U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

Message From The Director

Revised Draft Policy Memorandum Guiding EB-5 Adjudications

U.S. Citizenship and Immigration Services (USCIS) thanks stakeholders for providing comments to the draft policy memorandum we posted to address certain foundational issues in the EB-5 Program. In anticipation of tomorrow's "Conversation With The Director" regarding the EB-5 Program, we have attached the revised draft policy memorandum that incorporates some of your comments. In tomorrow's Conversation, we will discuss the revised draft policy memorandum and seek to focus on certain important policy issues that we wish to further explore with you, including the issue of material change and how to most fairly and effectively address it in our EB-5 adjudications.

As we stated previously, the formulation of the guiding EB-5 policy memorandum is an iterative process, one in which we seek your input. The revised policy memorandum is a further step in the iterative process. Tomorrow's Conversation will be important in guiding our determination of how to most effectively address some of the more difficult issues in the policy memorandum development process. We can continue tomorrow's discussion in the broader EB-5 quarterly engagement scheduled for later this month.

We are working hard to enhance the EB-5 Program, including the issuance of policies that address developments in the use of the Program and carefully adhere to the governing statutes and regulations. Tomorrow, we will discuss our efforts to date, issues of importance to you, and the path ahead. We are dedicated to realizing the EB-5 Program's potential to create jobs for U.S. workers and to vigilantly protecting the Program's integrity.

Thank you.

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Director
U.S. Citizenship and Immigration Services

DRAFT FOR COMMENT ONLY
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This draft does not constitute agency policy in any way or for any purpose.

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Policy Memorandum

SUBJECT: EB-5 Adjudications Policy

I. Introduction

The purpose of the EB-5 Program is to promote the immigration of people who can help create jobs for U.S. workers through their investment of capital into the U.S. economy.

Congress established the EB-5 Program in 1990 to bring new investment capital into the country and to create new jobs for U.S. workers. The EB-5 Program is based on our nation's interest in promoting the immigration of people who invest their capital in new, restructured, or expanded businesses in the United States and help create or preserve needed jobs for U.S. workers by doing so.

In the EB-5 Program, immigrants who invest their capital in job-creating businesses in the United States receive conditional permanent resident status in the United States for a two-year period. After two years, if the immigrants have satisfied the conditions of the EB-5 Program and other criteria of eligibility, the conditions are removed and the immigrants become unconditional lawful permanent residents of the United States. Congress created the two-year conditional status period to help ensure compliance with the statutory and regulatory requirements and to provide a measure of predictability before meaningful investment activity is undertaken.

The 1990 legislation that created the EB-5 Program envisioned lawful permanent resident status for immigrant investors who invest in and engage in the management of job-creating commercial enterprises. In 1993, the legislature enacted the "Immigrant Investor Pilot Program" that was designed to encourage immigrant investment in a range of business opportunities within designated regional centers.

Our goal at U.S. Citizenship and Immigration Services is to make sure that the potential of the EB-5 Program, including the Immigrant Investor Pilot Program, is fully realized and the integrity of the EB-Program is protected. Through our thoughtful and careful adjudication of applications and petitions in the EB-5 Program, we can realize the intent of Congress to promote the immigration of people who invest capital into our nation's economy and help create jobs for U.S. workers.

II. Preliminary Statement: The Preponderance of The Evidence Standard

As a preliminary matter, it is critical that our adjudication of petitions in the EB-5 Program adhere to the correct standard of proof. In the EB-5 Program, the petitioner must establish each element by a preponderance of the evidence. That means that the petitioner must prove to us that what he or she claims is more likely so than not so. This is a lower standard of proof than the standard of "clear and convincing," and even lower than the standard "beyond a reasonable doubt" that applies only to criminal cases. The petitioner does not need to remove all doubt from our adjudication, but must instead show that what he or she presents is more probable than not.

III. The Three Elements of the EB-5 Program

The EB-5 Program is based on three main elements: (1) the immigrant's investment of capital, (2) in a new commercial enterprise, (3) that creates jobs. Each of these elements is explained below in the context of both the original EB-5 Program and the Immigrant Investor Pilot Program.

A. The Investment of Capital

The EB-5 Program is based in part on the fact that the United States economy will benefit from an immigrant's contribution of capital. It is also based on the view that the benefit to the U.S. economy is greatest when the capital is committed to a job-creating commercial enterprise and placed at risk. The regulations that govern the EB-5 Program define the terms "capital" and "investment" with this in mind.

