

## **EB-5 Advisory: Loan Proceeds**

As noted in a previous Peng & Weber advisory, USCIS announced an abrupt policy change on April 22, 2015 regarding the use of loan proceeds as EB-5 capital. (We refer to this as the “April 22, 2015 Policy Change.”) Under the April 22, 2015 Policy Change, if an investor in an EB-5 commercial enterprise invests cash that was obtained from a loan, the cash will not qualify as “capital” (i.e., will not count toward the required minimum EB-5 investment amount) unless 3 requirements are satisfied:

1. The petitioner is personally and primarily liable for the indebtedness;
2. The indebtedness is secured by assets the petitioner owns; and
3. The value of the collateral is sufficient to secure the amount of indebtedness that is being used to satisfy the petitioner’s minimum investment amount.

To date, USCIS has provided little guidance on what loan structures will or will not result in qualifying loan proceeds. This advisory discusses a number of hypothetical examples intended to aid one’s general understanding of how USCIS’s April 22, 2015 Policy Change might apply in various situations. Each hypothetical example walks through the 3 questions that must be answered “yes” in order for the loan proceeds to count as capital under USCIS’s new policy:

1. Is the petitioner personally and primarily liable for the loan?
2. Is the loan secured by assets the petitioner owns?
3. Is the value of collateral sufficient to secure the loan?

Note: This advisory is provided for general informational purposes only. All examples are hypothetical and all comments reflect possible but not certain outcomes under the April 22, 2015 Policy Change. The content of this advisory is not intended as case-specific legal advice and should not be relied upon as such. The specific facts of an actual case should be evaluated in consultation with qualified immigration counsel.

### **A. Safest Scenarios**

#### **1. Literal Compliance**

- **Example 1:** Petitioner obtains a bank loan as sole borrower using a house he solely owns as collateral. (Assume the house’s value is sufficient to secure the loan amount.)
  - **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? Yes.
    2. Is the loan secured by assets Petitioner owns? Yes.
    3. Is the value of the collateral sufficient? Yes.
  - **Comment:** The loan proceeds should qualify as EB-5 capital. This is the model scenario.
  - **Caveat:** If Petitioner is married, the I-526 submission should include a statement by Petitioner’s spouse confirming Petitioner’s ownership and control of the house and the spouse’s consent to Petitioner’s use of the house as collateral for his loan.



## 2. Gift of Loan Proceeds

- **Example 2:** Petitioner’s father gifts him funds for his EB-5 investment. The father obtained the gifted funds from a bank loan using the father’s house as collateral.
  - **Analysis:** Gifted funds should not be subject to the “loan proceeds” analysis.
  - **Comment:** The gifted funds should qualify as EB-5 capital. The I-526 submission should include a gift statement from the father. In addition, Petitioner should document the underlying loan to explain that the gift was lawfully sourced.
  - **Caveat:** Recently proposed legislation (Senate bill S. 1501) seeks to *restrict* the use of gifted funds for EB-5 investment. If enacted, the legislation would only allow gifts made by a petitioner’s spouse, parent, child, sibling or grandparent. Even gifts from a petitioner’s in-laws would not be allowed, under the plain language of the proposed bill. Therefore, individuals who are planning to use gifted funds for their EB-5 investments should consider structuring the gift transfers so they are made by a spouse, parent, child, sibling or grandparent. (For example, if a petitioner’s aunt intends to provide the funds to the petitioner as a gift, the aunt could transfer the funds to the petitioner’s mother as a gift, and the mother could then transfer the funds to the petitioner as a gift. USCIS may or may not agree that such double gifts are acceptable, however.)

### B. Least Safe Scenarios

Note: The “alternative” listed under each example is offered for general discussion purposes only and not intended to imply acceptance or approval by USCIS.

