August 24, 2020

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

Submitted via e-mail: **USCISPolicyManual@uscis.dhs.gov**

Re: Comments on Changes to USCIS Policy Manual, Clarifying Guidance for Deployment of Capital in Employment Based Fifth Preference (EB-5) Category, 6 USCIS-PM G.2 and 6 USCIS-PM G.4

Dear Director:

The American Immigration Lawyers Association (AILA) together with Invest In the USA (IIUSA) write respectfully and jointly to submit comments in response to the U.S. Citizenship and Immigration Services ("USCIS") new guidance issued on July 24, 2020, titled "Clarifying Guidance for Deployment of Capital in Employment Based Fifth Preference (EB-5) Category."[1] Specifically, that new guidance impacts the deployment of investment capital or further deployment of investment capital after the job creation requirement is satisfied (i.e., redeployment of investment capital), amending the USCIS Policy Manual, Volume 6., Part G, Chapter 2, Eligibility Requirements, and Chapter 4, Immigrant Petition by Alien Investor (Form I-526).

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, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

Invest in the USA (IIUSA) is the national, membership-based 501(c)(6) not-for-profit industry trade association for the EB-5 Regional Center Program industry. We have over 300 member organizations who represent a broad range of professions withing the industry including Regional Center owners and operators, immigration attorneys, corporate and securities attorneys, financial service providers, project developers and more. IIUSA's members account for the vast majority of

[1] *See* U.S. CITIZENSHIP & IMMIGRATION SERV., DEP'T OF HOMELAND SECURITY, PA-2020-11, USCIS PUBLIC SERVICES (JULY 24, 2020), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200724-EB5FurtherDeployment.pdf.

capital formation and job creation generated in the United States resulting from the Program. IIUSA advocates for policies that maximize economic benefit to the United States from the EB-5 Regional Center Program. Accordingly, our primary mission is to achieve the permanent Congressional reauthorization of the EB-5 Regional Center Program after over 30 years of enthusiastic bipartisan support and demonstrated economic impact.

We appreciate the opportunity to comment on the new guidance amending USCIS Policy Manual Volume 6: Immigrants, Part G, Investors. We believe that our respective organizations and members' collective expertise and experience makes us particularly well-qualified to offer views on this matter. The comments below attempt to express the significant concerns of the EB-5 stakeholder community about the substantive policy changes reflected in the new guidance.

Background on Redeployment & Further Deployment Guidance Prior To July 2020

The regulation at 8 CFR §204.6(j)(2) requires EB-5 investment capital to be placed "at risk for the purpose of generating a return on the capital placed at risk." For the last five years, USCIS guidance on the application of this regulation contained no reference to a geographic limitation on redeployment.

As visa retrogression in EB-5 became a reality in 2015, and it became apparent great numbers of EB-5 investors would have to sustain their investments in the NCEs for ten years or more, USCIS issued a draft EB-5 Policy Memorandum in 2015 entitled "Guidance on the Job Creation Requirement and Sustainment of Investment for EB-5 Adjudication of Form I-526 and Form I-829."[2] The draft memorandum outlined the following points:

- The continuous maintenance or "sustainment" of the capital investment requires that the capital be "at risk" throughout the sustainment period and sustained in a single new commercial enterprise.
- The capital will not be considered "at risk" if it is merely being held in the new commercial enterprise's bank account or an escrow account during the sustainment period.
- If, on the other hand, the investor shows that all of his or her invested funds were lost as a result of the investment, the investor may still meet the sustainment requirement for the Form I-829 adjudication.

The language contained in the August 2015 draft EB-5 memorandum suggested that EB-5 funds could not simply remain in a bank account or escrow account controlled exclusively by the NCE and be considered "at risk" for purposes of eligibility for removal of conditions on permanent resident status. USCIS memorialized this guidance in a Policy Alert entitled "Job Creation and

[2] U.S. CITIZENSHIP & IMMIGRATION SERV., DEP'T OF HOMELAND SECURITY, DRAFT MEMORANDUM, DRAFT PM-602-0121, GUIDANCE ON THE JOB CREATION REQUIREMENT AND SUSTAINMENT OF INVESTMENT FOR EB-5 ADJUDICATION OF FORM I-526 AND FORM I-829, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Policy_Memo_Guidance_on_the_Job_Creation_Requirement_and_Sustainme.pdf.

Capital At Risk Requirements for Adjudication of Form I-526 and Form I-829."[3] Specifically, USCIS stated that:

- An investor must also sustain his or her investment "at risk" throughout the 2-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.

Following these two publications, USCIS memorialized its guidance in the USCIS Policy Manual in June 2017. As an initial matter, the Policy Manual confirmed the *Matter of Izummi* holding that the full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. In the regional center context, the immigrant investor must establish that the capital was invested into the NCE and that the full amount of capital was subsequently made available to the Job Creating Entity (JCE), if separate.[4]

The June 2017 version of the Policy Manual then broke down the "at risk" requirement into two components:[5]

- *At-Risk Requirement Before the Job Creation Requirement is Satisfied*. Before the job creation requirement is met, the following at-risk requirements apply: (1) 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) there must be a risk of loss and a chance for gain; (3) business activity must actually be undertaken; and (4) the full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.

- *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. After the job creation requirement is met, the following at-risk requirements apply: (1) 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) there must be a risk of loss and a chance for gain; and (3) business activity must actually be undertaken.

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[3] U.S. CITIZENSHIP & IMMIGRATION SERV., DEP'T OF HOMELAND SECURITY, POLICY ALERT, PA-2017-01, JOB CREATION AND CAPITAL AT RISK REQUIREMENTS FOR ADJUDICATION OF FORM I-526 AND FORM I-829 (June 14, 2017), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20170614-EB5JobsAndCapitalAtRisk.pdf.

[4] June 2017 Version, USCIS Policy Manual, Volume 6, Part G, Chapter 2, Section A.2.

[5] *Id.*

The update also included two examples of permissible redeployment investments:

a. If the scope of an NCE was to loan pooled investments to a job-creating entity for the construction of a residential building, the NCE, 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.
b. The NCE may 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 NCE.

Nowhere in the 2015 Draft Memorandum or in the June 2017 alert and Policy Manual update did USCIS state that a redeployment following the completion of job creation must occur within the geographic boundaries of the sponsoring regional center.

Moreover, on numerous occasions stakeholders asked USCIS to provide specific guidance with respect to the geographic areas of redeployments. On October 5, 2018, then USCIS Director Francis Cissna and Chief of the Immigrant Investor Program Office (IPO) Sarah Kendall attended a meeting with IIUSA.[6] During the question and answer session one of IIUSA's members reiterated this request:

> Imagine if you were running a new commercial enterprise that has $50-, $100 million coming back to you and you need to exercise your fiduciary duty to the investors to redeploy this within the parameters that make sure they keep their green card and get their I-829 approved one day. But at the same, you don't want to put this thing into unnecessarily risky new projects…..So we need clarity. What can that be? Does it have to be into another job-creating enterprise like the one it already was? Can it be into some kind of fund of things? Can it be buying somebody else's interest in such a thing? All the way to can you use this money to buy -- to buy interest in a mutual fund of publicly traded securities. That's a risk. Is that enough? **The rules -- the policy that has been articulated is just not clear about what that needs to be. It says that it needs -- it doesn't say whether the redeployment needs to be within the scope of the regional center or not. I don't think that the people writing this thought that that was required. But they didn't say it one way or the other and it needs to say one way or the other. And I think it should say it doesn't have to be in the same regional center or any regional center, doesn't have to be in a targeted employment area. But it needs to say, one way or the other.** And it needs to say: does this thing that it's redeployed in need to be like the original one that is using the money newly to create jobs? Or can it be taking out somebody else's interest in a thing that created jobs already? I mean, can a -- if the money originally went to build a building that had some operations, we

[6] *See* USCIS OFFICE OF PUBLIC AFFAIRS, TRANSCRIPT, U.S. CITIZENSHIP AND IMMIGRATION SERVICES MEETING WITH IIUSA (Oct. 5, 2018), https://www.uscis.gov/sites/default/files/document/foia/USCIS_Cissna_IIUSA_Meeting_and_Statistical_Analysis_Charts.pdf (emphasis added).