1. "Capital" Defined

The word "capital" in the EB-5 Program does not mean only cash. Instead, the word "capital" is defined broadly in the regulations to take into account the many different ways in which an individual can make a contribution of financial value to a business. The regulation defines "capital" as follows:

> Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

8 C.F.R. § 204.6(e).

The definition of "capital" has been clarified in precedent decisions that our Administrative Appeals Office (AAO) has issued:

- First, the definition of "capital" is sufficiently broad that it includes not only such things of value as cash, equipment, and other tangible property, but it can also include the immigrant investor's promise to pay (a promissory note), as long as the promise is secured by assets the immigrant investor owns, the immigrant investor is liable for the debt, and the assets of the immigrant investor do not for this purpose include assets of the company in which the immigrant is investing.

  In our AAO's precedent decision *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Comm'r 1998), we reflected the fact that the immigrant investor's promissory note can constitute "capital" under the regulations if the note is secured by assets the petitioner owns. We also determined that:

  (1) The assets must be specifically identified as securing the promissory note;

  (2) Any security interest must be perfected to the extent provided for by the jurisdiction in which the asset is located; and,

  (3) The asset must be fully amenable to seizure by a U.S. note holder.

- Second, all of the capital must be valued at fair market value in United States dollars. The fair market value of a promissory note depends on its present value, not the value at any different time. *Matter of Izummi*, 22 I&N Dec. 169, 186 (Comm'r 1998).

- Third, any assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital. The immigrant investor must demonstrate by a preponderance of the evidence that the capital was obtained through lawful means. According to the regulation, to make this showing the immigrant investor's petition must be accompanied, as applicable, by:

  (1) Foreign business registration records; or,

  (2) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this list), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the immigrant investor; or,

  (3) Evidence identifying any other source(s) of capital; or,

  (4) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private

> civil actions (pending or otherwise) involving monetary judgments against the immigrant investor from any court in or outside the United States within the past fifteen years.

8 C.F.R. § 204.6(j)(3)(i)-(iv).

2. "Invest" Defined

The immigrant investor in the EB-5 Program is required to invest his or her capital. The regulation defines "invest" as follows:

> Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur [the immigrant investor] and the new commercial enterprise does not constitute a contribution of capital . . . .

8 C.F.R. § 204.6(e).

The regulation also provides that, in order to qualify as an investment in the EB-5 Program, the immigrant investor must actually place his or her capital "at risk," and that the mere intent to invest is not sufficient. The regulation provides as follows:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petition is actively in the process of investing. The alien must show actual commitment of the required amount of capital.

8 C.F.R. § 204.6(j)(2).

The EB-5 Program is seeking to attract individuals from other countries who are willing to put their capital at risk in the United States, with the hope of a return on their investment, to help create U.S. jobs. The law does not specify what the degree of risk must be, whether minimal or significant; the capital need only be at risk to some degree. However, if the immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not at risk. *Matter of Izummi,* 22 I&N Dec. at 180-188. For the capital to be "at risk" there must be a chance that it is lost. In our precedent decision *Matter of Izummi,* 22 I&N Dec. at 183-188, the AAO found that the capital was not at risk because the investment was governed by a redemption agreement that protected against the loss of the capital. A promise to return any portion of the immigrant investor's minimum required capital negates the required element of risk.

In order for the immigrant investor to show that he or she has actually committed the required amount of capital, the evidence presented may include, but is not limited to, the following:

(1) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(2) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(3) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(4) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(5) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

8 U.S.C. § 204.6(j)(2)(i)-(v).

3. The Amount of Capital That Must be Invested

The statute governing the EB-5 Program provides that the immigrant investor must invest $1,000,000 in capital in a new commercial enterprise that creates not fewer than ten jobs. As discussed above, this means that the present fair market value, in United States dollars, of the immigrant investor's lawfully-derived capital must be $1,000,000. *8 U.S.C. § 1153(b)(5)(C)(i).*

An exception exists if the immigrant investor invests his or her capital in a new commercial enterprise that is principally doing business in, and creates jobs in, a "targeted employment area." In such a case, the immigrant investor must invest a minimum of only $500,000 in capital. *8 U.S.C. § 1153(b)(5)(C)(ii).* *See* Section 3.a below for the definition of where the new commercial enterprise is "principally doing business."

