greatly appreciate the opportunity to provide comments to USCIS on its Policy Manual. In the highly complex area of EB-5 adjudications, stakeholder feedback is essential to developing policy that is both consistent with legal authorities and sensible to commercial practicalities. Accordingly, we applaud your efforts to solicit stakeholder feedback.

A. Comments to USCIS Policy Manual

We offer comments on two key areas of the revised Policy Manual:

[1] *Available at* https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG.html.

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1. Definition of the sustainment period as two years of conditional permanent resident status; and
2. Imposition of an "at-risk requirement" after job creation completion.

1. Definition of the sustainment period as two years of conditional permanent resident status

The revised Policy Manual at Footnote 4 to Chapter 5, Section A.2 reads:

> See 8 CFR 216.6(c)(1)(iii). The sustainment period is the investor's 2 years of conditional permanent resident status. USCIS reviews the investor's evidence to ensure sustainment of the investment for 2 years from the date the investor obtained conditional permanent residence. An investor does not need to maintain his or her investment beyond the sustainment period.

Although the language appears clear on its face, we would like to confirm our understanding of the definition of the sustainment period. First, it appears that after two (2) years of conditional permanent residence, a new commercial enterprise may redeem an investor's investment, assuming all other requirements are met, even though the investor's Form I-829 is still pending. In such a scenario, we also understand that an investor will be deemed to have met the requirement to sustain the investment in USCIS's Form I-829 adjudication. Finally, we interpret the above to read that this policy is effective immediately, meaning that new commercial enterprises may begin redeeming investors who have fulfilled two (2) years of conditional permanent resident status as of June 14, 2017.

Provided USCIS agrees with our reading of the above, we applaud USCIS's interpretation of the sustainment period as both consistent with the original intent of Congress and legacy INS, as well as sensible, given the unforeseen visa backlog and lengthy I-829 adjudication times.

2. Imposition of an "at-risk requirement" after job creation completion

Chapter 2, Section A.2 of the revised Policy Manual includes a new provision as follows:[2]

> *At-Risk Requirement After the Job Creation Requirement is Satisfied*
>
> 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 (in other words, the exchange of goods or services) consistent with the scope of the new commercial enterprise's ongoing business.[29] After the job creation requirement is met, the following at-risk requirements apply:
>
> - 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;

[2] Citation references preserved; cited sources omitted.

- There must be a risk of loss and a chance for gain; and
- Business activity must actually be undertaken. [30]

> For example, if the scope of a new commercial enterprise was to loan pooled investments to a job-creating entity for the construction of a residential building, the new commercial enterprise, upon repayment of a loan that resulted in the required job creation, may further deploy the repaid capital into one or more similar loans to other entities. Similarly, the new commercial enterprise may also further deploy the repaid capital into certain new issue municipal bonds, such as for infrastructure spending, as long as investments into such bonds are within the scope of the new commercial enterprise in existence at the time the petitioner filed the Immigrant Petition by Alien Entrepreneur (Form I-526).
>
> Officers must determine whether further deployment has taken place, or will take place, within a commercially reasonable time and within the scope of the new commercial enterprise's ongoing business.[31]

We believe these revisions to Chapter 2 are inconsistent with the statute, regulations, and precedent decisions *Matter of Izummi*[3] and *Matter of Ho*.[4] We urge USCIS to adopt policy that adheres to governing legal authorities. New policies unrooted in existing law create hazards in compliance and adjudication. In this instance, we may not object to the policy of permitting reuse or redeployment of repaid capital; however, we object to reaching this policy by stretching the "at risk" test beyond its lawful limits.

We observe that a failure to meet the "at risk" test is a frequent invocation in requests for evidence, intents to deny, and denials in EB-5 adjudication. Of greatest concern is USCIS's finding that petitioners have failed to sustain an investment "at risk" in the I-829 adjudication context. No such requirement to sustain an investment "at risk" exists in law, as discussed more fully below. We offer these comments toward the larger goal of refining USCIS' adjudication of the "at risk" test to assure rational basis and greater predictability in EB-5 adjudication.