#### 1. Collateral Owned by a Third Party

- **Example 3:** Petitioner obtains a bank loan as sole borrower using his sister’s house as collateral. (Assume the house’s value is sufficient to secure the loan amount.)
  - **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? Yes.
    2. Is the loan secured by assets Petitioner owns? No.
    3. Is the value of the collateral sufficient? Yes.
  - **Comment:** The loan proceeds likely would not qualify as EB-5 capital because the collateral is not owned by Petitioner.
  - **Alternative:** Instead of asking his sister to let him use her property as collateral for his loan, Petitioner should ask his sister to act as the *borrower* and then *gift* him the loan proceeds. (As explained in Example 2, if a petitioner wants to use gifted funds, it is safest if the gifting party is the petitioner’s spouse, parent, child, sibling or grandparent.) Making the funds a gift should remove them from “loan proceeds” treatment. The I-526 submission should include a gift statement from the sister and evidence of compliance with reporting and tax obligations related to the gift (if any).
- **Example 4:** Petitioner obtains a bank loan as sole borrower using his mother’s house as collateral. The mother purchased the house with the intent to gift it to Petitioner. The parties always understood that the house was Petitioner’s even though ownership was registered in the mother’s name. (Assume the house’s value is sufficient to secure the loan amount.)

- **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? Yes.
    2. Is the loan secured by assets Petitioner owns? No.
    3. Is the value of the collateral sufficient? Yes.
  - **Comment:** Despite the mother's intent to gift the house to Petitioner, title to the house was never actually registered in Petitioner's name. Since Petitioner is not the owner of the collateral as a legal matter, the loan proceeds likely would not qualify as EB-5 capital.
  - **Alternative:** If Petitioner's mother intends to gift the house to Petitioner, she should take the steps necessary to transfer legal title to Petitioner. The I-526 submission should include a gift statement from the mother and house ownership records reflecting the transfer of title to Petitioner.
- **Example 5:** Petitioner obtains a bank loan as sole borrower using a house owned by his 10-year-old daughter as collateral. Petitioner purchased the house but registered title in his daughter's name for estate planning purposes. The daughter is not even aware that she is the registered owner of the house. (Assume the house's value is sufficient to secure the loan amount.)
- **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? Yes.
    2. Is the loan secured by assets Petitioner owns? No.
    3. Is the value of the collateral sufficient? Yes.
  - **Comment:** Even though the house in fact belongs to Petitioner, the proceeds of the loan likely would not qualify as EB-5 capital because legal title is not registered in Petitioner's name.
  - **Alternative:** If Petitioner wants to use his house as collateral, he should first take the steps necessary to register title in his name. The I-526 submission should include house ownership records reflecting the transfer of title to Petitioner. [Unlike Example 3, the registered house owner in this example (the daughter) is a minor. The bank would likely not agree to let the daughter sign a loan contract, so the strategy of having her be the borrower and then gift the loan proceeds to Petitioner might not work.]

## 2. Loans Not Secured by Collateral

- **Example 6:** Petitioner obtains a personal loan from his sister. In light of the siblings' close relationship, no collateral is provided for the loan.
- **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? Yes.
    2. Is the loan secured by assets Petitioner owns? No.
    3. Is the value of the collateral sufficient? No; there is no collateral.
  - **Comment:** The loan proceeds likely would not qualify as EB-5 capital because there is no collateral, i.e., the loan is not "secured."
  - **Alternatives:**
    - Even if Petitioner's sister is happy to lend him money on a bare promise of repayment, her loan to him should be structured to require collateral. The collateral must be property Petitioner owns and that has an appraised value equal to or greater than the loan amount. If Petitioner does not own sufficient

property to provide as collateral, the loan amount should be limited to the value of property that Petitioner can provide. The I-526 submission should include Petitioner's property ownership records and a third-party appraisal of the property.

- In light of proposed bill S. 1501, a better alternative might be for Petitioner's sister to *gift* the funds to Petitioner instead of loaning them. S. 1501 provides that loan proceeds will only be counted as EB-5 capital if they are issued by a "reputable banking or lending institution that is properly chartered or licensed under the laws of any State, territory, country, or applicable jurisdiction"; if S. 1501 is enacted, Petitioner would not be allowed to use personal loan proceeds for EB-5 investment. To show a gift from the sister, the I-526 submission should include a gift statement from the sister and evidence of compliance with reporting and tax obligations related to the gift (if any).

➤ **Example 7:** Petitioner obtains a personal loan from his mother. Both parties understand that Petitioner probably will not be able to repay the loan and, if so, it will be forgiven (converted into a gift). No collateral is provided for the loan.

- **Analysis:**

1. Is Petitioner personally and primarily liable for the loan? Yes.
2. Is the loan secured by assets Petitioner owns? No.
3. Is the value of the collateral sufficient? No; there is no collateral.

- **Comment:** Even though the mother's loan to Petitioner is essentially a gift, it likely would be subject to "loan proceeds" analysis because it is technically structured as a loan. The loan proceeds likely would not qualify as EB-5 capital because the loan is not secured by collateral.

