STANDARDS AND GUIDELINES FOR REDEPLOYMENT OF EB-5 INVESTMENT FUNDS

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This White Paper sets forth a legal framework for establishing the standards and guidelines for redeployment of investment funds by a "new commercial enterprise" ("**NCE**") received from investors ("**EB-5 Investors**") seeking to qualify for visas pursuant to the EB-5 Immigrant Investor Program under Section 203(b)(5) of the Immigration and Nationality Act ("**INA**"), (8 U.S.C. § 1153(b)(5)) (the "**EB-5 Program**"). This White Paper assumes that the initial investment was made by the NCE in a "job creating entity" ("**JCE**"), the investment funds have been utilized by the JCE in accordance with a business plan approved by United States Citizenship and Immigration Services ("**USCIS**") and then repaid by the JCE to the NCE after the requisite 10 jobs per EB-5 Investor have been created. Here we conclude that a redeployment by the NCE that meets the guidelines described in this White Paper would reflect industry best practices for compliance with USCIS policy, securities laws and fiduciary duties of the general partner or manager of the NCE.

Reasons Why Redeployment of EB-5 Investment Funds Has Become Necessary

The EB-5 industry has dramatically changed over the past few years, due to the substantial increase in EB-5 Investors applying for EB-5 immigrant visas, particularly from the Peoples Republic of China. The EB-5 Program limits the number of visas that are issued each fiscal year to alien investors and their spouse and qualifying children to a maximum of approximately 10,000. In the event that the number of applicants exceeds the maximum available visas, the Visa Control and Reporting Division ("**Visa Control Division**") of the U.S. Department of State will limit the number of applicants from each country to an aggregate maximum of 7% of the total number of EB-5 immigrant visas available each fiscal year (the "**Visa Cap**"). Until fiscal year 2015, the annual worldwide quota was not reached. Meanwhile, since approximately 2010, applicants born in Mainland China have exceeded 80% of the total number of applicants. In fiscal year 2015, the Visa Control Division announced that the annual worldwide quota would be reached, and that it was therefore imposing a "cut-off date" for applicants born in China, as a result of which an applicant receiving an approval of his or her I-526 Immigrant Petition by Alien Entrepreneur ("**I-526 Petition**") cannot move forward in the process toward conditional permanent residence (whether through immigrant visa processing or adjustment of status) until the applicant's "priority date" (the date the I-526 Petition was filed) is earlier than the published cut-off date. As of the July 2017 Visa Bulletin issued by the Visa Control Office, the "cut-off date" for EB-5 Investors born in Mainland China is June 8, 2014. It is anticipated that the "cut-off date" will move forward slowly for the foreseeable future. As a result, for EB-5 Investors born in Mainland China (unless they will be accompanied in the immigration process by a

spouse born other than in Mainland China), delays in the processing for immigrant visa or adjustment of status application will occur. It has been estimated that, due to the number of applications filed by EB-5 Investors from Mainland China, those EB-5 Investors may be delayed by up to 10 years from the date of filing their I-526 Petitions before they are able to commence their two-year period of conditional residence (which includes approximately 24 months for adjudication of the I-526 Petition, followed by a waiting period of approximately 7 years before the investor receives an immigrant visa or adjustment of status, and approximately 6 months before the investor enters the U.S. to commence the period of conditional residence .

Under current policies of USCIS, as recently updated by its Policy Manual dated June 14, 2017 (the "Policy Manual"), every EB-5 Investor is required to retain his or her investment capital "at risk" in the NCE until such time as that EB-5 Investor has been in the U.S. for 2 years in conditional resident status, commencing on the date the EB-5 investor entered the U.S. or obtained a change of status if the investor was already in the U.S. under a different visa (the "Sustainment Period"). Due to the EB-5 quota backlog for Mainland China, those EB-5 Investors are required to retain their capital "at risk" in the NCE for a period that could reach or exceed 12 years, taking into account the estimated 10 year waiting period to commence conditional residence status plus the 2 year period of conditional resident status. Since the vast majority of EB-5 projects are structured such that the NCE makes a loan to the JCE with a five-year term to maturity, a proper redeployment strategy is necessary for most NCEs in order to continue to meet the "at risk" requirement following the date that the JCE repays the original loan to the NCE until the date that EB-5 investors have completed their Sustainment Period. Even for those investors not from Mainland China, it is possible that their investment capital will need to be redeployed before they satisfy the Sustainment Period, especially since ~~based upon the USCIS Policy Statement dated August 10, 2015,~~ loans can be repaid after the required jobs have been created, even before the loan maturity date, necessitating a redeployment strategy even for such non-Mainland China investors.