> sold it and now the enterprise wants to redeploy this money in a real estate investment trust, is that okay? Here, it's not clear.[7]

Former Director Cissna responded confirming that not even USCIS had thought about the geographic area of the redeployment when publishing the June 2017 update to the Policy Manual:

> So we're all bedeviled by this. And you all, the issue you is you have to live with it and hold that money and figure out something to do with it. And we have to monitor what you're doing. And so that is the original sin here that we're all suffering under. But if we're right and that's what we're stuck with then, yeah, then the guidance has to be clear. It is no good if the guidance is not clear. So thank you for that. We will definitely talk about that. It may be that, you know, that you're all stuck having to redeploy in the fashion that we described and that's the price we pay because the laws have not been updated and improved in a long time. And that will just, I hope -- it's one more thing, one more reason why Congress needs to fix the laws that underlie the program. One more problem to add on. But I do understand the issue and we'll definitely talk about that.[8]

Following this October 2018 meeting, stakeholders again asked questions of USCIS regarding the geographic limitations of a redeployment.

At a October 29, 2018 AILA & IIUSA EB-5 Industry Forum, IPO Director Sarah Kendall stated:

> Once the job creation requirement has been met, the following requirements continue to apply: (1) the immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on that capital, (2) both a risk of loss and chance for gain must be present for the investment; and (3) business activity must actually be undertaken.[9]

No restriction on the geographic location was outlined by USCIS in the draft guidance, the final June 2017 Policy Manual update nor in the IPO's public comments to stakeholders on numerous occasions. Even further, Ms. Kendall confirmed during the October 29, 2018 AILA & IIUSA Industry Forum:

> I'll note that the "at risk" requirements are identical before and after job creation except that before the job creation is satisfied, the full amount of the investment must also be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.[10]

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[7] *Id*.
[8] *Id*.
[9] U.S. CITIZENSHIP & IMMIGRATION SERV., IMMIGRATION INVESTOR PROGRAM OFFICE 2018 AILA & IIUSA INDUSTRY FORUM, SARAH M. KENDALL REMARKS (Oct. 29, 2018), https://www.uscis.gov/sites/default/files/document/foia/2018_AILA_IIUSA_EB-5_Industry_Forum_Sarah_M._Kendall_Remarks.pdf.
[10] *Id*.

This statement confirmed that USCIS believed the only difference between the initial deployment and future redeployments was the initial deployment for job creation purposes required the full amount of each investor's capital to be deployed to the JCE within the scope of the regional center's area as required by *Matter of Izummi*.

Now, after years of the EB-5 industry's reasonable reliance upon the statements and guidance USCIS provided, USCIS has abruptly changed the requirements of redeployment investments and added significant new restrictions to the Policy Manual with retroactive effect, without any opportunity for notice or comment by the public in advance of this change.

Issue #1*:* The adverse impacts of the new guidance are <u>not</u> "minimal," will inflict severe economic harm, and establish a basis for the denial of EB-5 immigration benefits to thousands of good-faith investors and family members

USCIS states that "(t)hese ***clarifications*** apply to all Form I-526 and I-829 petitions pending on or after [date of publication]. USCIS considered ***potential impacts to petitioners and determined that such impacts, if any, would be minimal*** because this is merely a clarification of continuing eligibility requirements. USCIS is not changing any substantive requirements."[11]

As the representatives of EB-5 investors, new commercial enterprises, and regional centers, AILA and IIUSA strongly object to the characterization of the profoundly harmful impacts of this clarifying guidance as "minimal". In fact, the data shows implementation of the new guidance will affect an estimated $14.8 billion of EB-5 capital and the EB-5 eligibility of more than 50,000 intending immigrants.

By its own terms, the new guidance applies to all pending I-526 and I-829 petitions. As of December 31, 2019, there were 17,468 Forms I-526 and 10,373 Forms I-829 pending with USCIS. And as of April 20, 2020, there were 24,005 Forms I-526 that had been approved for petitioners awaiting visa availability. Considering these statistics do not include derivative beneficiaries, the number of immigrants affected by the new guidance is several magnitudes higher.

The below chart summarizes these statistics:

Petition Type	**USCIS Reported Case Data**	**Est. Value of Capital Subject to New Rules[12]**
I-526 Petitions Pending	17,468	$8.7 billion
I-526 Petitions APPROVED (awaiting visa issuance)	24,005	$12 billion
I-829 Petitions Pending	10,373	$5.1 billion
Totals	**51,846**	**$14.8 billion**

[11] PA-2020-11, *supra* note 1 (emphasis added).
[12] Assumes $500,000 capital investment for each petitioner.

Thus, it is disingenuous for USCIS to assert the changes to the Policy Manual will have "minimal impact, if any" when the data reveals the massive scale of economic and immigration impacts.

And to be clear, the changes to the Policy Manual absolutely enact substantive changes. Labeling the updates as mere "clarification" does not change the substantive nature of the impacts that will inflict real harm on stakeholders who justifiably relied upon previously issued USCIS guidance. We detail some of the anticipated harms below.

Harm to Group #1: EB-5 investors with pending petitions that have already made redeployment investments

The restrictions in the new guidance are rendered significantly more harmful and punitive by virtue of their retroactive application to all pending I-526 and I-829 petitions. EB-5 investors who in good faith followed the letter of EB-5 law and the guidelines provided by the USCIS Policy Manual at the time they filed their petitions will be harmed. Prior to July 24, 2020, the Policy Manual required redeployment of EB-5 funds to ensure they remained "at risk." These EB-5 investors had no means of foreseeing this change in USCIS policy, and therefore had no reason to object to the redeployment of their funds that would occur within a commercially reasonable time, in an investment within the original business scope of the NCE, but happened to be outside of the geographic scope of the regional center.

Retroactive application of the new restrictive guidance means these petitioners are now subject to having their petitions denied. Moreover, redeployment investment transactions are typically illiquid and irrevocable, leaving the EB-5 investors with no recourse to even try to comply with the new retroactive policy requirements. This will impose substantial harm on good faith EB-5 investors who otherwise met every other requirement of the EB-5 program.

Harm to Group #2: EB-5 investors with pending petitions where the NCE was in the process of redeploying at the time of the July 2020 update

In addition to those EB-5 investors with already completed redeployment investments, the retroactive application of the July 2020 update impacts those EB-5 investors with pending petitions based on investments in NCEs that were in the process of finalizing redeployment investments outside the scope of the regional center at the time the July 2020 update was released.

Redeployment investment transactions are often complex, and it takes time to source a fiscally sound and EB-5 compliant investment, not to mention the time it takes for negotiations and underwriting/due diligence. As of July 24, 2020, many of these pending transactions were no doubt fully committed and binding even though they had not been finalized, and the new policy does not account for such redeployments that may be currently underway. The NCEs in those cases will be in breach of contract if they attempt to protect the EB-5 eligibility of their investors and break those agreements to comply with the new USCIS policies. This could trigger liquidated damages, and result in litigation as a consequence of their reasonable reliance on the USCIS stated redeployment policy for the last five years.