The three foundational elements of an EB-5 investment under the statute are: an **investor**'s contribution of **capital** to the **new commercial enterprise**. An EB-5 investor's capital must be "at risk." The "at risk" evidentiary test is found in the regulations.[5] The "at risk" test ensures that the investor has "invested" in the way Congress intended for EB-5 qualification purposes, because "investment" can otherwise have diverse meanings. The regulations state that for I-526 eligibility, the investor has to show USCIS that he or she has put the capital "at risk for the purposes of generating a return on the capital placed at risk."[6]

[3] *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r, Examinations 1998) ("Izummi").
[4] *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998).
[5] *See* 8 CFR §204.6(j)(2).
[6] *Id.*

Critically, these regulations relate only to I-526 petition eligibility. There is no "at risk" requirement for the removal of conditions found in statute at Immigration and Nationality Act (INA) section 216A or in the implementing regulations governing removal of conditions at 8 CFR § 216.6. As only applicable to I-526 eligibility, if an investment was "at risk" at the time of investment, the test is satisfied. It is not a requirement that must be continuously met beyond the petitioner's investment in the new commercial enterprise. As such, once the I-526 petition is approved, USCIS has determined that the investor has satisfied the investment "at risk" requirement. In order for the I-829 to be approved, the requirements that remain are sustainment of the investment and job creation.

The foregoing is confirmed in *Matter of Izummi*.[7] Critical to our discussion here, *Izummi* is an I-526 eligibility decision, not an I-829 eligibility decision. *Izummi*'s holding applies to whether the investment meets the requirements for EB-5 classification and does not reach the requirements for removal of conditions.

Two conclusions follow and are explained in detail below. First, rather than imposing one set of requirements for the investment to be "at risk" before job creation and imposing another set of requirements for the investment to be "at risk" after job creation, the Policy Manual should confirm that the only relevant time for utilizing an investment "at risk" test is at the time of investment. Second, any policy imposition to sustain the investment "at risk" is *ultra vires* and contrary to statute, regulations, and precedent decisions.

a. <u>The relevant time for determining whether an investment is "at risk" is at the time of investment</u>

First, the plain language and context of regulations at 8 CFR § 204.6(j)(2) make clear that the only relevant time for determining whether an investment "at risk" has occurred is at the time of the investor's EB-5 investment.

The requirement that an EB-5 investor's capital be "at risk" is found in the EB-5 regulations' description of evidence required to prove "investment" for I-526 eligibility. These regulations state:

> "**To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petition has placed the required amount of capital at risk** for purposes of generating a return on the capital placed at risk. Evidence of mere intent to invest or of prospective investment arrangements entailing no present commitment will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital."[8]

[7] *Matter of Izummi*, *supra*, note 3.
[8] 8 CFR §204.6(j)(2) (emphasis added).

The plain language of this regulation makes clear that the core requirement is investment. To prove investment has occurred, the investor must produce evidence that the required capital has been placed "at risk." A showing that the investor has placed his capital "at risk" is therefore not an independent requirement for EB-5 eligibility; rather, it is an evidentiary test to prove due investment has occurred or is in the process of occurring.

Second, the purpose of the regulation at 8 CFR § 204.6(j)(2) is to ensure that the investor is making his EB-5 investment, appreciating that there is risk of loss but hoping for a gain. When Congress created the EB-5 immigrant category in 1990, it intended that the investor have a personal stake in the success of the enterprise receiving the EB-5 capital.[9] Congress specifically required investors to commit equity, rather than debt, into the new commercial enterprise, in order to build in the element of risk.