Laws and Policy Governing Sustainment of an EB-5 Investment "At Risk"

The requirement that the investment be "at risk" appears in 8 C.F.R. § 204.6(j)(2). That regulation requires the investment be placed "at risk for the purpose of generating a return on the capital placed at risk."

The precedent decision, *Matter of Izummi*, 22 I&N Dec.169 (1998), amplifies the "at risk" requirement by prohibiting guaranteed returns of or on the invested capital and unconditional, contractual promises of repayment.

Taken together, the law (regulations and precedent decisions) prevents the redeployment of invested funds into any investment vehicle that provides guaranteed returns and no chance for gain or loss, including accounts or securities with federal government guarantees.

USCIS amended its Policy Manual on June 14, 2017 to clarify various policy issues regarding the requirement of an investor to sustain the investment. The three major clarifications are as follows:

1. After the Sustainment Period concludes, even though the I-829 petition to remove conditions has not been adjudicated, investor capital can be returned. For Chinese nationals, this could mean a Sustainment Period of up to 10 to 12 years from the date of initial filing of the I-526 petition.

2. During the entire Sustainment Period, the investment by the investor must be sustained "at risk". The Policy Guidelines set forth new defined standards to meet the "at risk" requirements, including in a manner related to "engagement in commerce" and "within the scope of the new commercial enterprise's business."

3. The investment amount can be redeployed by the NCE before or after completion of necessary job creation in the original job creating enterprise, and must be redeployed within a reasonable period of time following repayment of the original investment.

USCIS did not adopt, for purposes of redeployment, the definition of "at risk" that it had previously utilized - - chance of gain or risk of loss. Rather, for redeployment of funds to meet the "at risk" requirement, USCIS stated that the funds must be redeployed in a manner "related to engagement in commerce." Although this requirement is nowhere defined in any immigration statute, regulation or policy memo, USCIS explained that engagement in commerce is "the exchange of goods or services".

Federal law defines "engaged in commerce" within the realms of labor law, antitrust law and trademark law, in a very broad manner. The term seems to be used most broadly in labor law. For example, Title 29 of the Code of Federal Regulations Section 1620 states with respect to the use of the term "engaged in commerce" under the Fair Labor Standards Act ("FLSA") and the Equal Pay Act ("EPA") that:

> "Like the FLSA, the EPA applies to employees "engaged in commerce." 'Commerce' is broadly defined in section 3(b) of the FLSA. It includes both interstate and foreign commerce and is not limited to transportation across State lines, or to activity of a commercial character. All parts of the movement among the several States, or between any State and any place outside thereof, of persons or things, tangibles or intangibles, including communication of information and intelligence, constitute movement in "commerce" within the statutory definition."

Because of the breadth of the meaning of the phrase "engaged in commerce" under existing federal law, it is difficult to determine what is meant by this phrase in the USCIS Policy Manual.

The requirement that the redeployment be "within the scope of the NCE's business" seems a bit clearer due to the examples provided by USCIS in the Policy Manual.

Specifically the USCIS gives one example of an NCE that makes an initial investment in a construction loan for a multi-family property, and states that the NCE may make reinvestments in one or more similar loans. In addition, the USCIS states that an NCE may invest in new issue municipal bonds for infrastructure if those investments are within the scope of the NCE's business.

In both examples provided by the USCIS, there seems to be a requirement that the NCE's partnership agreement or operating agreement authorizes the NCE to make an investment or reinvestment that is similar in some respect to the reinvestment made by the NCE. However, since the reinvestment requirements do not include job creation unless the job creation requirements were not met by the original investment, we do not believe that the regulations would require that the reinvestment be in the same industry or geographic location as the NCE's original investment.. According to USCIS policies, even in the case where the job creation requirements were not met by the original investment, as long as the investor has obtained conditional resident status, a redeployment that was deemed to be a material change would not adversely affect the investor.