The policy change unjustly puts the NCE charged with managing EB-5 investor funds in such cases in the untenable position of being forced to choose between either i) finalizing and funding a redeployment investment that does not comply with the new guidance because the investment happens to be outside the geographic scope of the regional center, or ii) facing potentially onerous contractual liability from backing out of a contract for a commercial investment.

Harm to Group #3: EB-5 investors with new redeployments going forward

The new guidance requiring that redeployment of EB-5 funds must be within the geographic scope of the regional center severely restricts the ability of the NCE to find good quality and EB-5-compliant redeployment investment opportunities. Increasingly in recent years, IPO has restricted the geographic scope of regional center designations, and consequently some regional centers are very limited in size, comprised of as little as a single TEA or MSA. Other regional centers may consist of a large but primarily rural and sparsely populated area, e.g. the states of North Dakota or Wyoming. In both instances, it would be very difficult and or even impossible for the NCE to find another quality and EB-5-compliant redeployment investment opportunity within 12 months and within that limited geographic scope without putting the EB-5 investor funds into an unduly risky investment, or locking the funds up for an unreasonably long period of time because that was the only investment available.

Additionally, NCEs that that have very few investors may find it very difficult to find suitable redeployment opportunities within the geographic scope of the regional center simply because the amount of EB-5 funds is not substantial enough to garner commercial interest. On the flip side, NCEs that have many investors would also likely have a difficult time redeploying hundreds of millions of dollars if restricted to investing only within the geographic scope of the regional center.

Furthermore, the new restriction on the geographic limits of redeployments creates an uneven playing field among regional centers, giving a competitive advantage to existing regional centers with geographic scopes comprised of several states and/or well-developed and densely populated areas with affluent urban centers. USCIS' new guidance has the effect of picking winners and losers. When new EB-5 investors consider which regional center to invest with, they will naturally be drawn to regional centers with a large geographic scope, or those comprised of affluent urban centers, so as to increase the possibility of the NCE having a large selection of redeployment opportunities available to it. On the other hand, a regional center with a small geographic scope or comprised of rural areas will have a difficult time raising EB-5 funds, as EB-5 investors will doubt the ability of the regional center to redeploy the funds into quality investments that are also EB-5-compliant when the time comes. This will severely frustrate the original purpose of the EB-5 program: to stimulate the economy through foreign investment and create jobs in areas of the country that need it the most.

In sum, USCIS's justification for circumventing public notice and comment requirements based on its characterization of the new guidance as mere "clarification" with minimal, if any, potential impacts to petitioners does not hold up under scrutiny. As described above, the new guidance (a) changes substantive requirements and makes their application retroactive, and (b) negatively impacts an estimated $14.8 billion of EB-5 capital and the EB-5 eligibility of an estimated 50,000 intending immigrants. USCIS should withdraw the new guidance and undergo public notice and comment procedures as required by Administrative Procedure Act.

Issue #2: Impermissible Retroactive Application of New Guidance to Pending Cases

The new guidance states it applies "to all Form I-526 and I-829 petitions pending on or after date of publication," i.e., July 24, 2020. In the simplest of terms, USCIS examiners will now apply the newly issued guidance to the adjudication of many thousands of pending and approved I-526 petitions and pending I-829 cases, many of which were filed several years ago.

If USCIS maintains the new redeployment restrictions, it should, at a minimum, amend the guidance to apply prospectively only, with an effective date not less than six (6) months from the date of publication. Making this change is critical to ensure that countless EB-5 investors, regional centers, and other stakeholders have a fair opportunity to comply with USCIS's new redeployment restrictions, and to ensure they are not subject to undue harm as a result of having relied on USCIS's prior guidance.

There is ample authority to support this position, as it is well and long-established that "[r]etroactivity . . . is disfavored in the law."[13] When agencies adopt new policies or interpretations and apply them to past conduct, that retroactive effect blindsides regulated parties, depriving them of fair notice and undercutting trust in the fair administration of our laws.

In line with this principle, courts frequently prohibit agencies from applying new policies or interpretations retroactively; when the "inequity of retroactive application" outweighs the agency's "statutory interest[]" in retroactive effect, agencies are barred from applying a new policy retroactively.[14]

The District of Columbia (D.C.) Circuit, the federal appeals court with jurisdiction over the USCIS IPO, has identified five factors to consider when determining whether a new agency policy can be given retroactive effect:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[15]

Taken together, these factors[16] establish that it would be impermissible for USCIS to apply its new

[13] *Sage IT, Inc. v. Cissna*, 314 F. Supp. 3d 203, 208 (D.D.C. 2018); *see Landgraf v. USI Film Prod.*, 511 U.S. 244, 268 (1994) ("[R]etroactivity has long been disfavored[.]").
[14] *See Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *see also, e.g., Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539–40 (D.C. Cir. 2007).
[15] *Retail, Wholesale*, 466 F.2d at 390.
[16] The first factor—whether the case is one of first impression—applies "in the context of disputes between parties where a private litigant must bring suit," and is therefore neutral in this context. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1180 n.9 (10th Cir. 2015) (Gorsuch, J.); *see also Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275 (9th Cir. 2015) (noting that "[i]n the immigration context, in which the government is always a party, this concern is less relevant"). We will therefore limit this discussion to the other four factors.

restrictions on capital redeployment retroactively.[17]

There is also considerable precedent within USCIS supporting the adoption of policy changes prospectively. USCIS has enacted new policies in the past with respect to regional center geography and job creation and declined to retroactively apply those new policies to pending cases. As of May 15, 2018, USCIS rescinded its prior guidance on tenant occupancy methodology, and that update applies to all USCIS employees with respect to determinations of all Immigrant Petitions by Alien Investors (Form I-526), Petitions by Investors to Remove Conditions on Permanent Resident Status (Form I-829), and Applications for Regional Center Designation Under the Immigrant Investor Program (Form I-924) filed on or after that date. USCIS also gives deference to Form I-526 and Form I-829 petitions directly related to projects approved before May 15, 2018, absent material change, fraud or misrepresentation, or legal deficiency of the prior determination.[18]

Additionally, in August 2018, USCIS published guidance with respect to Form I-924 Applications for amendment of a regional center's geographic scope.[19] In changing the USCIS policy from permissive to mandatory amendments for expansion of the regional center's geographic scope, USCIS only applied its new policy to those I-924 Applications and those I-526 Petitions filed after the effective date of the new policy.

In both instances, USCIS recognized the importance of preserving deference to a policy in effect at the time of application filing. We urge USCIS to do the same here. While USCIS states in its Policy Alert that it has analyzed the effect of the new redeployment policy on pending I-526 and I-829 Petitions and concluded those affected would be minimal, we believe the investors detrimentally impacted by this change of policy will at best number in the hundreds, and at worst, in the thousands. Applying the new guidance to these petitions would likely result in at least hundreds, if not thousands, of I-526 or I-829 Petition denials. Such a drastic impact on cases clearly shows the importance of preserving deference to USCIS policy in effect at the time of filing.

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[17] USCIS should establish that its new capital-redeployment restrictions apply only to investors who file I-526 petitions after the guidance's effective date. This is the approach USCIS adopted when it rescinded its prior guidance on the Tenant Occupancy Methodology for estimating job creation; USCIS made the rescission applicable only "to determinations of all . . . Form I-526 [petitions] . . . filed on or after" the guidance's publication date. *See* 6 USCIS Policy Manual, Part G, Chap. 2, § D.6. A similar approach is warranted here. If USCIS insists on applying its new redeployment restrictions to investors with pending I-526 or I-829 petitions, it should, at a minimum, make the restrictions effective only for capital redeployments consummated more than six (6) months after the guidance's final effective date. A six-month delay of the effective date is essential because regional centers and NCEs generally take several months to consummate a capital redeployment after a redeployment vehicle is identified and the parties are contractually bound to follow through. A six-month delay of the effective date is therefore necessary to prevent NCEs, regional centers, and other stakeholders from the need to break existing redeployment contracts and agreements—actions which could spawn costly litigation that would, in turn, reduce the amount of EB-5 capital available to promote job creation and economic growth.