The regulations attempted to implement Congressional intent in this regard by looking to similar provisions in the regulations governing E-2 visa issuance for nonimmigrant treaty investors. The preamble to the final EB-5 regulations[10] points to the Department of State requirements for E-2 treaty investors as the model for the "at risk" evidentiary requirement.[11] The preamble states: "As with that program, the concept of investment here connotes the placing of funds or other capital assets at risk for the purpose of generating a return on the funds placed at risk." Accordingly, the EB-5 regulations mirror the E-2 regulations' investment requirement, which state:

> "An alien is classifiable as a nonimmigrant treaty investor (E-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:
>
> > (i) Has invested or is actively in the process of investing a substantial amount of capital in bona fide enterprise in the United States . . . ."[12]

The E-2 regulations explain the meaning of "investment" in the E-2 context:

> "Investment means the treaty investor's **placing of capital**, including funds and other assets, at risk in the commercial sense **with the objective of generating a profit**. The treaty investor must be in possession of and have control over the **capital invested or being invested**. The capital must be subject to partial or total loss **if investment fortunes reverse**. Such investment capital must be the investor's

[9] Letter from U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs, to Gene McNary, Comm'r, legacy Immigration and Naturalization Service (INS) (Aug. 2, 1991), commenting on the proposed EB-5 regulations ("We agree with the thrust of the proposed regulations that the alien must have a personal stake in the long range success of the enterprise and be willing to suffer a loss if the business fails. We do not believe that the investor should qualify merely by loaning money to the new enterprise, nor do we believe that the investment should be raised by securing a loan against the assets of the U.S. company. In short, we expect the investor to put his money at risk.").
[10] 56 Fed. Reg. 60897 (Nov. 29, 1991).
[11] *Id.* at 60905.
[12] 22 CFR §41.51(b)(i).

> unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor."[13]

The E-2 regulations clearly contemplate examining the investor's objective at the time of investment: did the investor **place his capital** with the objective of generating a profit, subject to partial or total loss if his investment soured? This purpose relates to the investor's placement of capital in the qualifying investment – that is, his initial capital placement, defined as "investment." The discussion of "investment" and the purpose with which the investor was required to place his capital relates to the time of investment and not any subsequent time. Certainly, there is no reference or mention of any subsequent investment or placement of capital.

Third, precedent AAO decisions,[14] in particular *Matter of Izummi* and *Matter of Ho*, make clear that the relevant time for determining whether capital has been placed "at risk" is the time of investment. *Izummi* states:

> "The alien **must go into the investment** not knowing for sure if he will be able to sell his interest at all after he obtains his unconditional permanent resident status; and if he is successful in selling his interest, the sale price may be disappointingly low (or surprising high and more than what he paid). This way, the alien risks both gain and loss. To allow otherwise transforms the arrangement into a loan."[15] (Emphasis added.)

Similarly, *Ho* examines whether sufficient business activity had been undertaken at the time of investment to render the investment sufficiently "at risk." In *Matter of Ho*, the petitioner had merely placed his capital in a corporate account he controlled and had undertaken only a lease, according to the AAO:

> "Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This

[13] 22 CFR §41.51(b)(7) (emphasis added).
[14] *Matter of Soffici*, 22 I&N Dec. 158, 19 Immigr. Rep. B2-25 (Assoc. Comm'r, Examinations 1998); *Matter of Izummi*, 22 I&N Dec. 169, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 19 Immigr. Rep. B2-106 (Assoc. Comm'r, Examinations 1998); *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm'r, Examinations 1998).
[15] *Matter of Izummi*, *supra*, note 3, at 187.

> petitioner's de minimis action of signing a lease agreement, without more, is not enough."[16]

Again, the scrutiny to determine whether an investor's capital was placed "at risk" is applied at the time of investment.

In the light of Congressional intent, the plain language of governing regulations, and the AAO's precedent decisions, the Policy Manual's new requirement imposed "once the job creation requirement has been met" to keep "capital properly at risk" is clearly outside the existing legal framework.

b. Any policy imposition to sustain the investment "at risk" is *ultra vires* and contrary to statute, regulations, and precedent decisions

The Policy Manual in Chapter 5, Section C expresses four (4) separate eligibility requirements for removal of conditions, beyond the requirements currently authorized by statute, regulations, and precedent decision. The new requirements are as follows:

