

PENG & WEBER

PLLC

ATTORNEYS AT LAW

PENG & WEBER ALERT

On April 22, 2015, USCIS held an EB-5 stakeholder engagement to provide EB-5 program updates for the first half of FY 2015 and discuss current adjudications-related issues. Chinese EB-5 investors in particular should be aware of two important policy announcements made by Julia Harrison, Deputy Chief of the Immigrant Investor Program Office (IPO), concerning cases in which the EB-5 petitioner's investment capital derive from loan proceeds. Noting that the IPO has received a number of inquiries on this topic over the past few months, Ms. Harrison announced the following two policies:

1. **Loan proceeds will qualify as "capital" for EB-5 purposes only if the loan meets the definition of "indebtedness" as set forth in the EB-5 regulation at 8 C.F.R. Section 204.6(e).** USCIS does not consider loan proceeds "cash" but rather "indebtedness," which means an EB-5 petitioner's loan must satisfy three criteria:
 - (1) The petitioner must have primary responsibility under the loan documents for repaying the debt;
 - (2) The debt must be secured by assets that the petitioner owns; and
 - (3) The value of the collateral must be sufficient to secure the amount of the debt. (In other words, the loan proceeds will qualify as capital only up to the value of such collateralized assets.)

Example: Under this newly announced policy, if an EB-5 petitioner invested funds he obtained through a bank loan secured by a mortgage on his *parents'* house, the investment funds would not qualify as "capital"—even if the loan was under the petitioner's name alone and the value of the house was sufficient to secure the loan amount. However, if the parents obtained the bank loan themselves and then *gifted* the proceeds to the petitioner to invest, the petitioner's investment *would* qualify as "capital."

2. **Loan proceeds may not be considered a lawful source of funds if based on a loan agreement that explicitly restricts the borrower's use of the loan proceeds to a purpose other than EB-5 investment.** In determining whether an EB-5 petitioner has demonstrated a lawful source of funds, USCIS will look at whether the loan agreement contains a restriction on the use of loan proceeds. Even if the petitioner obtains a loan from a lawful source, such as a reputable bank, USCIS may nevertheless deem the loan proceeds "unlawful" if they were obtained by unlawful means such as fraud on a loan application. USCIS cautions stakeholders against submitting documents that contain any provision that would restrict the use of funds for EB-5 investment; such provisions will likely trigger a request for evidence or notice of intent to deny.

Example: Under this newly announced policy, if the petitioner had signed a loan contract that stated the loan was for the purpose of providing the petitioner with operating capital for his business, but the petitioner subsequently obtained and used the loan proceeds for his EB-5 investment, USCIS would consider the loan proceeds as unlawfully obtained due to the discrepancy between the loan's stated purpose and ultimate use.



USCIS's position on loan proceeds as qualifying capital provoked numerous objections and challenges during the Q&A segment of the stakeholder engagement, including comments by Cletus Weber, founding partner of Peng & Weber, who had challenged USCIS's misinterpretation of the EB-5 regulations on this issue during the last EB-5 stakeholder teleconference on February 26, 2015 and questioned it again during the April 22, 2015 Q&A. Mr. Weber and many other stakeholders expressed deep concern that USCIS's position constitutes a new policy unsupported by the existing EB-5 regulations. However, Ms. Harrison characterized her announcement as a "clarification" regarding USCIS adjudications and repeatedly stated that USCIS was not open to debating or reconsidering the issue in the context of the stakeholder engagement. Where USCIS is "clarifying an existing policy," Ms. Harrison said, the only mechanism for debate is to utilize appeal procedures (after a petition is denied). It remains to be seen whether USCIS will be open to any dialogue on this issue through other means.

Chinese EB-5 investors who have obtained or plan to obtain a loan to fund their EB-5 investment should ask their immigration counsel about how USCIS's new policy announcements could affect them.

Stay tuned for Peng & Weber's complete report on the April 22, 2015 EB-5 stakeholder engagement.