NISKANEN CENTER

Public Interest Comment

Comments submitted to U.S. Citizenship and Immigration Services in the Matter of:

Job Creation and Capital At Risk Requirements

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Executive Summary

The Niskanen Center applauds USCIS for providing guidance on how they will handle visa retrogression, but suggests the agency modify its new policies to stay within its authorized purview, make clearer ambiguous provisions, and remove undue restrictions on investors.

We therefore make the following recommendations (which can be adopted together or independently):

1. Revise "At-Risk Requirement After the Job Creation Requirement is Satisfied" in Chapter 2(A)(2) to:
    a. Clarify when the job creation requirement is considered satisfied, specifically after 10 permanent jobs are created.
    b. Clarify that "business activity must actually be undertaken" refers only to activity by the new commercial enterprise (NCE)

c. Replace references to engagement in commerce and the requirements surrounding the "scope" of the NCE with a requirement that the NCE continue to operate in accordance with the definition of an NCE and the terms of its governing documents.

d. Remove the at-risk requirement after the job creation requirement is satisfied.

2. Revise Chapter 4(C) to:

   a. Apply all recommended changes suggested for Chapter 2(A)(2).

   b. Limit the definition of a material change to an I-526 petition to a regional center terminated *before* the job creation requirement is met.

Introduction

Congress has crafted America's investor visa to rely on the entrepreneurial spirit and competence of its immigrant investors to create jobs in the country. Unique to the U.S. is the significant authority Congress grants investors to determine the nature of their investment in visa programs.[1] The public interest is well served by the flexibility granted to investors and their American partners to operate and make investment decisions within the parameters of the program.

USCIS should be cautious creating rules that may disturb that balance by placing undue requirements on investors.

When considering new requirements, USCIS should follow carefully limit regulations to the authority granted within existing law, and should, to the extent authorized, defer investment decisions to investors to preserve and promote economic efficiency, and to protect immigrant investors.

Requirements After Job Creation are Outside the Scope of USCIS Authority

It is a positive development that USCIS has decided to delineate separate requirements to apply before and after the job creation requirement is satisfied because it allows a job creating enterprise (JCE) to pay

[1] See, by way of comparison, Canada's investor visa program.

off its loan to the new commercial enterprise (NCE), the JCE to be liquidated, and the investor's status to remain unchanged for the purposes of immigration.

However, requiring redeployment of capital by the NCE at risk is outside of the authority of USCIS to establish.[2]

USCIS cites INA §216A(d)(1)(B) to justify their authority to author new additions made to Chapter 5(A)(2) of the policy manual. INA §216A(d)(1)(B) requires that an alien, "invested, or is actively in the process of investing, the requisite capital" and that that investment be "sustained…throughout the period of the alien's residence in the United States." The definition of investment[3] pursuant to 8 CFR §204.6(e) means to contribute capital.

Contrary to the initial interpretation by USCIS, neither the statute nor the definition of investment requires capital continue to be at-risk beyond job creation, nor does it authorize USCIS to unilaterally enact such a requirement.[4] USCIS's interpretation is not also not supported by existing regulations or court decisions.

The Code of Federal Regulations § 204.6(j)(2) addresses the at-risk standard, but only for the purpose of adjudicating the I-526 petition.[5] Specifically, the regulation requires a showing that the petitioner placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk, and was at risk for the purposes of job creation. It does not, however, specify that the at-risk status must be continual for the length of the investment.

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[2] A number of other USCIS recommended changes also fall outside of the agency's authority, including limiting business activities of commercial enterprises to the exchange of goods and services and potentially limiting the scope of acceptable activities using redeployed capital to similar active business ventures only. The supplied examples give the impression that scope would be interpreted narrowly. But USCIS need not interpret scope narrowly once job requirements are met.

[3] 8 CFR §204.6(e).

[4] This point is made also in Carolyn S. Lee, "EB-5 Investment 'At Risk' and Sustaining Investment: Redeployment is Not Required," *Miller Mayer*, June 13, 2017. Available at: http://millermayer.com/wp-content/uploads/2017/06/AT-RISK-INVESTMENT-SUSTAINMENT.pdf. See also Mona Shah, "Redeployment Version 2.0: Serious Issues with USCIS'[s] New Policy Manual Changes," *Mona Shah and Associates*, June 22, 2017. Available at: http://mshahlaw.com/redeployment-version-2-0-serious-issues-uscis-new-policy-manual-changes/ and H. Ronald Klasko, "USCIS Policy Manual Changes on Sustainment, At Risk, Redeployment and Regional Center Terminations—Good, Bad and Ugly," *Klasko Law Partners*, June 16, 2017. Available at: http://www.klaskolaw.com/eb-5-investor-visas/uscis-policy-manual-changes-on-sustainment-at-risk-redeployment-and-regional-center-terminations-good-bad-and-ugly.