[18] *See* USCIS Policy Manual, Volume 6, Part G, Chapter 2, Section 6.

[19] *See* U.S. CITIZENSHIP & IMMIGRATION SERV., DEPT. OF HOMELAND SECURITY, PA-2018-06, GEOGRAPHIC AREA OF A REGIONAL CENTER (AUG. 24, 2018), https://www.uscis.gov/policymanual/Updates/20180824-EB5GeographicArea.pdf.

A. USCIS's new restrictions on capital redeployment represent an abrupt departure from the agency's prior redeployment guidance

USCIS's new restrictions on capital redeployment represent an "abrupt departure from well-established practice."[20] The USCIS guidance published on June 14, 2017, explained in detail the rules and restrictions on how capital may be "further deployed" by an NCE after the enterprise generated the requisite jobs to support its investors' EB-5 petitions and the capital was returned to the NCE. The guidance was specific and detailed, and the EB-5 community reasonably understood the guidance as a complete set of instructions governing what is and is not permissible when NCEs redeploy capital.

The new restrictions USCIS announced on July 24, 2020, regarding capital redeployment depart "abrupt[ly]" from that prior guidance. Nothing in USCIS's prior guidance suggested that NCEs had to redeploy capital in a new project located within the pre-approved scope of a regional center's geographic area; rather, the prior guidance contained *no* geographic restrictions whatsoever. This was not a case, moreover, where USCIS's silence left a "void" in the law.[21] To the contrary, because USCIS released its prior guidance specifically to guide the EB-5 community on the parameters governing redeployment, the introduction of *new*, previously undisclosed restrictions represents an "abrupt" change in policy.

USCIS's break in prior policy is even more "abrupt" with respect to the permissibility of municipal bonds as an acceptable form of investment. As USCIS's July 24, 2020 announcement of the new guidance itself acknowledges, USCIS "supersede[d]" the agency's prior guidelines on municipal bonds as a "potentially permissible financial instrument in the context of further deployment" of capital.[22] With respect to this policy change, USCIS itself has acknowledged the abrupt break by explaining that its prior guidance was "superseded."[23]

Because USCIS's policy represents unfair surprise and an "abrupt departure from well-established practice," these factors counsel strongly against retroactive application of USCIS's new redeployment restrictions.[24]

B. EB-5 investors and regional centers relied heavily on USCIS's prior guidance on capital redeployment—guidance which omitted the new restrictions USCIS now seeks to impose

As detailed above, USCIS guidance led stakeholders to believe for more than five (5) years that once job creation was achieved by the original JCE within the geographic area of the regional

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[20] *Retail, Wholesale*, 466 F.2d at 390.
[21] *Id*.
[22] PA-2020-11, supra note 1.
[23] *Id*.
[24] *Retail, Wholesale*, 466 F.2d at 390. Even if USCIS's new redeployment restrictions merely "fill[ed] a void" in the law rather than "abrupt[ly]" changing it, that alone would not license USCIS to apply the restrictions retroactively. *See, e.g.*, *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333–34 (9th Cir. 1982) (noting that new agency policy "was not an abrupt departure from established practice," but holding nonetheless that the agency could not permissibly apply the new policy retroactively).

center, no further geographic restrictions applied to further deployments. Indeed, the plain language of the June 2017 Policy Manual confirms this. Taken together, the Policy Manual and the public statements by USCIS confirmed for stakeholders that there was no geographic area limitation on a redeployment once the job creation requirement was satisfied.

Consequently, investors, NCEs, and regional centers all relied heavily, many to their detriment, on USCIS's initial redeployment guidelines—guidelines which imposed no restrictions on the geographic scope of redeployed capital, and which expressly permitted redeployment in municipal bonds. These heavy reliance interests tip strongly against retroactive application of USCIS's new redeployment restrictions.

In most cases, redeployment is not a choice; when a job-creating entity repays EB-5 capital to an NCE, USCIS policy since 2017 was clear on one point - that NCE must redeploy the capital to some "at risk" business purpose to satisfy USCIS's own requirements. If they did not, USCIS instructed that the capital would not be "at risk," and the NCE's investors would face the denial of EB-5 benefits. Investors, NCEs, and other stakeholders had little choice but to rely on USCIS's prior guidelines when structuring capital redeployments. And because USCIS's prior guidance contained no geographic restrictions, a sizable percentage of NCEs were forced to redeploy capital in investments located outside the geographic scope of the NCE's affiliated regional center.

The lingering unanswered questions about redeployment policy requirements created enormous compliance uncertainty and risk for NCEs. It meant NCEs were forced to make educated guesses and speculate what may or may not qualify as compliant redeployment and further deployment activities. This, of course, implicated billions of dollars of EB-5 capital and the EB-5 eligibility of thousands of immigrant investors.

As noted, stakeholders warned USCIS administration at all levels – from the Agency Director down to the IPO examiners – that a lack of clarity was forcing NCEs to make educated guesses about what activities may or may not qualify as a compliant redeployment and further deployment, and that these decisions implicated billions of dollars of EB-5 capital and the EB-5 eligibility of thousands of immigrant investors.

The large fraction of redeployments made outside the regional center's geographic scope stems in large part from difficulties NCEs face when choosing a redeployment investment vehicle. When a JCE repays capital to an NCE, USCIS requires the NCE to redeploy the returned capital within a "commercially reasonable" time—otherwise, the investors' capital will not be considered "at risk." And while USCIS's new guidelines now provide that one year is generally considered "reasonable," USCIS's initial redeployment guidelines contained no such guidance, forcing prudent NCEs to move forward as quickly as possible with redeployment, lest USCIS later determine that the time they took to identify a new investment vehicle was not "commercially reasonable." [25] Simple probability theory teaches that the best and most readily available

[25] Compounding this difficulty was the fact that USCIS's initial redeployment guidelines required that capital be redeployed in a project within the "scope" of the NCE's business activity, as defined in the investors' initial I-526 petitions. This requirement—largely eliminated from the new guidance—substantially limited the redeployment options available to NCEs. This, in turn, made it significantly less likely that NCEs were able to quickly identify good redeployment candidates within the regional center's geographic scope.

redeployment candidates were most likely outside the regional center's geographic scope. Particularly because USCIS's prior guidance included no geographic restrictions on redeployments, it is hardly surprising that most NCEs redeployed capital outside the scope of the regional center's designation.

Nowhere in the limited guidance USCIS provided did it state that a redeployment following the completion of job creation must occur within the geographic boundaries of the sponsoring regional center. And as noted, on numerous occasions stakeholders asked USCIS to no avail to provide specific guidance with respect to the geographic area for redeployments. Against this backdrop it is eminently reasonable for the NCEs to have relied upon the limited USCIS guidance available, and the absence of any stated geographic limitation on redeployments

C. Retroactive application threatens to exact an extraordinary toll on EB-5 investors who relied on USCIS's prior policy

It is difficult to overstate the detrimental impact retroactive application of USCIS's policy will have for EB-5 investors and the EB-5 program as a whole. We note USCIS's statement that the agency "considered potential impacts to petitioners and determined that such impacts, if any, would be minimal because this is merely a clarification of continuing eligibility requirements."[26] USCIS, however, is mistaken. Far from imposing only "minimal" impacts on EB-5 investors, USCIS's new redeployment restrictions threaten to upend the EB-5 Program by rendering ineligible thousands of EB-5 investors who complied to the letter with the agency's initial guidance on capital redeployments.