There are many remaining questions regarding how USCIS would determine that a reinvestment is within the scope of the NCE's business, but in general it seems likely that a redeployment of proceeds from the NCE's original investment into any form of investment that is authorized in the NCE's partnership agreement or operating agreement should meet the requirement that the reinvestment be within the scope of the NCE's business.

Since the Policy Manual makes it clear that once the job requirement has been satisfied, that condition should no longer apply to the redeployment requirements, a loan or redeployment of capital to completed projects or established businesses that do not involve the creation of new jobs should be permissible. That would seem to permit reinvestments in existing, cash flowing businesses, which would reduce the risks of reinvestment to the investors, as compared to a reinvestment into another development deal.

The Policy Manual also requires that the redeployment take place "within a commercially reasonable time." Presumably, there is no specific amount of time from the repayment of the initial loan or investment by the NCE in the JCE until the redeployment of the investment funds by the NCE, but this statement from USCIS makes it incumbent upon managers of NCEs to have a redeployment project or strategy in place in advance, so as not to run afoul of the timeliness requirement.

Finally, USCIS has helpfully clarified that redeployment does not engender a material change as long as the redeployment occurs after the necessary job creation in the original JCE has occurred. Even if redeployment occurs before job creation, there is no material change if it occurs after the investor has commenced the Sustainment Period. The only time that material change should be an issue on redeployment is if it occurs before job creation and before the investor has commenced the Sustainment Period.

Securities Law Requirements and Fiduciary Duties in Connection with Redeployment

Any reinvestment by an NCE must also meet federal and state securities law requirements, and the manager or general partner of the NCE must satisfy its fiduciary requirements to the investors when making a reinvestment decision on behalf of the NCE. Whereas the original investment made by an NCE is fully disclosed to every EB-5 investor in the NCE's offering documents, the specific reinvestment that the NCE would make upon a repayment of the original investment is usually not described in the NCE's offering documents. This is in large part due to the fact that it is prudent for NCEs to retain some flexibility in order to comply with changes in USCIS policies regarding what is necessary to comply with EB-5 program requirements.

In certain cases, especially in more recently prepared offering documents, there are disclosures of alternative redeployment loans and/or investments with the same developer and/or involving the same project, such as the refinancing of senior debt or the funding of expansion activities. Where these disclosures are made, the NCE should reinvest in accordance with the disclosure in the offering documents, unless there is a strong reason not to do so, in which event, the NCE may be required to obtain the consent of the investors before making a different reinvestment decision. However, where there is no disclosure as to what the NCE would reinvest in following the original investment, the general partner or manager of the NCE faces several issues under federal and state securities laws, as well as general standards of fiduciary duty in connection with a reinvestment decision. These issues are summarized below.

Since most NCEs do not specifically identify the type of reinvestment that will be made upon a reinvestment of proceeds from the original investment, there is an issue regarding whether or not further consent of investors is required for the reinvestment under federal or state securities laws. If the governing documents of an NCE permit reinvestment in another qualifying investment selected by the manager or general partner, and the offering documents specifically disclose that investors will not have the right to consent to the reinvestment, this should be sufficient for securities law purposes. However, investors may still claim that the level of disclosure regarding the reinvestment was not sufficient, or that the manager or general partner did not fully disclose conflicts of interest in connection with the reinvestment decision. Although it is theoretically possible to seek consent of investors to the reinvestment selected by the NCE manager or general partner to avoid this risk, as a practical matter, obtaining affirmative consent (usually by majority vote of investors) may be difficult or time consuming.

Securities law concerns also arise for the general partner or manager of an NCE in determining whether that reinvestment decision requires the general partner or manager to be a registered investment adviser (“RIA”) under federal or state securities laws. There is some question whether making a one-time reinvestment decision for an NCE would constitute the conduct of an investment advisory business, but there is no specific authority under federal or state securities laws that definitely answers this

question. This means that the general partner or manager of an NCE will be undertaking an additional risk by making a reinvestment decision on behalf of an NCE.

In addition, the general partner or manager of an NCE has a fiduciary duty to investors in the NCE to select a reinvestment option that will balance meeting the “at risk” requirements, yet protecting the interests of the investors in receiving a return of their capital contributions after the Sustainment Period. This requires that the general partner or manager reasonably consider several reinvestment options available at the time of the reinvestment, taking into account the above-referenced factors. Such decisions may involve conflicts of interest on the part of the general partner or manager to the extent that the general partner or manager would obtain higher compensation for itself, the regional center and potentially migration agents and brokers by investing in riskier products that may produce a higher rate of return to these third parties, but not to the investors in the NCE.