An immigrant investor may diversify his or her total EB-5 investment across a portfolio of businesses, so long as the minimum investment amount is placed in a single commercial enterprise. An immigrant investor who is not associated with a regional center may deploy capital into a portfolio of businesses, so long as all capital is deployed through a single commercial enterprise and all jobs are created within that commercial enterprise. For example, in an area in which the minimum investment amount is $1,000,000, the investor can satisfy the statute if the commercial enterprise deploys $600,000 toward one business that it wholly owns, and $400,000 toward another business that it wholly owns. *See 8 C.F.R. § 204.6(e)*. (In this instance, the two wholly-owned businesses would have to create an aggregate of ten new jobs between them.) An investor cannot qualify, on the other hand, by investing $600,000 in one commercial enterprise and $400,000 in a separate commercial enterprise.

In the regional center context, where indirect jobs may be counted, the commercial enterprise may create jobs indirectly through multiple investments in corporate affiliates or in unrelated entities, but the investor cannot qualify by investing directly in those multiple entities. Rather, the investor's capital must still be invested in a single commercial enterprise, which can then deploy that capital in multiple ways.

Where an investor elects to invest in a portfolio of businesses to satisfy EB-5 Program requirements, he or she must invest the standard statutory minimum of $1,000,000 in total unless each one of the businesses is located in a targeted employment area.

a. "Targeted Employment Area" Defined

The statute and regulations governing the EB-5 Program defines a "targeted employment area" as, at the time of investment, a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate. A "rural area" is defined as any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States). *8 U.S.C. § 1153(b)(5)(B)(ii), (iii); 8 C.F.R. § 204.6(e)*. In other words, a rural area must be both outside of a metropolitan statistical area and outside of a city or town having a population of 20,000 or more.

Congress expressly provided for a reduced investment amount in a rural area or an area of high unemployment in order to spur immigrants to invest in new commercial enterprises that are principally doing business in, and creating jobs in, areas of greatest need. In order for the lower capital investment amount of $500,000 to apply, the new commercial enterprise into which the immigrant invests must be principally doing business in the targeted employment area and must create the jobs in the targeted employment area. *8 U.S.C. § 1153(b)(5)(B)(i); 8 C.F.R. § 204.6(j)(6)(i), (ii).*

For the purpose of the EB-5 Program, a new commercial enterprise is "principally doing business" in the location where it regularly, systematically, and continuously provides goods or services that support job creation. If the new commercial enterprise provides such goods or services in more than one location, it will be deemed to be "principally doing business" in the

location that is most significantly related to the majority of the job creation. Factors to be considered in making this determination may include, but are not limited to, (1) the location of any jobs directly created by the new commercial enterprise; (2) the location of any expenditure of capital related to the creation of jobs; (3) where the new commercial enterprise conducts its day-to-day operation; and (4) where the new commercial enterprise maintains its assets that are utilized in the creation of jobs. *Matter of Izummi*, 22 I&N Dec. at 174.

As discussed fully below, investments through the Immigrant Investor Pilot Program can be made through regional centers and the new commercial enterprise may seek to establish indirect job creation. In these cases, the term "principally doing business" will apply to the job-creating enterprise rather than the new commercial enterprise. *See 8 C.F.R. § 204.6(j)(6)*; *Matter of Izummi*, 22 I&N Dec. at 171-73 (discussing the location of commercial enterprises to which the new commercial enterprise made loans).

The immigrant investor may seek to have a geographic area designated as a targeted employment area. To do so, the immigrant investor must demonstrate that the targeted employment area meets the regulatory criteria. The regulations also provide that a state government may designate a targeted employment area within its own boundaries based upon a finding of high unemployment.

b. A State's Designation of a Targeted Employment Area

The regulation provides that a state government may designate an area within its boundaries as a targeted employment area based on high unemployment. Before the state may make such a designation, an official of the state must notify USCIS of the agency, board, or other appropriate governmental body of the state that will be delegated the authority to certify that the geographic or political subdivision is a high unemployment area. The state may then send a letter from the authorized body of the state certifying that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. *8 C.F.R. § 204.6(h)(3)(i).*

Pursuant to the regulation, USCIS is to give deference to the state's designation of the physical boundaries of the geographic or political subdivision that will be the targeted employment area. However, USCIS must ensure compliance with the statutory requirement that the proposed area designated by the state in fact has an unemployment rate of at least 150 percent of the national average rate. For this purpose, USCIS will review state determinations of the unemployment rate and, in doing so, USCIS can assess the method or methods by which the state authority obtained the unemployment statistics. Acceptable data sources for purposes of calculating unemployment include Local Area Unemployment Statistics produced by a government agency, U.S. Census Bureau data, and data from the American Community Survey. State unemployment determinations should be based on the most recent publicly available data from the source relied upon.