The reliance interests of affected EB-5 investors are significant. EB-5 investors with pending I-526 petitions have each made qualifying investments of at least $500,000. And if their capital has already been redeployed, it means that their investments have most likely *already* resulted in the creation of at least 10 jobs for U.S. workers. Many of these investors made their investments and filed their I-526 petitions years ago and are waiting for their turn in a severely backlogged (and ever-growing) EB-5 visa line. Investors who have already immigrated to the United States and obtained conditional residency, for their part, have "sold businesses, uprooted from their homelands, and moved to the U.S."[27] They have built families, careers, and lives in the United States. And they have done so believing that compliance with USCIS's guidelines would enable them to make the United States their permanent home.

Based on the new policy guidelines as written, it appears that USCIS is prepared to deny pending I-526 and I-829 petitions if the investor's NCE has redeployed capital in a manner inconsistent with USCIS's new restrictions—including investing outside the geographic scope of the affiliated regional center. Retroactive application of USCIS's new restrictions would thus, in one fell swoop, render potentially *thousands* of EB-5 investors and eligible dependents ineligible for immigration benefits, with devastating consequences. Investors with pending I-526 petitions would suddenly become ineligible to immigrate to the United States, despite keeping their capital fully invested and despite *succeeding* in creating jobs for at least 10 U.S. workers.

[26] PA-2020-11, supra note 1.
[27] *See Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003).

To pursue EB-5 immigration benefits, these investors would have to make new investments and file new I-526 petitions, despite complying with all published requirements in force at the time their NCEs redeployed capital. Even assuming these investors were all financially capable of making a *second* EB-5 investment (at the increased investment amounts), these investors would be sent careening to the back of the EB-5 visa line, where the wait for investors born in China (who make up the majority of EB-5 investors overall) now measures in decades. And the burdens would be even more severe for conditional residents who have already immigrated to the United States; these investors stand to lose not only their place in the EB-5 visa line, but the lives they have spent years building in the United States.

In sum, far from imposing only a "minimal" impact on EB-5 investors, retroactive application of USCIS's new guidance would have momentous and far-reaching deleterious effects for thousands of EB-5 investors and their dependent family members. The gravity of these effects counsels strongly against retroactive application.[28]

D. USCIS can claim no significant statutory interest in retroactive application of its new restrictions [29]

Finally, USCIS can claim no compelling statutory interest in applying its new redeployment restrictions retroactively.

The geographic restrictions on redeployment contravene the EB-5 statute as amended; nothing in the statute creating the regional center program requires that capital that has *already been* invested and is then returned to the NCE be *redeployed* within the regional center's geographic scope. To the contrary, the statute enabling the regional center program simply enables the creation of a pilot program which "shall *involve* a regional center in the United States for the promotion of economic growth . . . ."[30] Furthermore, this statute contains only a single instruction regarding investor eligibility under the regional center program:

> In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly . . . .[31]

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[28] *Cf. Chang*, 327 F.3d at 928–29 (noting the burdens of retroactive application of new EB-5 policy, and holding, based on those burdens, that the agency could not apply the new policy retroactively to I-829 petitioners).

[29] The statute and regulations require that the investment be "at risk" for the I-526 petition to be approved. However, there is no mention whatsoever of the "at risk" requirement in the statute or the regulations relating to condition removal at the I-829 petition stage. Rather, the regulations require proof that the investor "substantially met the capital investment requirement" and "continuously maintained his or her capital investment over the two years of conditional residence." 8 CFR §§216.6(a)(4)(iii), 216.6(c)(1)(iii). There is no mention of maintaining the capital investment "at risk." The definition of "invest" in 8 CFR §204.6(e) makes no mention of "at risk"; rather, the "at risk" requirement is a separate regulatory requirement for the I-526 petition under 8 CFR §204.6(j)(2). The proper reading of the statute and regulations is that the investment must be "at risk" to create jobs, and the investment must be sustained through the two years of conditional residence; but the investment need not be *sustained* at risk.

[30] *See* Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874 (1992).

[31] *Id*.

In other words, investors in regional centers obtain one (and only one) benefit over non-regional center investors: they can claim credit for jobs their investments create *indirectly*. By the time an NCE redeploys capital, however, the requisite jobs have generally *already* been created. There is thus no statutory basis to deny immigration benefits to EB-5 investors whose NCEs deploy capital outside the regional center's geographic scope *after* the requisite jobs have already been created.[32]

But even if USCIS's new restrictions can be squared with EB-5 regulations and the statute, there is certainly nothing in their plain text that *compels* the new restrictions USCIS has promulgated. Thus, even if USCIS insists on maintaining these new restrictions prospectively, it has no compelling statutory basis to apply them *retroactively*.

Overall, the *Retail, Wholesale* factors strongly counsel against retroactive application of USCIS's new redeployment restrictions. The new guidance threatens to render ineligible most EB-5 investors whose NCEs redeployed capital within the past three years. It blindsides investors who relied on USCIS's initial redeployment guidance. It undermines trust and confidence in the EB-5 Program's administration. And it does so with little—if any—grounding in the EB-5 statutes or regulations. Thus, if USCIS insists on maintaining its new redeployment restrictions, it should at a minimum take swift action to clarify that these restrictions apply only prospectively.

USCIS imposition of retroactive application of the new rules to pending cases is contrary to public law and policy. Accordingly, USCIS should withdraw the new guidance and commence public notice and comment procedures with new policies, if any, being applied only prospectively and with sufficient time afforded to EB-5 stakeholders to transition to new compliance rules.

Issue #3: New USCIS rules violate Executive Order 13892 on Fairness and Surprise

Without any prior notice or engagement, the USCIS Guidance has blindsided the EB-5 industry and stakeholders in violation of Presidential Executive Order 13892, and the retroactive effects of the new guidance have deprived affected parties of the opportunity to engage in compliant activities.

On October 9, 2019, President Trump issued two Executive Orders impacting federal administrative law and agencies, including USCIS, designed to curtail agency positions that are

[32] USCIS grounds the requirement that capital redeployment be within the geographic scope of the regional center by citing 8 C.F.R. §§ 204.6(j) and 204.6(m)(7). But neither of these regulations supports—much less compels—USCIS's new policy. Section 204.6(j), for its part, provides that regional center investors must present "evidence that the alien has invested, or is actively in the process of investing, capital . . . within a regional center designated by the Service." To begin, a "regional center" is distinct from the approved *geographic scope* of the regional center—and just because capital is redeployed outside a regional center's *geographic scope* does not mean that the investment is no longer in a "regional center." More basically, an investor has "invested" in a regional center once his or her funds are irrevocably released to the NCE, and the NCE deploys them in a regional center sponsored project. Nothing in § 204.6(j) says anything about *subsequent* capital deployments. USCIS's reliance on § 204.6(m)(7) fails for similar reasons; even if "regional center" is equated with the regional center's *geographic scope*, an EB-5 applicant has invested "within a regional center" once the capital is irrevocably committed and released into an initial successfully project. The regulation says nothing about *subsequent* capital deployments after the requisite jobs have been created.

not adopted through notice and comment rulemaking. Both Executive Orders were published in the Federal Register on October 15, 2019.[33]

On signing these Orders, the President stated that this "new action [is taken] to protect Americans from out-of-control bureaucracy and stop regulators from imposing secret rules and hidden penalties on the American people. All too often guidance documents [have been used as] a backdoor for regulators to effectively change the laws and vastly expand their scope and reach. ... This regulatory overreach gravely undermines our constitutional system of our government. … A permanent federal bureaucracy cannot become a fourth branch of government, unanswerable to American voters."