> - The required funds were placed at risk throughout the period of the petitioner's conditional permanent residence in the United States;
>
> - The required amount of capital was made available to the business or businesses most closely responsible for creating jobs (unless the job creation requirement has already been satisfied);
>
> - This at-risk investment was sustained throughout the period of the petitioner's conditional permanent residence in the United States; and
>
> - The investor created (or maintained, if applicable), or can be expected to create within a reasonable period of time, the requisite number of jobs.
>
> Accordingly, if an immigrant investor fails to meet any of these requirements, he or she would not be eligible for removal of conditions. [17]

These requirements are not found in INA § 216A. Moreover, these requirements are not found in regulations. The regulations governing the eligibility requirements for an entrepreneur to remove conditions on resident status are provided at 8 CFR § 216.6(a)(4), and they contain two substantive requirements. Clause (iii) requires evidence that the investor sustained the investment. Clause (iv) requires evidence that the investor created or can be expected to create within a reasonable period of time the required ten full-time jobs for qualifying employees.

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[16] *Matter of Ho*, *supra*, note 4, at 210.
[17] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 5 – Removal of Conditions, C. Material Change.

The Policy Manual would add three additional requirements to the current two.

- First, the Policy Manual would require evidence that funds were placed at risk throughout conditional permanent residence. Based on an analysis of Congressional intent, plain language of the regulations, and AAO precedent decisions, we have established in the preceding section that **the only relevant time an investor's capital must be shown to be "at risk" is at the time of investment**.

- Second, the Policy Manual would require evidence that the required capital was made available to the businesses most closely responsible for job creation. While I-829 petitions may contain this evidence to show fulfillment of the business plan, this evidence is not required in the I-829 regulations. The language of the Policy Manual paraphrases *Matter of Izummi.*[18] As we have discussed, *Matter of Izummi* is relevant authority for I-526 eligibility but does not reach I-829 eligibility requirements, which are separate and distinct. Accordingly, this new requirement is not authorized.

- Third, the Policy Manual would require evidence that the investment, beyond merely being sustained, was an "at-risk investment … sustained throughout the period of petitioner's conditional permanent residence." The distinction between this new requirement and the first new requirement is unclear. However, the Policy Manual revisions would impose the sustained investment to also be "at risk."

We urge the Policy Manual's treatment of removal of conditions requirements to track existing regulations. Investors already bear the risk of job creation failure. To sustain their investment, they must also sustain their investment throughout at least two years in conditional permanent residency status, which when added to the visa backlog wait times, will be a number of years. Investors should not be required to bear the additional risks the Policy Manual revisions would impose to keep their investment sustained and furthermore sustained "at risk." Such a requirement is beyond the scope of existing authority and accordingly would present hazards in interpretation, compliance, and adjudication.

c. Permissible uses of repaid EB-5 proceeds

Having previously outlined above how a requirement to maintain an investment "at risk" after job creation and sustain at-risk investment are beyond the scope of existing authority, we now offer suggestions on permitted redeployment scenarios.

As suggested in the draft August 2015 Policy Memorandum, we agree with the policy position that when the business plan is fully executed and job creation is complete, the new commercial enterprise may redeploy the EB-5 capital, and its investors should not suffer a material change finding. We recommend that the final revisions to the Policy Manual adopt this position, but clarify that such redeployment is permitted, but not required. For all the reasons discussed above,

[18] *See Matter of Izummi*, *supra*, note 3 at 179 ("The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.").

we believe there is no legal basis to require investment to be maintained or sustained "at risk" to require an entirely new use, and potentially series of uses, of repaid EB-5 proceeds.

Should USCIS agree with this position, we respectfully request clarity on this point. For example, the Policy Manual uses the language "may further deploy," [19] but then states such redeployment "must be within a commercially reasonable time." [20] This suggests that further deployment is mandatory; this ambiguity should be resolved.

In formulating guidance on permitted redeployment, it appears that the concepts the Policy Manual put forth, though not aligned with the "at risk" test, may be aligned with the definition of "commercial enterprise":

> "Commercial enterprise means any for-profit activity formed for the **ongoing conduct of lawful business** including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company…."[21]

Concepts in the Policy Manual such as redeployment in activities "related to engagement in commerce" and "consistent with the scope of the new commercial enterprise's ongoing business" are more native to the "commercial enterprise" definition, rather than the "at risk" concepts in law.