There is no provision that allows a state to designate a rural area.

B. New Commercial Enterprise

As discussed at the beginning of this Policy Memorandum, the EB-5 Program eligibility requirements are based on the fact that the U.S. economy will benefit from an immigrant investor's investment of capital into a new commercial enterprise that, as a result of the investment, creates at least ten jobs for U.S. workers. We have discussed above the requirements regarding "capital" and "investment." We now turn to the definition of, and requirements for, a "new commercial enterprise."

1. "Commercial Enterprise" Defined

First, the regulation governing the EB-5 Program defines the term "commercial enterprise" broadly, consistent with the realities of the business world and the many different forms and types of structures that job-creating activities can have. The regulation defines a "commercial enterprise" as follows:

> [A]ny for-profit activity formed for the ongoing conduct of lawful business.

8 C.F.R. § 204.6(e).

The regulation provides a list of examples of commercial enterprises. It specifically states that the list is only of examples, and is not a complete list of the many forms a commercial enterprise can have. The examples listed are:

> [A] sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business.

8 C.F.R. § 204.6(e).

Finally, the regulation provides that the commercial enterprise must be one that is designed to make a profit, unlike, for example, some charitable organizations, and it does not include "a noncommercial activity such as owning and operating a personal residence." *8 C.F.R. § 204.6(e).*

2. "New" Defined

In its effort to spur job creation in a wide variety of businesses, the EB-5 Program has presented a broad definition of what constitutes a "new" commercial enterprise into which the immigrant investor can invest the required amount of capital and help create jobs.

The EB-5 Program defines "new" as "established after November 29, 1990." *8 C.F.R. § 204.6(e)*. The immigrant investor can invest the required amount of capital in a commercial enterprise that was established after November 29, 1990 to qualify for the EB-5 Program, provided the other eligibility criteria are met.

In addition, in the EB-5 Program a "new" commercial enterprise also means a commercial enterprise that was established before November 29, 1990 and that will be restructured or expanded through the immigrant investor's investment of capital:

a. The Purchase of an Existing Business That is Restructured or Reorganized

The immigrant investor can invest in an existing business, regardless of when that business was first created, provided that the existing business is simultaneously or subsequently restructured or reorganized such that a new commercial enterprise results. *8 C.F.R. § 204.6(h)(2)*. The facts of *Matter of Soffici*—where an investor purchased a Howard Johnson hotel and continued to run it as a Howard Johnson hotel—were not sufficient to establish a qualifying restructuring or reorganization. 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998) ("A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership.").

b. The Expansion of An Existing Business

The immigrant investor can invest in an existing business, regardless of when that business was first created, provided that a substantial change in the net worth or number of employees results from the investment of capital. *8 C.F.R. § 204.6(h)(3).*

"Substantial change" is defined as follows:

> [A] 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.

8 C.F.R. § 204.6(h)(3).

Investment in a new commercial enterprise in this manner does not exempt the immigrant investor from meeting the requirements relating to the amount of capital that must be invested and the number of jobs that must be created. *8 C.F.R. § 204.6(h)(3).*

The EB-5 Program provides that a new commercial enterprise can be used as the basis for the petition of more than one immigrant investor. Each immigrant investor must invest the required amount of capital and each immigrant investor's investment must result in the required number of jobs.

The new commercial enterprise can have several owners and the owners do not all have to be immigrant investors seeking to enter the EB-5 Program, provided that the source(s) of all capital invested is (or are) identified and all invested capital has been derived by lawful means. *8 C.F.R. § 204.6(g).*

3. Evidence of The Investment in a New Commercial Enterprise

To show that the immigrant investor has invested in a new commercial enterprise, the immigrant investor must present the following evidence, in addition to any other evidence we deem appropriate:

(1) as applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise; or,

(2) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the state or municipality does not issue such a certificate, a statement to that effect; or,

(3) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth or number of employees.