- **Alternative:** If Petitioner's mother intends to lend him money with the intent to forgive the loan in the future, Petitioner should ask his mother instead to characterize the money transfer as an *outright gift*. Gifted funds should not be subject to a "loan proceeds" analysis, as explained in Example 2. In light of proposed bill S. 1501, gifted funds would be safest if they come from Petitioner's spouse, parent, child, sibling or grandparent. The I-526 submission should include a gift statement from the mother and evidence of compliance with reporting and tax obligations related to the gift (if any). As discussed in Example 6, characterizing the mother's transfer to Petitioner as a gift would protect it from the loan restriction proposed by S. 1501.

### C. Potentially Unsafe Scenarios

Note: The hypothetical examples below cover common scenarios that lack specific and detailed guidance from USCIS, and are thus harder to navigate. The "alternative" listed under each example is offered for general discussion purposes only and not intended to imply acceptance or approval by USCIS.

#### 1. Petitioner and Spouse as Co-Borrowers of Loan

➤ **Example 8:** Petitioner and his wife are registered equal co-owners of House. Petitioner and his wife obtain a bank loan as co-borrowers using House as collateral. The loan agreement shows both parties as equally liable for the debt. All of the loan proceeds are deposited in Petitioner's bank account. (Assume House's value is sufficient to secure the loan amount.)

- **Analysis:**
  1. Is Petitioner personally and primarily liable for the loan? He might not be considered “primarily” liable.
  2. Is the loan secured by assets Petitioner owns? Yes. For property that Petitioner co-owns with a *spouse*, USCIS has generally treated the property as owned by Petitioner as long as the couple provides a statement confirming that either spouse is considered to have full ownership and control over all of their marital property. (However, USCIS may change its treatment of spousal co-ownership in the future, as discussed in Example 9.)
  3. Is the value of the collateral sufficient? Yes.
- **Comment:** It is unclear whether all of the loan proceeds would qualify as EB-5 capital. Because the loan agreement shows Petitioner as an equal co-borrower rather than the primary debtor, USCIS might take the position that he is not “primarily” liable on the entire debt and only allow him to count his 50% of the loan proceeds as capital—even though 100% of the loan proceeds were deposited into his account.
- **Alternative:** Petitioner should consider asking the lender to explicitly identify him as the primary debtor on the loan agreement. Assuming Petitioner can be identified explicitly as the primary debtor on the loan agreement, the wife should provide a gift statement for Petitioner’s I-526 submission confirming that she consented to the use of their joint property as collateral for Petitioner’s loan and gifted her half of the loan proceeds to Petitioner.

## 2. Collateral Co-Owned by Petitioner and Petitioner’s Spouse

- **Example 9:** Petitioner and his wife are registered equal co-owners of House. Petitioner obtains a bank loan as sole borrower using House as collateral. (Assume House’s value is sufficient to secure the loan amount.)
  - **Analysis:**
    1. Is Petitioner personally and primarily liable for the loan? USCIS likely would consider Petitioner primarily liable.
    2. Is the loan secured by assets Petitioner owns? Yes. For property that a petitioner co-owns with a *spouse*, USCIS has generally treated the property as owned by the petitioner as long as the couple provides a statement confirming that either spouse is considered to have full ownership and control over all of their marital property. However, in the future, USCIS may decide to count only 50% of House as owned by Petitioner, and therefore only count 50% of the loan proceeds (corresponding to Petitioner’s 50% ownership share) as EB-5 capital.
    3. Is the value of the collateral sufficient? Yes.
  - **Comment:** Based on USCIS’s general treatment of spousal co-ownership in the past, the loan proceeds likely would qualify as EB-5 capital.
  - **Alternative:** Instead of simply relying on USCIS’s past practice, Petitioner’s I-526 submission should include a joint statement from Petitioner and his wife confirming that Petitioner is entitled to the entire loan amount. The joint statement should explain that regardless of whether title is registered jointly or in the name of one spouse, each spouse has the right to dispose of or use the proceeds of any of the couple’s marital assets with the other spouse’s consent; and that Petitioner’s spouse consented to Petitioner’s loan.