Executive Order 13892

This Executive Order notes that "regulated parties must know in advance the rules by which the Federal Government will judge their actions," but finds that departments and agencies in the executive branch have not always acted with transparency and fairness. It goes on to require that agencies provide "prior public notice" of any legal standards the agency will be applying, and warns "(t)he agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.

Section 4 provides, as follows:

> Sec. 4. Fairness and Notice in Administrative Enforcement Actions and Adjudications.
>
> When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.

This emphasis on fairness and transparency was undermined entirely when USCIS published the new guidance without notice, taking the entire EB-5 stakeholder community by surprise. This lack of transparency and notice falls squarely within the gambit of "unfair surprise."

As described above, the new guidance (a) changes substantive requirements and applies them retroactively, and (b) negatively impacts an estimated $14.8 billion of EB-5 capital and EB-5 eligibility of an estimated 50,000 intending immigrants. Publication of the new guidance without any allowance for notice and comment prior to implementation constitutes unfair surprise in violation of Executive Order 13892. USCIS should withdraw the new guidance and commence public notice and comment procedures.

Issue #4: Deployment of Capital after Job Creation Is Satisfied

The USCIS Policy Manual now states that redeployment of EB-5 funds after the job creation is satisfied must occur: (1) within the same NCE; (2) under the same regional center sponsorship;

[33] *See* 84 FR 55235 and 84 FR 55239.

and (3) within the geographic boundaries of the regional center approved prior to the redeployment, but not in the same TEA area.[34]

A. Same NCE

The Policy Manual update requires that further deployment of capital after the job creation has been met must be within the same new commercial enterprise. The Policy Manual update ignores those situations where the original NCE may be taken over by a receivership appointed by a court and then later dissolved at the close of a receivership. For those investors who have become a victim to a bad actor regional center or NCE manager, it is possible the NCE may end up in a receivership following a court action. A receivership's goal is to wind up the NCE and distribute assets back to investors. The NCE may cease to exist following a winding up by the receiver by order of a court. However, the receiver may be able to return some portion of the investment funds to investors following approval by the court.

In this example, investors may receive a return of his or her capital contribution and have the NCE wound up by court order. In typical receiverships, it may be impossible for investors to gain control of the NCE to accomplish a redeployment to meet the requirements of sustaining the investment. However, the Policy Manual would prohibit an investor from investing into a second new commercial enterprise to keep funds at risk and in compliance with this new policy. By disallowing investors to redeploy into a new NCE, USCIS has taken away any ability for the investors in these scenarios to continue to comply with the rules for removal of conditions on Form I-829. USCIS should implement reasonable policies for those investors who can prove the actions of a bad actor in the NCE made it impossible or impracticable to keep the NCE active and allow for the investor to reinvest into a new NCE for further deployment of capital.

B. Same Regional Center and Geographic Area

The Policy Manual now requires that redeployment of capital occur within the geographic scope of the regional center, but a redeployment following job creation completion need not occur to the same JCE or TEA from the approved I-526 Petition. While USCIS issued a Policy Alert indicating that USCIS is simply making "clarifications" to policy, this is a drastic substantive change affecting many investors without notice, and with impermissible retroactive application as discussed throughout this comment.

1. Neither the Regulations nor *Matter of Izummi* Require Redeployment in the Geographic Area of the Regional Center

As discussed above, IPO Director Sarah Kendall confirmed in 2018 that the only difference between initial deployment and further deployments is the initial deployment for job creation must reach the JCE as outlined in *Matter of Izummi*. These statements created an expectation that the geographic area required for the investment was linked to the job creating enterprise, and it therefore follows that the focus was on the job creation requirement. In the precedent decision *Matter of Izummi*,[35] the Legacy INS Associate Commissioner elaborated further on the "at risk" requirement in the context of an I-526 Petition, outlining the following rules, among others:

[34] USCIS Policy Manual, Volume 6, Part G, Chapter 2, Section A.2.
[35] *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998).

- If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.
- Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.

Matter of Izummi focuses on the deployment of the capital to the JCE to create jobs. Reserve funds that were not made available for purposes of job creation cannot be placed at risk. As a result, the original JCE from the initial deployment must be located within the geographic scope of the sponsoring regional center so that the job creation is concentrated in and around the area of the regional center consistent with 8 CFR §204.6(m).

It does not follow, however, that additional deployments *after* the job creation has been achieved must still be located within the same geographic boundaries of the sponsoring regional center. *Matter of Izummi* focused only on the job creating enterprise and its location within the regional center to ensure job creation was concentrated in that area. Specifically, *Matter of Izummi* states

> Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job creating businesses, such job creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.[36]

Importantly, this precedent decision links the geographic boundaries of the regional center to the job creating entity in furtherance of job creation. It follows that if the job creation requirement has been met and no further job creating entity is required (and instead, only additional commercial activity is required), the location of that commercial activity is of no importance, and should not be constrained by geographic limitations of the regional center. Once the job creation requirement has been met, the NCE and the regional center have fulfilled the requirements that the regional center "[promoted] economic growth, improved regional productivity, job creation and increased domestic capital investment."[37]

Moreover, an application for initial designation of a Regional Center requires the applicant to propose geographic boundaries for the scope of the Regional Center and to describe "how the regional center focuses on a geographical region of the United States."[38] USCIS interprets this regulation to mean that a "regional center's geographic area must be limited, contiguous, and consistent with the purpose of concentrating pooled investment in defined economic zones."[39] And while the regional center will pool investments within its boundaries, nothing in the regulations specifically requires that all job creation (specifically indirect and induced job creation)

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[36] *Id*.
[37] 8 CFR §204.6(m).
[38] *Id*.
[39] USCIS Policy Manual, Part G, Chapter 3(A), citing Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, 106 Stat. 1828, 1874 (October 6, 1992), as amended.

occur within the geographic area of the regional center. USCIS has acknowledged in written correspondence to Senator Patrick Leahy that the applicable laws do not mandate that all indirect job creation attributable to a project take place within the regional center's geographic scope.[40]

As such, USCIS previously has recognized that certain economic activity may occur outside of the geographic area of the regional center boundaries. Additional economic activity resulting from a redeployment occurring outside of the geographic area of the regional center does not negate the improved regional productivity and job creation that happened through the initial deployment of capital, thereby satisfying Congressional intent and the regulations. We strongly urge USCIS to reevaluate the requirement that redeployments must occur within the boundaries of the regional center for this reason.

2. Practical Considerations for Redeployment

We also urge USCIS to reconsider its July 24, 2020 Policy Manual update on redeployment because it fails to take into account a number of practical considerations:

- The policy limits the potential for NCE's to redeploy. If the regional center is in an extremely rural area with no apparent opportunities for a financially viable redeployment, the investors' I-829 Petitions will be at risk. This policy will push prospective EB-5 investors to look for a regional center with a very large, urban area to allow for redeployments. It is likely to drive investors away from more rural regional centers.

- The USCIS policy would prohibit redeployments where the geographic scope may be partially inside and partially outside the scope of the approved regional center. For example, infrastructure projects financed through primary issue bonds may pass between counties and regional center boundaries. Those types of projects would be disqualified by this policy.

- What if a suitable redeployment opportunity is not available within the boundary of the regional center? The policy contains no discretion for USCIS to review the steps taken by an NCE to find a suitable redeployment within the regional center boundaries and make discretionary determinations regarding locations of redeployment projects.