8 C.F.R. §§ 204.6(j), (j)(1)(i)-(iii).

4. The Requirement That The Immigrant Investor be Engaged in The Management of The New Commercial Enterprise

The EB-5 Program requires the immigrant investor to be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial responsibility or through policy formulation. It is not enough that the immigrant investor maintain a purely passive role in regard to his or her investment. *8 C.F.R. § 204.6(j)(5).*

To show that the immigrant investor is or will be engaged in the exercise of day-to-day managerial control or in the exercise of policy formulation, the immigrant investor must submit:

(1) a statement of the position title that the immigrant investor has or will have in the new enterprise and a complete description of the position's duties; or,

(2) evidence that the immigrant investor is a corporate officer or a member of the corporate board of directors; or,

(3) if the new enterprise is a partnership, either limited or general, evidence that the immigrant investor is engaged in either direct management or policy making activities. If the petitioner is a limited partner and the limited partnership agreement provides the immigrant investor with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the immigrant investor will be considered sufficiently engaged in the management of the new commercial enterprise.

8 C.F.R. § 204.6(j)(5)(i)-(iii).

5. The Location of The New Commercial Enterprise in a Regional Center

As previously mentioned, there is a pilot program within the EB-5 Program that provides for different job creation rules if the immigrant investor makes his or her investment in a new commercial enterprise located within a "regional center." The pilot program is called the "Immigrant Investor Pilot Program," and the different job creation rules are discussed below. A "regional center" is defined as follows:

> Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

8 C.F.R. § 204.6(e).

A regional center that wants to participate in the Immigrant Investor Pilot Program must submit a proposal to us that:

(1) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(2) Provides in verifiable detail how jobs will be created directly or indirectly;

(3) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(4) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and,

(5) Is supported by economically or statistically sound valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

8 C.F.R. § 204.6(m)(3)(i)-(v).

The Immigrant Investor Pilot Program was implemented with the goal of spurring greater economic growth in the geographic area in which a regional center is developed. A foreign national may be the principal or owner of a regional center. The regional center model within the Immigrant Investor Pilot Program can offer an immigrant investor already-defined investment opportunities, thereby reducing the immigrant investor's responsibility to identify acceptable investment vehicles. A regional center can manage, direct, and control the projects and developments that the new commercial enterprise initiates. In addition, the regional center can develop business plans and otherwise facilitate the formation of the new commercial enterprise, and can provide the economic analysis required to demonstrate job creation. As discussed fully below, if the new commercial enterprise is located within and falls within the economic scope of the defined regional center, different job creation requirements apply.

A regional center can contain one or more new commercial enterprises.

C. The Creation of Jobs

In developing the EB-5 Program, Congress intended to promote the immigration of people who invest capital into our nation's economy and help create jobs for U.S. workers. The creation of jobs for U.S. workers is a critical element of the EB-5 Program.

It is not enough that the immigrant invest funds into the U.S. economy; the investment must result in the creation of jobs for qualifying employees. As discussed fully below, the EB-5 Program provides that each investment of the required amount of capital in a new commercial enterprise must result in the creation of at least ten jobs.

It is important to recognize that while the immigrant's investment must result in the creation of jobs for qualifying employees, it is the new commercial enterprise that creates the jobs. This distinction is best illustrated by an example:

> Ten immigrant investors seek to establish a hotel as their new commercial enterprise. The establishment of the new hotel requires capital to pay financing costs, purchasing the land, developing the plans, obtaining the licenses, building the structure, taking care of the grounds, staffing the hotel, and the many other types of expenses involved in the development and operation of a new hotel. The immigrant's investments can go to pay part or all of any of these expenses. Each immigrant's investment of the required amount of capital helps the new commercial enterprise – the new hotel – create ten jobs. The ten immigrants' investments must result in the new hotel's creation of 100 jobs for qualifying employees (ten jobs resulting from each of the ten immigrant's investment).

See 8 C.F.R. §204.6(j) (it is the new commercial enterprise that will create the ten jobs).

It is also important to note that the full amount of the immigrant's investment must be made available to the business(es) most closely responsible for creating the jobs upon which EB-5 eligibility is based. Thus, in the regional center context, if the new commercial enterprise is not the job-creating entity, then the full amount of the capital must be first invested in the new commercial enterprise and then placed into the job-creating entity. *Matter of Izummi*, 22 I&N Dec. at 177.

1. Full-Time Positions For Qualifying Employees

The EB-5 Program requires that the immigrant investor invest the required amount of capital in a new commercial enterprise in the United States that "will create full-time positions for not fewer than 10 qualifying employees." *8 C.F.R. § 204.6(j).*

An "employee" is defined as follows:

> Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise.

