

USCIS Releases Draft EB-5 Policy Guidance Clarifying Immigration and Project Related Issues Raised by Retrogression

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Popularity of the EB-5 Immigrant Investor Program has surged in recent years among foreign investors from mainland China. As a result, the demand for EB-5 visas by foreign investors born in mainland China has exceeded total annual availability, and for the first time in the history of the EB-5 Program, the U.S. Department of State imposed a visa backlog for Chinese investors in May 2015. This backlog, known as retrogression, impacts the amount of time an investor must wait to receive their conditional green card following Form I-526 approval. The current backlog is approximately two years, though unless there is a change in the law, it is anticipated to grow as demand for EB-5 visas continues.

Retrogression not only impacts a Chinese investor's waiting time to receive their conditional green card, but also the timeline for the return of their investment capital and period for measuring job creation, among other issues. For developers, retrogression has also created uncertainty in loan-model projects where the new commercial enterprise ("NCE") deploys capital to the project through a loan agreement, typically with a five-year repayment term. USCIS has not confirmed whether the investor's qualifying investment will remain sustained and at-risk if the project is complete and loan proceeds repaid to the NCE prior to or during the investor's conditional green card period and whether the NCE could redeploy the repaid capital to a new project.

To potentially clarify some of the open questions raised by retrogression, U.S. Citizenship and Immigration Services ("USCIS") released draft policy guidance on August 10, 2015, addressing three key EB-5 Program requirements: job creation, sustainment of the investment, and material changes:

Job Creation

The EB-5 Program requires that the investor's capital investment in the NCE result in the creation of at least ten full-time jobs for U.S. workers. The foreign investor must demonstrate creation of the required jobs within a two-year period beginning six months after approval of the Form I-526. This period was based on the determination that, barring retrogression, the average processing time for an investor to obtain their conditional green card following Form I-526 approval is six months. The investor must prove job creation at the time of filing their Form I-829.

Although retrogression may significantly alter the timeframe in which an investor may receive their conditional green card following Form I-526 approval, the measuring period for job creation will continue to commence within the two-year period beginning six months after Form I-526 approval, even if the investor does not receive their conditional green card within this timeframe. However, USCIS will not require that the jobs remain in existence at the time of Form I-829 adjudication. Rather, the job creation requirement will be satisfied if the investor can show that at least ten full-time jobs were created by the NCE due to his or her investment that were considered permanent at the time they were created. USCIS will also continue to credit the investor with jobs not yet created at the time of Form I-829 adjudication, provided that the investor can demonstrate that the jobs will be created within a reasonable period of time at the time of filing the Form I-829, defined as three years from the investor's receipt of their conditional green card.

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Sustainment

The EB-5 Program also requires that the investor show that his or her investment has remained at risk and sustained in a single NCE for the duration of the conditional green card period and through Form I-829 Approval. USCIS has clarified that a single NCE may deploy the capital to wholly-owned businesses or job creating entities. If the project is complete and repays the loan proceeds to the NCE prior to Form I-829 approval, the NCE could redeploy the capital to a different, wholly-owned project and the investment would remain sustained. However, capital will not be considered at risk if it is merely held in the NCE's bank account or in escrow during the conditional green card period; capital must remain subject to the risk of loss or chance of gain.

Material Change

Finally, in recognition of the extended timeframe between Form I-526 and Form I-829 approval caused by retrogression, USCIS clarified when changes to the project and/or investment may impact the investor's continued eligibility for immigration benefits. Material changes occurring after approval of the Form I-526 but before an investor's receipt of their conditional green card can result in revocation.

Changes that occur in accordance with the investor's business plan as filed with the Form I-526 would generally not be considered material. For example, if a project is completed as described in the business plan, the requisite number of jobs created, and the loan repaid to the NCE, the NCE could redeploy the capital into another "at risk" project without risking revocation of an approved Form I-526. In addition, an amendment to an NCE's offering documents in light of the new guidance to remove a liquidation provision based on repayment of a loan from the project prior to Form I-829 approval would also be permitted. An investor may also be permitted to file their Form I-829 in spite of changed circumstances so long as their Form I-526 was filed in good faith and with the intention to follow the business plan provided.

Conclusion

The policy guidance is not yet final and remains open for public comment through September 08, 2015. However, the final guidance, once issued, is anticipated to bring clarity for both investors and developers alike and to resolve critical uncertainties surrounding EB-5 Program requirements.

Miller Canfield's full service EB-5 Team has expertise in all aspects of regional center and direct investment projects, including working with developers, investors, and related entities on both immigration and project-related issues. We encourage subscription to our E-Alerts to receive the latest developments on the EB-5 Program as they progress or encourage contacting one of our EB-5 Team members with any EB-5 immigration or project-related inquiries.

Yanping Wang

+1.212.704.4419

wangy@millercanfield.com