Issue #5: Deployment of Capital <u>before</u> Job Creation Is Satisfied

The new guidance provides that "[b]efore the job creation requirement is met, a new commercial enterprise may deploy capital directly or through any financial instrument so long as applicable requirements are satisfied." The new guidance then lists several of these "applicable requirements," which include placing immigrant investors' capital at-risk, making the deployed

[40] December 2010 Correspondence from USCIS Director Alejandro Mayorkas to U.S. Senator Patrick J. Leahy, Chair of the Senate Judiciary Committee. *See also* May 30, 2013 EB-5 Adjudications Policy Memorandum at 18, which states "Indirect jobs can qualify and be counted as jobs attributable to a regional center, based on reasonable economic methodologies, even if they are located outside of the geographical boundaries of a regional center."

capital available to the business(es) most closely responsible for job creation, undertaking business activity, and establishing a sufficient relationship to commercial activity.

On its face, this guidance appears to broadly apply to *any* deployment of capital by a NCE which occurs before the job creation requirement is met. It thus encompasses both (a) *initial* deployments of capital by a NCE in furtherance of the underlying EB-5 investment upon which immigrant investors' eligibility is based, and (b) *further* deployments of capital by a NCE *after* the capital from the underlying EB-5 investment has been returned to the NCE but *before* the requisite number of jobs have been created by that underlying EB-5 investment.

As a threshold matter, USCIS should clarify whether the new guidance under the sub-heading, "Deployment of Capital," indeed applies to both *initial* deployments of capital and *further* deployments of capital which occur before the job-creation requirement is met. We note that the EB-5 Policy Manual specifically carves-out guidance related to "Further Deployment After the Job Creation Requirement is Satisfied," and also explains that a "further deployment" occurs when "investment capital is returned or otherwise available to the new commercial enterprise."[41] USCIS should similarly clarify the scope of its guidance under the sub-heading, "Deployment of Capital."

To the extent that USCIS's new guidance on deployment of capital encompasses *further* deployments of capital *before* the job creation requirement is satisfied, we have identified several aspects of this guidance which require further clarification.

Capital At-Risk Requirements

Preliminarily, we agree that further deployments of capital by a NCE which occur before the job creation requirement is met must continue to demonstrate that investors' capital is "placed at risk for the purpose of generating a return on the capital placed at risk" and "there must be a risk of loss and a chance for gain."[42] We also acknowledge and appreciate USCIS's prior helpful clarification that investors must maintain their compliance with these capital at-risk requirements only for the two (2) years of their conditional lawful permanent resident ("LPR") status.[43]

Further Deployment of Capital to Job Creating Entity/Entities

Before the job creation requirement is satisfied, the EB-5 Policy Manual requires that "the full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based."[44] In this regard, the EB-5 Policy

[41] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Deployment of Capital.
[42] *Id*.
[43] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 5, Removal of Conditions, Sustainment of Investment, note 4 ("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.").
[44] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirement, Deployment of Capital (citing *Matter of Ho*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). *See Matter of Izummi*, 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998)).

Manual explains that "[t]he requirement to make the full amount of capital available to the business or businesses most closely responsible for creating the employment upon which the petition is based is generally satisfied through the *initial deployment* of capital resulting in the creation of the required number of jobs." [45]

But what about a situation where the initial deployment of capital did not yield the requisite number of jobs but the NCE is nevertheless required to further deploy capital so that its investors are able to maintain compliance with the at-risk requirements. In order to meet the removal of conditions on permanent residence the investors must demonstrate the requisite job creation was achieved, which in this scenario would have to come from the activities following further deployment of the EB-5 capital. Accordingly, it would be helpful if USCIS could clarify that where the NCE carried out the business activities described in the Comprehensive Business Plan, but nevertheless failed to create the requisite number of jobs, the NCE can further deploy the EB-5 funds to another job creating entity ("JCE") and receive credit for the resulting job creation.- As discussed below, these and other related issues require further clarification by USCIS.

USCIS Should Clarify Whether Further Deployment That Occurs Before the Job Creation Requirement is Satisfied Must Remain With the Same JCE(s) or May Be Provided to Different JCE(s)

To the extent the NCE is required to further deploy capital to a JCE where the initial deployment of capital did not yield the requisite number of jobs, USCIS should clarify whether such further deployment (a) must remain with the JCE which received the initial investment and which was primarily responsible for creating jobs upon which investors' petitions were based, or (b) may be provided to a different JCE(s) capable of facilitating additional job creation to make up for any shortfall in jobs resulting from the initial deployment of capital.

We submit that USCIS should not require a NCE to further deploy capital back to the same JCE that received the initial investment and failed to create the requisite jobs simply because that JCE is tethered to investors' petitions. Rather, USCIS should allow a NCE to further deploy capital to any JCE(s) capable of facilitating job creation, provided that such JCE(s) is located within the geographic area of the sponsoring regional center and, if applicable, in a TEA (as further discussed below).

USCIS Should Confirm Investors Can Receive Credit for Additional Job Creation that Results from Further Deployment

To the extent a NCE is required to further deploy capital to a JCE(s) where the initial deployment of capital did not yield the requisite number of jobs, USCIS should confirm that investors can receive credit for any additional job creation generated by the JCE(s) from such further deployment. We believe that this would be appropriate, as existing policy guidance already provides a mechanism for a NCE to be able to satisfy the job creation requirement by deploying

[45] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Deployment of Capital, at note 35 (emphasis added).

capital to "one or multiple job-creating entities in a portfolio."[46] More importantly, it would be incongruous to require that the further deployment of capital pre-job creation must be made available to a JCE, only to turn around and disallow investors to receive credit for job creation generated by such JCE. As such, we submit that NCEs/investors should be able to receive credit for any additional job creation resulting from the further deployment of capital. We acknowledge that any such additional job creation credited through further deployment would have to maintain compliance with existing policy guidance related to the "2½ year rule" and "reasonable time period" for I-526 Petitions and I-829 Petitions, respectively.

USCIS Should Clarify the Geographic Requirements for Further Deployments that Occur Before the Job Creation Requirement is Satisfied

To the extent that capital further deployed before the job creation requirement is satisfied must be made available to a JCE, USCIS should also clarify whether (a) such further deployment must occur within the approved geographic area of the sponsoring regional center, and (b) the JCE(s) receiving such further deployed capital must be located within a TEA.

Further Deployment that Occurs Before the Job Creation Requirement is Satisfied Must be Insulated from USCIS's Material Change Policy

Under USCIS's material change policy, investors who have not obtained conditional lawful permanent resident status would need to refile their pending I-526 Petitions or risk revocation of any approved I-526 Petitions in the event that USCIS determines the NCE has materially failed to adhere to the underlying business plan. Conversely, investors who have already obtained conditional LPR status may apply for removal of the conditions on permanent residence notwithstanding a material change in the underlying business plan if the investors have otherwise satisfied all eligibility requirements, including job creation.

During the November 2018 telephonic EB-5 Stakeholder Engagement, officials from the Immigrant Investor Program Office stated that NCEs must further deploy the capital investments of investors with pending I-526 Petitions after the proceeds of the underlying EB-5 investment have been returned to the NCE. Thus, NCEs seemingly have no choice but to undertake further deployment in order to preserve their investors' immigration statuses.

As discussed above, USCIS's new guidance on deployment of capital provides that, before the job creation requirement is satisfied, capital must be made available to the entities most closely responsible for creating the employment upon which investors' petitions are based. We have identified several areas where USCIS must provide further clarification related to this requirement in the context of a *further* deployment of capital. To the extent that NCEs are permitted to further deploy capital to different JCEs, or investors are permitted to receive credit for additional job creation resulting from the further deployment of capital, it is critical that USCIS deems these actions to not constitute a material change to the underlying business plan. Otherwise, investors who have not yet obtained conditional LPR status will be left in a no-win situation: further deploy capital in order to comply with the at-risk requirement while potentially jeopardizing their

[46] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Multiple Job-Creating Entities.

eligibility on account of a material change determination. It would be the height of absurdity for a mechanism created to preserve investors' immigration eligibility to also prove to be their undoing.