### 3. Collateral Co-Owned by Petitioner and a Third Party Who Is Not a Spouse

- **Example 10:** Petitioner and his father are registered equal co-owners of House. Petitioner obtains a bank loan as sole borrower using House as collateral. (Assume House's value is sufficient to secure the loan amount.)
- **Analysis:**
  1. Is Petitioner personally and primarily liable for the loan? Yes.
  2. Is the loan secured by assets Petitioner owns? Yes. *However*, for property that a petitioner owns with a *non-spouse*, USCIS has generally treated the property as owned by the petitioner only in proportion to the petitioner's ownership share, and has counted only the petitioner's proportional share of the loan proceeds as belonging to the petitioner.
  3. Is the value of the collateral sufficient? Yes.
- **Comment:** Based on USCIS's past practice, it is likely that only 50% of the loan proceeds (corresponding to Petitioner's 50% ownership share) would qualify as EB-5 capital.
- **Alternative:**
  - Prior to Petitioner obtaining the loan, father should transfer his 50% ownership interest in House to Petitioner as a gift. This would make Petitioner the sole legal owner of House, and would be the clearest way to show that Petitioner is entitled to all of the loan proceeds. Petitioner's I-526 submission should include an updated house ownership certificate reflecting Petitioner's sole ownership of House, as well as a statement by the father explaining the gift of his 50% interest to Petitioner.
  - If a timely ownership transfer is not possible, then Petitioner's I-526 submission should at least include an agreement or joint statement by Petitioner and his father explaining that the father consented to Petitioner's use of House for Petitioner's loan, and that the father gifted any interest he had in the loan proceeds to Petitioner. This agreement would help to show that Petitioner should receive credit for the entire loan amount.

### 4. Collateral Owned Solely by Petitioner's Spouse

- **Example 11:** Petitioner obtains a bank loan as sole borrower using a house titled in his wife's name as collateral. The house was acquired *during* the couple's marriage. (Assume the house's value is sufficient to secure the loan amount.)
- **Analysis:**
  1. Is Petitioner personally and primarily liable for the loan? Yes.
  2. Is the loan secured by assets Petitioner owns? No.
  3. Is the value of the collateral sufficient? Yes.
- **Comment:** It is unclear whether USCIS would consider property held in the wife's name alone as property owned by Petitioner under marital property principles (as explained in Example 9). If so, the loan proceeds would qualify as EB-5 capital. If not, then they likely would not.
- **Alternative:** Petitioner's I-526 submission should include a joint statement from Petitioner and his wife confirming that Petitioner is entitled to the entire loan amount. The joint statement should explain that regardless of whether title is registered jointly

or in the name of one spouse, all property acquired by either spouse during marriage is marital property; each spouse has the right to dispose of or use the proceeds of any of the couple's marital assets with the other spouse's consent; and Petitioner's spouse consented to Petitioner's loan.

➤ **Example 12:** Petitioner obtains a bank loan as sole borrower using a house titled in his wife's name as collateral. The house was acquired by the wife *prior to* the couple's marriage. (Assume the house's value is sufficient to secure the loan amount.)

- **Analysis:**

1. Is Petitioner personally and primarily liable for the loan? Yes.
2. Is the loan secured by assets Petitioner owns? No.
3. Is the value of the collateral sufficient? Yes.

- **Comment:** Given that the wife acquired the house prior to marrying Petitioner, USCIS might be less likely to consider the house as property co-owned by Petitioner under marital property principles. If USCIS takes that view, it might not count any of the loan proceeds as EB-5 capital.

- **Alternative:** There are several alternative approaches, listed from stronger to weaker:

- (1) Petitioner's wife obtains the bank loan herself using her property, and then gifts the proceeds to Petitioner.
- (2) Petitioner's wife transfers title to Petitioner's name, and Petitioner remains the borrower.
- (3) Petitioner's wife transfers title to both her and Petitioner's names jointly, and provides a statement affirming her consent to Petitioner's use of the house as collateral for his loan. Petitioner remains the borrower.
- (4) Petitioner remains the borrower and the wife remains the title holder, but the couple provides a joint statement affirming their agreement to characterize the house as marital property, and stating that the wife consented to Petitioner's use of the house as collateral.

## 5. Valuations of Non-Real Property Collateral

Many loans used to fund EB-5 investments involve real property collateral, with the property's value confirmed through a third-party real estate appraisal report. However, collateral for a loan does not always have to be real property. For example, it is common for a petitioner who owns a company to fund his EB-5 investment with a loan from the company, secured by his shares in the company. For valuations of collateral other than real property, USCIS has not provided guidance on what valuation methodologies are acceptable.

