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 into a portfolio of publicly traded U.S. securities managed by a registered investment adviser, or into a new real estate investment, with appropriate due diligence and oversight of the new investment, together with NCE fund administration provided by a third-party fund administrator, 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 February 2017 Visa Bulletin issued by the Visa Control Office, the "cut-off date" for EB-5 Investors born in Mainland China is April 15, 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 six to eight years from the date of filing their I-526 Petitions before they are able to commence their two-year period of conditional residence.

Under current policies of USCIS, 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 receives final adjudication of his or her I-829 Petition to Remove Conditions ("**I-829 Petition**"). Due to the delay in processing visas for EB-5 Investors from 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 ten years. 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.

Laws and Policy Governing "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. Presumably, this would prohibit investments in accounts or securities with federal government guarantees. It would allow investments in securities that are not guaranteed and for which the value could increase or decrease.

USCIS issued a draft Policy Memorandum for public comment on August 10, 2015 entitled "Guidance on the Job Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829" (the "**Draft Memorandum**"). The Draft Memorandum specifically stated as follows regarding the requirement that every EB-5 Investor's capital investment remain in the NCE and "at risk" until the end of the EB-5 Investor's period of conditional residence:

> "The petitioner must show that he or she has continuously maintained his or her capital investment over the two years of conditional residence when filing the Form I-829 petition. INA § 216A(c)(1)(A). In addition, in order to qualify as an investment in the EB-5 Program, the immigrant investor must have actually

placed his or her capital "at risk" for the purpose of generating a return. 8 C.F.R. § 204.6(j)(2). Therefore, 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."

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"As mentioned previously, the statute and regulations, when read together, require the invested capital to be "at risk" throughout the sustainment period. For the capital to be "at risk" there must be a risk of loss and a chance for gain. USCIS' current policy allows for the investor's money to be held in escrow at the Form I-526 petition stage until the investor has obtained conditional lawful permanent resident status if the immediate and irrevocable release of the escrowed funds is contingent only upon approval of the investor's Form I-526 and subsequent visa issuance and admission to the United States as a conditional permanent resident or, in the case of adjustment of status, approval of the investor's Form I-485. However, 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. At the Form I-829 stage, USCIS will continue to require evidence verifying that the escrowed funds were released, and that the investment was sustained in the new commercial enterprise such that the capital was "at risk" throughout the sustainment period."

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"An investor may receive a return on his or her capital (i.e., a distribution of profits) during or after the conditional residence period, so long as prior to or during the two-year conditional residence period, and before the requisite jobs have been created, the return is not a portion of the investor's principal investment and was not guaranteed to the investor. Matter of Izummi, 22 I&N Dec. 169, 180-188 (Assoc. Comm'r 1998). …Note, however, that to the extent that all or some portion of the new commercial enterprise's claim against the job-creating entity is repaid to the new commercial enterprise during the sustainment period, the new commercial enterprise must continue to deploy such repaid capital in an "at risk" activity for the remainder of the sustainment period." (*Emphasis added*.)

USCIS has not issued any further guidance on the requirements for redeployment of the NCE's capital in a manner that satisfies the "at risk" requirements as interpreted by USCIS. Pursuant to a stakeholder's call held by USCIS on August 13, 2015, an economist for USCIS reiterated the USCIS position that the original investment made by an NCE in a JCE would have to remain outstanding through the I-829 Petition process. However, there have been no further statements by USCIS regarding the specific requirements for redeployment of investment funds by the NCE. The statements that have been made by USCIS, particularly in the Draft Memorandum, do not require that a redeployment of funds be invested in another JCE, or in a targeted employment area, or within the geographic area of the regional center that originally sponsored the NCE's

investment in the original JCE. We believe that none of these requirements should apply after the NCE's original investment in the JCE has been repaid to the NCE, so long as the JCE has met the job creation requirements specified in the NCE's approved business plan prior to the repayment of the investment by the JCE to the NCE.

