EB-5 PRACTICE: USCIS'S APRIL 22, 2015, POLICY-CHANGE ANNOUNCEMENT AND THE OBVIOUS MEANING OF "CASH" AND "INDEBTEDNESS" UNDER 8 C.F.R. §204.6(e)

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I. Introduction

This article examines a legally indefensible, retroactive policy change that the United States Citizenship and Immigration Services (USCIS) recently introduced with respect to how it adjudicates the *Form I-526 Immigrant Petition by Alien Entrepreneur* under the employment-based fifth preference (EB-5) immigrant visa category. With little warning and no stated policy rationale for doing so, USCIS recently posted to its official website an April 22, 2015, policy-change announcement (2015 Policy-Change Announcement) establishing a novel legal theory about what constitutes investment "capital" under the EB-5 regulations at 8 C.F.R. §204.6(e).[1]

The targets of this abrupt policy change are certain types of completely legal—previously approvable—loans that the EB-5 petitioner used to acquire funds to invest in the United States to qualify for a conditional green card under the EB-5 regulations.[2] According to this new theory, if an EB-5 petitioner executes a loan with a bank or other third party, receives cash "proceeds" of that loan, and finally meets his or her minimum EB-5 investment requirement by investing that cash in a new commercial enterprise (NCE) in the United States, that cash will no longer be treated as "cash" under 8 C.F.R. §204.6(e), but will instead be treated as "indebtedness."[3]

Setting aside substantive details for the time being, the *effect* of the 2015 Policy-Change Announcement is to arbitrarily—and retroactively—create a shredder for adjudicating hundreds or thousands of already *pending*—otherwise approvable—I-526 petitions solely because USCIS changed the policy without warning, *after* these petitioners had already filed their petitions under USCIS's prior policy.

In addition to its draconian retroactivity, the new policy is directly at odds with USCIS's own regulations, which have not changed at all on this issue during the twenty-five years the regulations have been in effect. As well, USCIS has stated no policy reason whatsoever for this change.

Because this new policy is based on a novel interpretation of USCIS's regulations, which are heavily based in fundamental concepts of investment, capital, and the like, which in turn stem from generally accepted accounting principles (GAAP), this article seeks to determine not only whether the new policy can possibly fit within USCIS's *existing* regulations, but also whether it can possibly fit within fundamental concepts of GAAP. Before delving into the technical details, however, it is important to review the fundamentals of EB-5 law as actually written, because they have been what both USCIS and its predecessor, the Immigration and Naturalization Service (legacy INS), had previously followed on this issue in approving thousands of cases under similar facts over a twenty-five-year period.

II. Broad Overview of General EB-5 Requirements

Congress created the EB-5 program twenty-five years ago to increase foreign direct investment in the United States as a way to create or save jobs for U.S. workers. The program is set forth in Section 203(b)(5)

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[1] Immigrant Investor Program Office (IPO): EB-5 Telephonic Stakeholder Engagement (April 22, 2015): IPO Deputy Chief's Remarks, *reprinted at* 20 Bender's Immigr. Bull. 548 (App. E) (May 15, 2015). The entirety can be found online at http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_IPO_Deputy_Chief_Julia_Harrisons_Remarks.pdf.

[2] In most cases, the primary reason for obtaining a loan is to extract the cash from a valuable underlying asset, such as a house or commercial property, instead of selling the asset outright. This issue is discussed in more detail below.

[3] As discussed in more detail below, *after* USCIS issued its 2015 Policy-Change Announcement to introduce this new policy, U.S. Senate Judiciary Committee Ranking Member Patrick Leahy and U.S. Senate Judiciary Chairman Charles Grassley jointly introduced S.1501, the "American Job Creation and Investment Promotion Reform Act of 2015," which, among other things, proposes: a) to write into the statute essentially the same rule that the 2015 Policy-Change Announcement claims to be existing law; and b) make it effective only for cases filed *after* enactment. (See S.1501 Sec. 2(b)(L)(iv)(I).) Logically, Congress would be proposing to *add* to the statute only if it were *not* already law.

The 2015 Policy-Change Announcement also raises a separate issue related to the stated *purpose* of the loan, but that is a completely different issue adjudicated under a completely different test, namely, the "lawful means" test of 8 C.F.R. §204.6(j)(3). This article focuses only on the "capital" test of 8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2) and therefore does not address the loan-purpose issue.

of the Immigration and Nationality Act (INA). Thousands of families from around the world invest through the EB-5 program every year, and their investments create tens of thousands of jobs annually for U.S. workers, all at no cost to the U.S. taxpayer.