8 C.F.R. § 204.6(e).

The employee must be a "qualifying employee" for the purpose of the EB-5 Program's job creation requirement. A "qualifying employee" is defined as follows:

> Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien

> entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

8 C.F.R. § 204.6(e).

It is important to note that the definition of "qualifying employee" does not include the immigrant investor himself or herself, the immigrant investor's spouse, sons, or daughters, or any nonimmigrant alien. *8 C.F.R. § 204.6(e).*

The EB-5 Program's job creation requirement provides that it is "full-time employment" that must be created for the ten or more qualifying employees. "Full-time employment" is defined as follows:

> Full-time employment means employment of a qualified employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week

A full-time employment position can be filled by two or more qualifying employees in a job sharing arrangement as long as the 35-working-hours-per-week requirement is met. However, a full-time employment position cannot be filled by combinations of part-time positions, even if those positions when combined meet the hourly requirement. *8 C.F.R. § 204.6(e).* Jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as full-time jobs. Consistent with prior USCIS interpretation, however, jobs that are expected to last for at least two years are sufficiently permanent to qualify for EB-5 purposes.

2. Job Creation Requirement

As previously discussed, the centerpiece of the EB-5 Program is the creation of jobs. The immigrant investor seeking to enter the United States through the EB-5 Program must invest the required amount of capital in a new commercial enterprise that will create full-time positions for at least ten qualified employees.

There are three measures of job creation in the EB-5 Program, depending on the new commercial enterprise and where it is located:

(a) Troubled Business

The EB-5 Program recognizes that in the case of a troubled business, our economy benefits when the immigrant investor helps preserve the troubled business's existing jobs. Therefore, when the immigrant investor is investing in a new commercial enterprise that is a troubled business or, in the regional center context, is placing capital into a job-creating entity that is a troubled business, the immigrant investor must only show that the number of existing employees in the troubled business is being or will be maintained at no less than the pre-investment level for a period of at least two years. *8 C.F.R. § 204.6(j)(4)(ii).*

This regulatory provision, while allowing job preservation in lieu of job creation, does not modify the numeric requirement; in the case of a troubled business, ten jobs must be preserved, created, or some combination of the two (e.g., an investment in a troubled business that creates four qualifying jobs and preserves six would satisfy the statutory and regulatory requirements).

A troubled business is defined as follows:

> [A] business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss.
>
> For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

8 C.F.R. § 204.6(e).

(b) New Commercial Enterprise Not Associated With a Regional Center

For a new commercial enterprise that is not a troubled business and is not associated with a regional center, the EB-5 Program provides that the full-time positions must be created directly by the new commercial enterprise. This means that the new commercial enterprise (or its wholly-owned subsidiaries) must itself be the employer of the qualified employees who fill the new full-time positions. *8 C.F.R. § 204.6(e)* (definition of employee).

(c) New Commercial Enterprise Located Within and Associated With a Regional Center

For a new commercial enterprise that is not a troubled business and is located within a regional center, the EB-5 Program provides that the full-time positions can be created either directly or indirectly by the new commercial enterprise. *8 C.F.R. § 204.6((j)(4)(iii).*

Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. For indirect jobs, the new full-time employees would not be employed directly by the new commercial enterprise. For example, indirect jobs can include, but are not limited to, those held by employees of the producers of materials, equipment, or services used by the new commercial enterprise. Indirect jobs can qualify 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.

For purposes of proving indirect job creation, petitioners must employ reasonable economic methodologies to establish by a preponderance of the evidence that the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.

3. Evidence of Job Creation

In order to show that a new commercial enterprise will create not fewer than ten full-time positions for qualifying employees, an immigrant investor must submit the following evidence:

> Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or,
>
> A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(j)(4)(i).

For purposes of the Form I-526 adjudication and the job creation requirements, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526. The business plan filed with the Form I-526 should reasonably demonstrate that the requisite number of jobs will be created by the end of this two-year period.

A business plan must comply with the requirements set forth in our AAO precedent decision:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Matter of Ho, 22 I&N Dec. 206, 213 (Comm'r 1998).