Proposed Standards for Redeployment of NCE Investment Funds

USCIS stated in the Draft Memorandum that "For the capital to be 'at risk' there must be a risk of loss and a chance for gain." Based upon that definition of "at risk," it is not required that the NCE redeploy its capital into another job creating entity, so long as the NCE's original investment met the job creating criteria approved by USCIS in the NCE's original business plan. This is consistent with the two requirements for condition removal in Section 216A of the INA (8USC§1186b); viz; sustainment of investment and creation of jobs. If the creation of jobs requirement has already been fulfilled, the only requirement remaining is sustainment of the investment. Therefore, we suggest that the following types of investments should be deemed sustained "at risk" for purposes of an NCE redeploying its capital into a new investment for purposes of compliance with the USCIS requirement that each EB-5 Investor's capital remain invested until final adjudication of his or her I-829 Petition:

1. Investment in Publicly Traded Securities. Investing in publicly traded securities provides the opportunity for gain and the risk of loss. In addition, it offers greater liquidity to an NCE seeking to redeploy its investment funds, so that the NCE may repay each EB-5 Investor at an appropriate time after that EB-5 Investor receives final adjudication of his or her I-829 Petition. Liquidity is an important factor to NCEs in determining the appropriate redeployment investment, because each EB-5 Investor may receive final adjudication of his or her I-829 Petition at a different time, so the redeployment investment should be capable of being liquidated over time, and provide flexibility to allow liquidation to take place in a manner consistent with USCIS policy. The suitability of a redeployment of capital by the NCE in a portfolio of publicly traded securities should be determined by a qualified and experienced investment adviser. Investment in publicly traded securities has the additional advantage of being transparent with regard to the valuation of the securities held in the portfolio, based on publicly available information regarding the prices of such securities.

2. Investment in Privately Held Securities or Real Estate. Another possible strategy for an NCE to redeploy its capital would be to invest in a loan or equity investment in another real estate project, either with the same developer or with another developer, with investment terms that take into account the potential I-829 Petition timetable for EB-5 Investors in the NCE based upon the date that each EB-5 Investor commenced his or her period of conditional residence. Ordinarily an investment in real estate would not provide liquidity until the real estate investment is sold or refinanced; therefore, such a strategy should include liquidity features that would allow the NCE to repay each EB-5 Investor in a manner consistent with USCIS policy. The suitability of a redeployment of capital by the NCE into another real estate project would depend upon the risk factors that apply to the specific investment (including, without limitation, the risk

of a lack of liquidity) and could be determined by a qualified third party experienced in the evaluation of real estate investments.

Proposed Guidelines for Redeployment of NCE Capital in Compliance with Federal Securities Laws and State Law Fiduciary Obligations

1. Investment in Publicly Traded Securities. In order for the NCE to invest in a portfolio of publicly traded securities, the NCE ordinarily must engage a registered investment adviser to advise the NCE on the allocation of capital among a designated class of securities, as required by the Investment Advisers Act of 1940 (the "**Advisers Act**"). The NCE may, for this purpose, enter into an advisory agreement with a registered investment adviser, including an investment policy statement that specifies the types of investments to be made in the NCE's account. The NCE's account should be custodied at an independent qualified custodian (as defined by SEC Rule 206(4)-2 under the Advisers Act). The dividend income of the NCE's investment portfolio could be distributed to the general partners or managers and members of the NCE during the period of redeployment, but any capital appreciation of the investment portfolio during the redeployment period should remain in the NCE's investment account and reinvested in the investment portfolio during the redeployment period. In addition, as a further assurance to EB-5 Investors in the NCE, we propose that the NCE's funds should be administered by an independent fund administrator, to assure that each EB-5 Investor is repaid his or her capital from the NCE's investment account at the appropriate time.

2. Investment in Privately Held Securities or Real Estate. For those NCEs which desire to invest in a real estate project, in the form of a loan or an equity investment, we recommend that the NCE engage a third party experienced in evaluation real estate investments to conduct due diligence and determine if the proposed investment is suitable for the NCE, based upon the NCE's investment timeline and risk profile. In addition, we recommend that the NCE consider the engagement of a third party to monitor the investment and to advise the NCE regarding any material developments that would affect the NCE's investment. We also believe that, during this redeployment phase, it is appropriate for the NCE's funds to be administered by an independent fund administrator, to assure that each EB-5 Investor is repaid his or her capital from the proceeds of the NCE's investment in the new real estate project at the appropriate time in accordance with USCIS policy.

Conclusion

We believe that the standards and guidelines proposed in this White Paper would meet the USCIS requirements of sustaining the NCE's capital "at risk" until such time as each EB-5 Investor has received final adjudication of his or her I-829 Petition. These standards would also meet the requirements of the federal securities laws, and the fiduciary duties of the general partner or manager of an NCE to the EB-5 Investors in the NCE, 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 who receives final adjudication of his or her I-829 Petition.