Under the EB-5 program, the federal government will grant a two-year period of *conditional* resident status to the petitioner and eligible family members if the petitioner invests at least $1,000,000 (or in certain circumstances $500,000) of "capital" in a U.S. for-profit company—technically referred to as a "new commercial enterprise" or "NCE"—and then creates or saves at least ten jobs in or through that NCE.[4] If the EB-5 petitioner complies with applicable regulations, the petitioner and eligible family members will be afforded an opportunity to convert their temporary two-year status into lawful *permanent* resident (LPR) status, commonly referred to as having a "green card."

What constitutes "capital" within this overall EB-5 investment context stands at the center of USCIS's 2015 Policy-Change Announcement and is therefore discussed in great detail in this article.

III. Overview of Applicable Statutory and Regulatory Framework

To understand how USCIS's 2015 Policy-Change Announcement attempts to *change* applicable law requires a relatively robust understanding of what the law actually *says*, how it actually works, and why it works that way within the broader context of EB-5 generally. This section provides an overview.

A. EB-5 Statute

Section 203(b)(5) of the INA describes the general EB-5 equation, namely: money + jobs = green cards. The statute also sets forth other EB-5 components, but USCIS bases its 2015 Policy-Change Announcement solely on the agency's new interpretation of the regulations, not on any statutory language.

B. EB-5 Regulations

The EB-5 regulations at 8 C.F.R. §204.6 (and 8 C.F.R. §216.6) set forth provisions on the job-creation requirement, a management requirement, and a few other secondary rules, none of which is at issue in USCIS's 2015 Policy-Change Announcement. A major portion the regulations, however, focuses heavily on the *quid pro quo* exchange between EB-5 petitioner and the NCE.

The workhorse of this part of the regulations is the definition of "capital" in 8 C.F.R. §204.6(e). That provision regulates *both* sides of this exchange between the petitioner and the NCE. Most of the underlying rules regulate the petitioner's side and are discussed in the next section of this article.

The single rule that relates to the NCE's side of the exchange states that when the EB-5 petitioner contributes assets for an investment in the NCE, the NCE must *in exchange for* that investment issue back to the petitioner *equity* (i.e., *ownership* interests in the NCE), not *debt* (i.e., a promise by the NCE to *repay* those funds to the petitioner). Specifically: "A contribution of capital *in exchange for* a note, bond, convertible debt, obligation, or any other debt arrangement between the alien and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part."[5] In lay terms, this rule requires that the EB-5 petitioner become an *owner* of, not a *lender* to, the NCE.

IV. Regulating the *Petitioner's* Side of the *Quid Pro Quo* Exchange

Conceptually, an EB-5 petitioner's overall investment process has two steps. First, the petitioner *acquires* some type of asset via employment or business earnings, sale or leveraging of an asset, receipt of a gift, etc. Second, the petitioner *contributes* some type of asset to the NCE. To understand the central flaw of the 2015 Policy-Change Announcement, it is critical to understand how the regulations as written clearly reflect this *two-step* investment process.

A. *Two*-Step Investment Process Yields Two *Separate* Tests

The regulations reflect this overall two-step investment process by creating separate tests for each step. One test is referred to as the "capital" test and the other is referred to as the "lawful means" test. Both tests, which are described in more detail below, originate from within the basic definition of "capital" in 8 C.F.R. §204.6(e).

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[4] The $1,000,000 minimum investment requirement drops to $500,000 if the petitioner invests in a new commercial enterprise that is geographically located in a "targeted employment area" (TEA). 8 C.F.R. §204.6(f)(2).

[5] 8 C.F.R. §204.6(e) (emphasis added). Of course, the investor can still loan money to the NCE. It is just that the investor cannot count the amount of any loans for meeting the minimum investment requirement under §204.6(e) (i.e., the $500,000 or $1,000,000 minimum investment requirement). (These minimum investment requirements have been in place since Congress created the EB-5 category in 1990, but Congress is widely expected to increase these amounts in the future. For example, S.1501, mentioned above, proposes increasing the minimum investment requirements to $800,000 (TEA) and $1.2 million (non-TEA).)