In the case of a troubled business, a comprehensive business plan must accompany the other required evidentiary documents. *8 C.F.R. § 204.6(j)(4)(ii).* In the case of a new commercial enterprise within a regional center, the direct or indirect job creation may be demonstrated by the types of documents identified above or by reasonable methodologies. *8 C.F.R. § 204.6(j)(4)(iii).*

When there are multiple investors in a new commercial enterprise, the total number of full-time positions created for qualifying employees will be allocated only to those immigrant investors who have used the establishment of the new commercial enterprise as the basis of their entry in the EB-5 Program. An allocation does not need to be made among persons not seeking classification in the EB-5 Program, nor does an allocation need to be made among non-natural persons (such as among investing corporations). *8 C.F.R. § 204.6(g)(2).*

IV. Procedural Issues

The EB-5 Program provides that the immigrant investor will file an initial petition and supporting documentation to be classified as eligible to apply for an EB-5 visa through USCIS's adjustment of status process within the United States or through the Department of State's visa application process abroad. Upon adjustment of status or admission to the United States, the immigrant investor is a conditional lawful permanent resident. The EB-5 Program further provides that if, after two years, the immigrant investor has satisfied the EB-5 Program's conditions, the conditions will be removed and the immigrant investor will be an unconditional lawful permanent resident.

A. The Sequence of Filings: General Overview

An immigrant investor seeking admission into the United States as a lawful permanent resident will proceed in the following sequence:

- For an immigrant investor who is investing in a new commercial enterprise that is not part of a regional center, the immigrant investor will file a Form I-526 that, together with the supporting evidence, demonstrates by a preponderance of the evidence that the immigrant investor has invested, or is actively in the process of investing, lawfully obtained capital in a new commercial enterprise in the United States that will create full-time positions for not fewer than ten qualifying direct employees.

- For an immigrant investor who is investing in a new commercial enterprise that is part of a regional center:

    - The entity seeking designation as a regional center will file a Form I-924 that, together with the supporting evidence, demonstrates by a preponderance of the evidence that the requirements for a regional center have been met. The individuals who establish the regional center can be, but need not be, the immigrant investors themselves; and,

- Once USCIS designates the entity as a regional center, each immigrant investor will file a Form I-526 that, together with the supporting evidence, demonstrates by a preponderance of the evidence that the immigrant investor has invested, or is actively in the process of investing, lawfully obtained capital in a new commercial enterprise in the United States that will create directly or indirectly full-time positions for not fewer than ten qualifying employees.

It is important to note that at this preliminary Form I-526 filing stage, the immigrant investor must demonstrate his or her commitment to invest the capital but need not establish that the required capital already has been invested; it is sufficient if the immigrant investor demonstrates that he or she is actively in the process of investing the required capital. However, evidence of a mere intent to invest or of prospective investment arrangements entailing no present commitment will not suffice. *8 C.F.R. § 204.6(j)(2); see Matter of Ho*, 22 I&N Dec. 206, 210 (Comm'r 1998). Similarly, at this preliminary stage the immigrant investor need not establish that the required jobs already have been created; it is sufficient if the immigrant investor demonstrates in a business plan that the required jobs will be created. *8 C.F.R. § 204.6(j); 8 C.F.R. § 204.6(m).*

- Ninety days prior to the two-year anniversary of the date on which the immigrant investor obtained conditional lawful permanent resident status, the immigrant investor will file a Form I-829 to remove the conditions. The I-829 petition to remove conditions must be accompanied by the following evidence:

  (1) Evidence that the immigrant investor invested or was actively in the process of investing the required capital and sustained this action throughout the period of the immigrant investor's residence in the United States. The immigrant investor can make this showing if he or she has, in good faith, substantially met the capital investment requirement and continuously maintained his or her capital investment over the two years of conditional residence. Even at this stage the immigrant investor need not have invested all of the required capital, but need only have substantially met that requirement. The evidence may include, but is not limited to, an audited financial statement or other probative evidence such as bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements; and,

  (2) Evidence that the immigrant investor created or can be expected to create, within a reasonable time, ten full-time jobs for qualifying employees. In the case of a troubled business, the immigrant investor must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. The evidence may include, but is not limited to, payroll records, relevant tax documents, and Forms I-9.

8 C.F.R. § 216.6(a)(4).

It is also important to note that the EB5 Program allows an immigrant investor to become a lawful permanent resident, without conditions, if the immigrant investor has established a new commercial enterprise, substantially met the capital requirement, and can be expected to create within a reasonable time the required number of jobs. All of the goals of capital investment and job creation need not have been fully realized before the conditions on the immigrant investor's status have been removed. The regulations require the submission of documentary evidence of "substantial" compliance with the capital requirements and evidence that the jobs will be created "within a reasonable time." This is a reflection of the EB-5 Program's desire to attract investment and promote job creation, and also its recognition of the dynamics of capital investments in new commercial enterprises for the purpose of creating jobs.