➤ **Example 13:** Petitioner is an 80% shareholder in Company, which is a private enterprise. Company's current balance sheet shows RMB 10,000,000 in undistributed profits. Petitioner obtains a loan of RMB 3,500,000 from Company using his shares in Company as collateral. Company deems Petitioner's shares in Company sufficient collateral on the basis that his share represents an entitlement to RMB 8,000,000 (80%) of the undistributed profits.

- **Analysis:**

1. Is Petitioner personally and primarily liable for the loan? Yes.
2. Is the loan secured by assets Petitioner owns? Maybe. On the one hand, Petitioner clearly owns the shares used as collateral. On the other hand, USCIS may take the



view that the actual collateral is undistributed profits, which belong to the company and only become Petitioner's once they are distributed to Petitioner.

3. Is the value of collateral sufficient? *Unclear*. Share ownership in a private company is normally difficult to value due to the absence of a public market for the share. As shorthand, petitioners have commonly used an undistributed profits analysis to show that their shares are sufficient collateral for a company loan. USCIS has routinely accepted this approach in the past. However, USCIS has recently begun to reject the undistributed profits analysis in specific cases (without specifying what would be an acceptable valuation method).
- **Comment:** The loan proceeds likely would not qualify as EB-5 capital unless Petitioner could provide a third-party appraisal of the share value that is not based on undistributed profits.
  - **Alternative:**
    - Although Petitioner might prefer taking a loan over a distribution for tax reasons, the safer approach from an EB-5 perspective would likely be for Petitioner to obtain a *distribution* from Company instead of a loan. A distribution should not be subject to the "loan proceeds" analysis. The I-526 submission should include documentation of Petitioner's share ownership, Company's income, and authorization and transfer of the distribution.
    - If Petitioner does not want to obtain a distribution from Company, another alternative would be for Petitioner to borrow money from a *bank* (using his real estate or other collateral) instead of Company. As explained in Example 6, proposed bill S. 1501 states that only bank loan proceeds from a properly chartered/licensed and reputable banking or lending institution may be counted as EB-5 capital. If this loan restriction is enacted, Petitioner would not be allowed to use loan proceeds from Company for his EB-5 investment (unless Company happened to be a properly chartered/licensed and reputable banking or lending institution).

The hypothetical examples above demonstrate the wide-reaching impact of the April 22, 2015 Policy Change, but do not cover every type of situation that may arise in an actual case. As stated above, this advisory is provided for general informational purposes only. All examples are hypothetical and all comments reflect possible but not certain outcomes under the April 22, 2015 Policy Change. The content of this advisory is not intended as case-specific legal advice and should not be relied upon as such. The specific facts of an actual case should be evaluated in consultation with qualified immigration counsel.

As a final note, USCIS has been applying its new policy retroactively to I-526 petitions that were filed before April 22, 2015, and has been refusing to allow now-ineligible loan structures to be cured after the fact. We are aware of at least one class action lawsuit recently filed in the U.S. District Court for the District of Columbia to challenge USCIS's denials of I-526 petitions based on the unfair retroactive application of its new policy. Until and unless the April 22, 2015 Policy Change is invalidated in court, it will remain in effect and must be factored into immigration planning.



EB-5 stakeholders should also be aware that proposed Senate bill S. 1501 includes restrictions on the use of loan proceeds as EB-5 capital. Under the bill, capital derived from a loan may only count toward the required minimum EB-5 investment amount if the loan (i) is secured by the EB-5 petitioner's assets and (ii) is issued by a reputable banking or lending institution that is properly chartered or licensed by the applicable government authority. Although the loan restriction in S. 1501 does not mirror the April 22, 2015 Policy Change, it does include the second requirement set forth in the April 22, 2015 Policy Change (that the collateral must be owned by the petitioner). If enacted by Congress, S. 1501 would codify the collateral ownership requirement, making it official from the enactment date regardless of whether the April 22, 2015 Policy Change was previously invalidated by a court.

For more information on S. 1501, please refer to "FAQs About Proposed Bill S. 1501" by Peng & Weber, at [http://www.greencardlawyers.com/news/Newsletter/FAQs%20About%20S%20%201501\\_REV071015.pdf](http://www.greencardlawyers.com/news/Newsletter/FAQs%20About%20S%20%201501_REV071015.pdf).