That said, greater clarification on the meaning of such terms is necessary for new commercial enterprises to engage in permitted redeployment. For example, the concept of redeploying "consistent with the scope of the new commercial enterprise's ongoing business" is unclear. An entity is often formed with the general purpose of conducting any lawful activity. In such instances, a new commercial enterprise should arguably be permitted to deposit repaid EB-5 funds in an institutional, interest-bearing account to satisfy this language.

Other concepts in the Policy Manual that require clarification include the following:

- "Business activity must actually be undertaken."[22] What level of business activity is required? After repayment of EB-5 proceeds when all the job creation activity has been completed, presumably the threshold for activity would be lower than imposed in *Matter of Ho*, but further guidance is greatly needed.

- Further deployment "within a commercially reasonable time."[23] What timeframe is commercially reasonable? What are the factors to be applied? Would or should the general one-year test applicable to I-829 job creation within a reasonable time apply?

[19] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 2.
[20] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 2.
[21] *See* 8 CFR §204.6(e). (emphasis added)
[22] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 2 – Eligibility Requirements, 2. Investment, A. Investment of Capital, 2. Investment.
[23] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 2 – Eligibility Requirements, 2. Investment, A. Investment of Capital, 2. Investment.

- Chapter 5 revisions refer to requiring "this at-risk investment was sustained throughout the period of the petitioner's conditional permanent residence."[24] Clarification is needed here to confirm that the sustainment period is two years, per the new footnote 4 in Chapter 5.

- Repaid capital may be further deployed "into one or more similar loans to other entities."[25] The USCIS revisions in setting forth the redeployment standard uses as an example the "construction of a residential building." What defines a "similar loan?" Is it limited to residential construction, or construction, and would redeployment into hotel construction project not be permitted?

To the extent that permitted reuse or redeployment is made final policy, stakeholders need clarifying guidance to comply.

Concrete guidance is also needed when there has been job creation failure. As the August 2015 draft memorandum suggested, this may be an instance when reuse or redeployment should be required. Alternatively, perhaps there should be a requirement that the new commercial enterprise use commercially reasonable efforts to redeploy. The material change risk, as the August 2015 draft memorandum suggests, would apply.

We suggest in these comments that while clarifying guidance is urgently needed, keying redeployment scenarios to an "at risk" requirement hampers clarifying guidance. More appropriate legal authority, and therefore perhaps a richer source of clarification, may be found in the concept of "ongoing" commercial enterprise instead.

B. Conclusion

We understand that as a policy matter, USCIS may wish to see repaid funds in continuous use rather than merely deposited in an account. Any new requirement imposed by policy, however, should remain within the bounds of existing authority. When existing terms and concepts are stretched beyond their roles, there is loss of predictability in adjudication. Stakeholders then must attempt to apply guidance, unmoored from authority, which USCIS may subsequently interpret differently. For these reasons, we believe it is paramount that conceptual clarity in complex concepts such as the "at risk" evidentiary test for investment be preserved.

From an investor's point of view, any compelled reuse of repaid funds invites risk that investors did not anticipate at the outset. When a project is completed and jobs created, investors' economic risk should be commensurately greatly reduced. With any required redeployment scheme, investors will be forced to take on subsequent rounds of economic risk of varying levels. While this outcome may be consistent with the concept of an "ongoing" commercial enterprise,

[24] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 5 – Removal of Conditions, C. Material Change.
[25] *See* USCIS Policy Manual, Volume 6 – Immigrants, Part G – Investors, Chapter 2 – Eligibility Requirements, 2. Investment, A. Investment of Capital, 2. Investment.

we urge USCIS to forego arriving at this result by importing the "at risk" requirement into sustainment. USCIS policy should move toward greater precision and adherence to governing authority to ensure integrity and predictability.

In closing, we thank you for providing this opportunity to comment on the newly published sections of the USCIS Policy Manual. We look forward to a continuing dialogue on this and related matters.

Sincerely,

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