Verbatim, that provision reads as follows (emphasis added):

> 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.

The first two sentences of this definition focus on the *second* step of the petitioner's overall investment process (i.e., the petitioner's ultimate *contribution* of the asset to the NCE). This is the "capital" test and focuses on *what* the petitioner contributed to the NCE. Even though the regulations allow the petitioner to contribute virtually any type of asset[6] to the NCE, the vast majority of petitioners actually contribute *cash* to the NCE, and because it is cash, there are no lingering issues of its fair market value.

The third and final sentence of the definition of "capital" in 8 C.F.R. §204.6(e) focuses on the *first* step of the petitioner's overall investment process (i.e., the petitioner's *acquisition* of the investment asset). This is the "lawful means" test and focuses on *how* the petitioner acquired the asset in the first place. Both tests are discussed below.

Structurally, even though the regulations introduce the concept of "lawful means" within the overall definition of "capital" at 8 C.F.R. §204.6(e) as a third and final thought, the regulations later on (in 8 C.F.R. §204.6(j)) set forth completely *separate* paragraphs with separate evidentiary tests for both "capital" and "lawful means." Specifically, the evidentiary paragraph for the "capital" test is 8 C.F.R. §204.6(j)(2), and the evidentiary paragraph for the "lawful means" test is 8 C.F.R. §204.6(j)(3).

What follows from this *two-part* regulatory *structure* is that the regulations clearly envision the "capital" test and the "lawful means" test as completely *separate* concepts, not as overlapping thoughts to be mixed and matched, flipped and flopped, or blended together into a conceptual fog.

B. "Capital" Test in 8 C.F.R. §204.6(e) and (j)(2)

The question of *what* constitutes "capital" is determined primarily by looking at the list of assets mentioned in 8 C.F.R. §204.6(e): cash, equipment, inventory, other tangible property, cash equivalents, and a specific type of "indebtedness." The types of evidence required to meet the "capital" test are set forth in the corresponding evidentiary paragraph at 8 C.F.R. §204.6(j)(2).

i. 8 C.F.R. §204.6(e): "Invest means to contribute capital."

In the context of analyzing the 2015 Policy-Change Announcement, it is critical to understand *where* in the two-step analysis of the petitioner's overall investment process the "capital" test is applied. The answer to the *where* question can be found in the definition of "invest" under the regulations, which reads as follows: "Invest means to *contribute* capital" (emphasis added).

Specifically, this means that the "capital" test is a test of the *type* of asset that the petitioner actually "contribute[d]" to the NCE.

Also, because the regulatory definition of "invest" and its overarching concept of *contribution* are so essential to understanding the central flaws in the 2015 Policy-Change Announcement, this article includes as appendices two diagrams that elucidate this critical point. First, **Appendix C** highlights that under the regulations, "[i]nvest means to *contribute* capital," which logically means that the *test* of whether something is "capital" must be conducted only on what the petitioner actually "contribute[d]" to the NCE.[7] That is, the "capital" test is *not* a test of *how* the petitioner originally acquired the cash to invest in the NCE. Second, **Appendix D** highlights that although the regulations *do* impose a test on the "means" through

[6] Although the definition of "capital" at 8 C.F.R. §204.6(e) includes virtually anything of reasonable value to the NCE, two points are important. First, property is limited to "*tangible* property," which excludes *intangible* property, such as trademarks, copyrights, patents, etc. The regulations likely exclude them because, although clearly valuable, such assets are very difficult to value absent a true arm's length transaction between unrelated parties. Second, "indebtedness" is at the core of the legal weakness of the 2015 Policy-Change Announcement. As discussed in more detail below, the reality is that "indebtedness" truly applies only to loans, promissory notes, etc. under which the NCE has a *right to receive* future payments. The 2015 Policy-Change Announcement attempts to apply it to the "proceeds" of loans, promissory notes, etc. under which the petitioner had an *obligation to pay* a bank or other third party that is wholly unrelated to the NCE.

[7] As discussed in more detail below, the 2015 Policy-Change Announcement's novel new theory that "indebtedness" applies to *cash* proceeds of a petitioner's loan from a bank or other third party cannot possibly be correct, because the petitioner never "contribute[d]" the indebtedness to the NCE. The petitioner contributed only *cash* to the NCE.

which the petitioner "obtained" his or her investment cash, that test (called the "lawful *means*" test) is a completely *different* test altogether and does *not* focus on testing whether the petitioner's contribution to the NCE constitutes "capital."[8]

ii. 8 C.F.R. §204.6(j)(2): "Capital" Is a Test of What the Petitioner Contributed to the NCE.