To mitigate the risk of securities law violations or fiduciary duty claims, it is recommended that the NCE general partner or manager consider engaging an independent RIA to evaluate the reinvestment options available to the NCE, determine the advantages and disadvantages of each reinvestment option, and recommend a reinvestment option to the NCE that is most suitable for the NCE's investors. However, such decisions may involve conflicts of interest on the part of the general partner or manager, and there is always the risk that investors will claim that the general partner or manager violated its fiduciary duty in selecting the reinvestment made for the NCE.

Investment Transparency in Connection with Reinvestment

Another key element for the protection of the Investors in an NCE is safeguarding funds and providing transparency of fund administration to investors. This is important in connection with the initial investment decision, and equally important in connection with a reinvestment due to the timing differences in payments that will be made by the NCE during the reinvestment period as investors become eligible for return of their capital on different dates. Therefore, it is advisable for NCEs to engage a third party fund administrator to track all NCE payments from the reinvestment and to investors to insure that the investors’ timing needs and concerns regarding appropriate payments are properly managed.

Suggested Guidelines for Reinvestment

Based on the new Policy Manual policy provisions, and in consideration of immigration laws, securities laws, and applicable fiduciary duties, we recommend that every redeployment by an NCE following repayment of the initial investment should meet the following guidelines:

1. The investors should be advised in advance of the reinvestment how their investment funds will be redeployed, in a written document that details the reasons why the specific reinvestment was selected, what steps were taken to analyze the investment, including review by an independent RIA,

how the reinvestment will impact the investors' repayment of their capital when they become eligible for repayment under current USCIS policies, and how the investors' funds will be monitored and protected during the reinvestment period. This communication could take into account the following factors:

(a) A detailed description of the new investment or portfolio of investment products that is being undertaken;

(b) The attendant risks factor associated with the redeployment;

(c) An independent report by an RIA analyzing the appropriateness of the investment;

(d) An analysis of the procedures considered in making the investment decision (including whether investor consent is required or otherwise being sought); and

(e) An immigration analysis of the appropriateness of the investment to satisfy the "at risk" requirement.

2. The NCE manager or general partner should seek to make a reinvestment in an investment that is "within the scope of the NCEs business" in accordance with USCIS policies, and that provides the lowest level of risk possible to investors based upon the reinvestment options available to the NCE at the time and that are consistent with the requirement that the redeployed funds are in a project "engaged in commerce";

3. Under current guidelines, it appears that USCIS may not approve a redeployment in a bank account or a marketable securities account, because those types of investments would likely not be considered to be "within the scope of the NCE's business", but USCIS may approve a redeployment in a loan or investment, or pool of loans or investments, similar to the types of loans or investments described in the NCE's original offering documents;

4. The NCE manager or general partner should seek a reinvestment option that will permit the NCE to return capital contributions to investors at varying intervals as investors fulfill the Sustainment Period requirement, and will accommodate the need for earlier repayment of non-Chinese investors and a longer reinvestment period for Chinese investors due to the anticipated delay in their ability to meet the Sustainment Period;

5. The NCE manager or general partner should engage an independent RIA to review the reinvestment options with the general partner or manager and assess the advantages and disadvantages of each reinvestment option, with a view towards protecting the capital of the investors;

6. The NCE should engage a third party fund administrator to provide fund tracking and transparency to investors during the reinvestment period;

7. Existing NCEs should review their existing partnership or operating agreement to determine the requirements that will apply to a reinvestment of the proceeds of repayment of the NCE's original investment; and

8. New NCE's should modify their offering documents to take into account all of the above possibilities in addressing the ambiguities of the Policy Guidelines.

Conclusion

We believe that the standards and guidelines proposed in this White Paper should meet the USCIS requirements of sustaining the NCE’s capital “at risk” from an immigration standpoint. These standards should also satisfy the requirements of federal securities laws and the corporate fiduciary duties of the general partner or manager of an NCE to the EB-5 Investors, by hiring qualified third parties to manage the NCE’s investment, custody the investment and administer the funds to be paid to EB-5 Investors as the investment is liquidated to repay each EB-5 Investor upon conclusion of the required Sustainment Period.