Business Activity & Commercial Activity

Before the job creation requirement is satisfied, the EB-5 Policy Manual requires the NCE to deploy capital in a manner that results in the actual undertaking of "business activity."[47] We note that the concept of "business activity" appears elsewhere in Chapter 2 and is derived from *Matter of Ho*, which states, in relevant part, that capital invested in a NCE is properly at-risk where there is "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."[48] By way of example, *Matter of Ho* explains that "[m]erely [] capitalizing a new commercial enterprise [is] not sufficient to show that an [investor] has placed his capital at risk."[49]

Matter of Ho counsels that investment capital may not sit idle with the NCE for an unreasonably long time but rather must be put to use by the NCE in a manner that furthers the purpose for which it was established. We note that the "business activity" of a NCE is to carry out its operational imperatives and functions in accordance with its governing documents. We further note that such "business activity" may include the NCE making an initial deployment of capital to facilitate the underlying EB-5 investment, as well as making a further deployment of capital after the repayment/realization of the underlying EB-5 investment to the NCE.

In light of the foregoing, we submit that, as long as a NCE effectuates the deployment of capital – whether through an initial deployment in furtherance of the underlying EB-5 investment or a further deployment to facilitate investors' compliance with the capital at-risk requirements – the NCE should be deemed to have successfully undertaken actual business activity consistent with *Matter of Ho*.

The EB-5 Policy Manual also provides that the deployment of capital before the job creation requirement is satisfied must establish "[a] sufficient relationship to commercial activity (namely, engagement in commerce, that is, the exchange of goods or services) . . . such that the enterprise is and remains commercial."[50] In this regard, USCIS cites 8 C.F.R. §204.6(e), in an apparent reference to the definition of "commercial enterprise," which includes "any for-profit activity formed for the ongoing conduct of lawful business . . . ."

We note that the definition of "commercial enterprise" refers specifically to the NCE into which investors contribute capital, and not the JCE which receives such capital from the NCE. Further, it is the "ongoing conduct" of the *NCE* that informs its status as a "commercial" entity. For example, an entity that is formed solely for the purpose of making the single, underlying EB-5 investment may not be considered "commercial" because it is not formed to engage in "ongoing"

[47] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Further Deployment of Capital After the Job Creation Requirement is Satisfied.
[48] *See Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).
[49] *See Matter of Ho*, 22 I&N Dec. 206, 206 (Assoc. Comm. 1998).
[50] *See* USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Further Deployment of Capital After the Job Creation Requirement is Satisfied.

activity. We note that USCIS's new guidance now allows NCEs to remedy any limitations to their original scope/purpose(s) with an amendment to the relevant documents which describes further deployment(s) activities.

In light of the foregoing, we submit that once a NCE effectuates the deployment of capital in accordance with its governing documents (as amended) – whether as part of an initial deployment capital in furtherance of the underlying EB-5 investment or a further deployment of capital to facilitate investors' compliance with the capital at-risk requirements – the NCE should be deemed to have engaged in "for-profit activity" that is "commercial" in nature, consistent with 8 CFR §204.6(e).

And to the extent that USCIS is imputing the "business activity" and "commercial activity" requirements to the actual recipient(s) of deployed capital (rather than the NCE), the agency should make its position clear and explain the underlying rationale. Assuming, *arguendo*, that the focus of these requirements is the activities of the JCE, we submit that any such entity which creates jobs with the proceeds of an initial or further deployment of capital can be deemed to have undertaken actual business and commercial activities. However, because there is no requirement that further deployment of capital post-job creation actually remain with any JCE, USCIS must provide additional guidance on what types of activities would be deemed sufficiently business and commercially oriented when undertaken by recipients of further deployed capital.

Secondary Market Financial Instruments

The EB-5 Policy Manual states that the "purchase of financial instruments traded on secondary markets" will not satisfy the applicable requirements for the deployment of capital. [51]

We note that this language appears only under the sub-heading, "Deployment of Capital," which deals with deployments of capital *before* the job creation requirement is satisfied. Thus, it appears that the prohibition against secondary market purchases is limited to deployments of capital – including further deployments of capital – which occur before the requisite number jobs are created. This reading of the new guidance is further supported by the fact that one of the reasons listed in support of the proposition that secondary market purchases do not qualify as eligible deployment vehicles is because they allegedly "[d]o not make capital available to the job-creating business."

Notwithstanding the foregoing, to the extent that the prohibition against the purchase of financial instruments on the secondary market does extend to further deployments post-job creation, USCIS should make this clear in its guidance.

From a policy perspective, the requirement restricting redeployment from secondary financial instruments should be eliminated, because it is not well founded in the law, and investors who have endured the risks associated with the original investment and created the necessary jobs in it should not be required to endure the lack of liquidity and diversification that comes with "primary" financial arrangements.

[51] *Id.*

If not eliminated, this policy should be made prospective only, to redeployments that occur 180 days or more after the date of the PM announcement, because stakeholders had no reason to expect this restriction, and many redeployments have been made innocently that do not comply with this new requirement, and innocent investors will unnecessarily and inappropriately suffer if USCIS applies the restriction to their pending or future filings.

Issue #6: Questions and Answers: EB-5 Further Deployment

In addition to publishing the new guidance modifying the Policy Manuel, USCIS also separately posted issued guidance titled "Questions and Answers: EB-5 Further Deployment."[52] That guidance, again issued without any notice or opportunity for comment, contains unclear and confusing directives upon stakeholders and should be withdrawn or clarified. In particular, we are most concerned about the legal and policy implication of Question 2 and its answer. That reads as follows:

> ***Q2. My Form I-526, Immigrant Petition by Alien Investor, is pending, and, to maintain my eligibility, I need to further deploy my capital. Do I need to submit more information to USCIS about my pending petition to show that I am maintaining my eligibility?***
>
> *A2. We must be able to determine whether you have met all applicable requirements, including that your capital is at risk and your new commercial enterprise continues to engage in commercial activity throughout the entire EB-5 adjudication process (from the time we receive your petition through the time of its adjudication). Depending on your case, you may need to give us more information so that we can determine whether you are eligible for the benefit. You may submit such information to us while your petition is pending (this is called interfiling). We may also notify you during the adjudications process.*

USCIS appears to permit, but not require, the concept of interfiling. The first comment is that the criteria for interfiling do not appear in the law or any regulation. Moreover, a search of the USCIS Policy Manuel for the terms "interfile" or "interfiling" reveals no results. USCIS must provide clarification on this elective process.

To the extent that an EB-5 investor does elect to voluntarily submit an ad hoc package of "further deployment" documents to supplement a long pending I-526 petition, will USCIS issue a receipt or acknowledgement notice? What procedures has USCIS implemented to ensure unsolicited documents will be cataloged by the mail room, updated into electronic case records, and inserted into the physical file?

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[52] *Questions and Answers: EB-5 Further Deployment,* U.S. CITIZENSHIP & IMMIGRATION SERV., 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 (last updated July 24, 2020).

Conclusion

As outlined in detail above, AILA and IIUSA oppose USCIS' adoption of the arbitrary and capricious policy of adding new substantive eligibility requirements, including geographical limitations, which are applied retroactively. Not only is this policy deeply flawed as a matter of law, it reflects hallmarks of arbitrary caprice including disregard for significant harmful impact to U.S businesses and lawful immigrants contributing to the U.S. economy. We respectfully request that USCIS immediately rescind the policy reflected in Issue #4 and #5 and clarify the effective date of the other policies announced in the Policy Alert.

In closing, we thank you for providing this opportunity to comment on the updated USCIS policy guidance. We look forward to a continuing dialogue on this and related matters.

Respectfully submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

INVEST IN THE USA (IIUSA)