Distinct EB-5 eligibility requirements must be met at each stage of the EB-5 immigration process. Where USCIS has evaluated and approved certain aspects of an EB-5 investment, that favorable determination should generally be given deference at a subsequent stage in the EB-5 process. Unless there is reason to believe that a prior adjudication was in error, the agency will not reexamine determinations made earlier in the EB-5 process. However, a previously favorable decision may not be relied upon in later proceedings where, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation in the record of proceeding, or the previously favorable decision is determined to be legally deficient.

B. Material Change

The process of establishing a new business and creating jobs depends on a wide array of variables over which an investor or the creator of a new business may not have any control. The very best of business plans may be thrown off, for example, because of a sudden lack of supply in required merchandise or an unexpected hurricane that devastates an area in which the new business was to be built.

The effect of changed business plans on a regional center or an individual investor's immigration status may differ depending on when the change is made relative to the various petitions the regional center or the individual investor have filed.

It is well established that in visa petition proceedings, a petitioner must establish eligibility at the time of filing and that a petition cannot be approved if, after filing, the petitioner becomes eligible under a new set of facts or circumstances. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. at 175 ("a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements").

1. Regional Center Applications (Forms I-924)

In recognition of the fact that the regional center developer might in good faith have to implement material changes after submission of the initial Form I-924 petition to USCIS, the instructions to Form I-924 provide that a regional center may amend a previously-approved designation. The Form I-924 provides a list of acceptable amendments, including to geographic area, organization structure, capital investment projects (including changes in the economic analysis and underlying business plan used to estimate job creation for previously-approved investment opportunities), and an affiliated commercial enterprise's organization structure.

The approval of an amended Form I-924 does not cure or amend the I-526 petition an individual investor filed prior to the approval of the regional center amendment. The amendment alters the scope of the regional center to include the new commercial activity being conducted so that petitions filed after the amendment's approval fall within the scope of the regional center's approved activities.

2. Investors Who Have Obtained Conditional Lawful Permanent Resident Status

Historically, USCIS has required a direct connection between the business plan the investor has provided and the subsequent removal of conditions. USCIS would not approve a Form I-829 petition if the investor had made an investment and created jobs in the United States if the jobs were not created according to the plan presented in the Form I-526. While that position is a permissible construction of the governing statute, USCIS also notes that the statute does not require that direct connection. In order to provide flexibility to meet the realities of the business world, USCIS will permit an alien who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed. An individual investor can, at the prescribed time, proceed with his or her Form I-829 petition to remove conditions and present documentary evidence demonstrating that, notwithstanding the business plan contained in the Form I-526, the requirements for the removal of conditions have been satisfied.

USCIS notes, however, that it is more beneficial for an immigrant investor to utilize the business plan contained in the Form I-526. As the Ninth Circuit Court of Appeals has recognized, if the alien investor is seeking to have the conditions removed from his or her status based on the business plan contained in the Form I-526, USCIS may not revisit certain aspects of the business plan, including issues related to the economic analysis supporting job creation. *Chang v. U.S.*, 327 F.3d 911, 927 (9th Cir. 2003). If, however, the immigrant investor is seeking to have his or her conditions removed based on a business plan not consistent with the approved I-526, the *Chang* decision does not foreclose USCIS from requiring or requesting evidence to prove the element of job creation. This may include revisiting issues previously adjudicated in the Form I-526, such as the economic analysis underlying the new job creation.

USCIS also notes that, in the case of a petition affiliated with a regional center, the petitioner will only be able to claim indirect job creation if the new business plan falls within the scope of the regional center.

V. Conclusion

Congress created the EB-5 Program to promote immigrants' investment of capital into new commercial enterprises in the United States so that new jobs will be created for U.S. workers. The EB-5 Program provides for flexibility in the types and amounts of capital that can be invested, the types of commercial enterprises into which that capital can be invested, and how the resulting jobs can be created. This flexibility serves the promotion of investment and job creation and recognizes the dynamics of the business world in which the EB-5 Program exists. Our careful and thoughtful adjudication of petitions in the EB-5 Program should be mindful of these important principles.