[5] 8 CFR §204.6(j)(2).

Relatedly, the Administrative Appeals Office (AAO) held in *Matter of Izummi* that the at-risk requirement was a tool to ensure funds are used to create jobs—and therefore the at risk requirement is only be applicable *before* the job requirement is met.[6]

Finally, the Code of Federal Regulations § 216.6[7]—which governs the I-829 petition pertaining to requirements for entrepreneurs seeking permanent residence in the U.S.— also does not require the applicant to demonstrate continued at-risk status of their investment.

At no point does USCIS cite legislative, regulatory, or administrative guidance that requires a sustained requirement that an investment remain at-risk after job creation, nor does the agency cite authority that allows them to implement and enforce such a rule.

Requirements After Job Creation are Unduly Restrictive

To the extent that USCIS asserts discretionary authority to implement broad regulations, we recommend they exercise restraint.

The reason that the American program is structured around both job creation and freedom of investment is because Congress rightly believed that investors would be able to steer their capital towards creating jobs through worthwhile and valuable projects, subject to government inducements toward rural areas and targeted employment areas.

That investors should be required to take risks—to have a chance at profit and a chance at loss—is an important principle of the program to ensure that projects are worthwhile and to weed out, as the statute puts it, "investments made solely as a means of evading the immigration laws of the United States."[8] In other words, risk is instrumentally useful, but it is not a goal of the EB-5—creating worthwhile jobs is. Where USCIS has discretion, it should not promote risk, but allow flexible deployment of capital. Once the job creation requirement is satisfied, such restrictions lose their justification and USCIS should defer to investors as to where capital is best deployed.

Not only is capital flexibility most conducive to economic growth, specific concerns arise in the EB-5 context that should reinforce the principle of deferring to investor choice. Because of the increasing

[6] *Matter of Ho*, 22 I&N Dec. 206-214 (AAO 1998) and *Matter of Izummi*, 22 I&N Dec. 169-200 (AAO 1998).
[7] 8 CFR §216.6.
[8] INA §216A(d)(1)(A)

backlog, investors are very uncertain when they will be granted conditional permanent residence and therefore, when they may be able to end their investment. Therefore, they have a need for liquidity that many other investors do not have. Requiring they redeploy capital in projects similar to the kind they originally invested in to create jobs is not only potentially inefficient, it is unfair to investors who would be at the mercy of project managers who would know that investors need to keep capital deployed, but do not know in advance when they would want a loan to mature.

Therefore, even if USCIS is still convinced that it must require redeployment, it ought to modify or clarify current redeployment policies to promote efficiency and protect investors by allowing more liquid investments during capital redeployment. USCIS should explicitly protect NCE investment in any portfolio with a sufficient proportion of "at risk" securities to qualify the portfolio as "at risk." Indeed, it can and should do this irrespective of policies surrounding redeployment. In fact, redeploying capital in this way may already be allowed under current rules but it is not clear. Specifically, the requirement that new activities be "within the scope of the new commercial enterprise" is ambiguous, as is the reference to "engagement in commerce." The examples that follow the requirements imply that USCIS would be strict, requiring very similar enterprises. But when job creation requirements are already met, narrowly interpreting scope--or redefining commerce--is unnecessary and unauthorized. As long as the NCE still acts as an NCE and acts within its governing guidelines (and within the law), an immigrant investor's immigration status should be protected regardless of the nature of business activities conducted after the job creation requirement has passed.

Conclusion

Just as we want investors to choose job creation projects in which to invest freely within the parameters of the EB-5 program, redeployment requirements should serve to secure investors as much freedom to choose new investments as they are allowed by law, thereby promoting efficiency and flexibility in the regional and national economy to further the purpose of an investor visa program. Accordance with that principle will also bring the policy manual into harmony with law, regulations, and precedent decisions.

We thank USCIS public engagement for the opportunity to comment and are happy to answer questions or work with USCIS in any capacity that could be helpful.