The fact that the "capital" test is a *what-was-contributed* test, not a *how-was-it-acquired* test, is further confirmed in the separate evidentiary paragraph, 8 C.F.R. §204.6(j)(2), which explains what types of evidence are needed to meet the "capital" test. Specifically, 8 C.F.R. §204.6(j)(2) reads as follows (adding emphasis):

> (2) 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 petitioner is actively in the process of investing. The alien must show actual *commitment* of the required amount of capital. Such evidence may include, but need not be limited to [a number of different alternative types of evidence].

All of the relevant terms in this part of the provision, which are italicized, highlight that the test of "capital" focuses on *what* the petitioner does with the money or other asset, not on *how* the petitioner acquired it in the first place. For example, the investor must have "invested" the capital. In addition, the petitioner must show that the petitioner "has *placed*" the capital at risk. Also, the petitioner "must show actual *commitment* of the required amount of capital." Not a single concept here even remotely implies that this test is about *how* the petitioner initially "obtained" these funds.

C. "Lawful Means" Test in 8 C.F.R. §204.6(e) and (j)(3)

Although certainly of substantive importance in real-world adjudications, the "lawful means" test is clearly the *secondary* test both conceptually and structurally. For example, in 8 C.F.R. §204.6(e), the "lawful means" test stems from the third and final sentence of that section (i.e., below the list of assets generally constituting "capital" and below the requirement that such assets be accounted for at "fair market value"). The "lawful means" test also plays very little *substantive* role in USCIS's 2015 Policy-Change Announcement.

Nonetheless, the "lawful means" test does still play a significant *structural* role in the *analysis* of the Announcement's rationale for attempting to reverse twenty-five years of prior policy. Specifically, whereas each of these two tests has its *own* seat within the regulations, the 2015 Policy-Change Announcement attempts to plop its twisted version of "indebtedness" down *simultaneously* in both seats. In other words, although the *substance* of the "lawful means" test is not directly applicable, the *location* of the test's application within the petitioner's overall asset-acquisition-and-investment process plays a vital role in understanding the serious legal and logical problems underlying the 2015 Policy-Change Announcement.

V. Understanding "Cash" and "Indebtedness" Within the Definition of "Capital" at 8 C.F.R. §204.6(e)

Because the centerpiece of the 2015 Policy Change Announcement is its erroneous attempt to "classify" (actually re-classify) *cash* loan "proceeds" as "indebtedness" instead of "cash," it is absolutely critical to understand the difference between "cash" and "indebtedness." The starting point, of course, is 8 C.F.R. §204.6(e), which lists the following assets as types of "capital":

- Cash
- Equipment
- Inventory
- Other tangible property
- Cash equivalents
- 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.

A. The Obvious Meaning of "Cash" Under 8 C.F.R. §204.6(e)

The meaning of "cash" seems completely obvious even in lay terms. For that reason, the regulations provide no further definition beyond 8 C.F.R. §204.6(e), which simply lists "cash" as the very first and most obvious asset type constituting "capital" under the statute and regulations.

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[8] As highlighted in the regulations, as discussed above and in **Appendix D**, these two tests are *structurally* in two separate paragraphs, one at 8 C.F.R. §204.6(j)(2) ("capital" test) and the other at 8 C.F.R. §204.6(j)(3) ("lawful means" test).

The obviousness of the meaning of "cash" can also be seen in the specific regulatory paragraph that sets forth the alternative types of evidence to show that a petitioner has invested "cash" in the NCE. Specifically, 8 C.F.R. §204.6(j)(2) states that petitioners may prove the contribution of cash by providing: "Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise."

B. "Indebtedness" as "Capital" Under 8 C.F.R. §204.6(e)

To laypersons, the meaning of "indebtedness" may seem nearly as obvious as the meaning of "cash": It means that someone owes someone something. Though that much is certainly true, it is only half of the story.

The other half—completely ignored or overlooked by the 2015 Policy-Change Announcement—is that at the *other* end of an "indebtedness" pipe, someone has a *right to receive* something from someone else.[9] The question, then, is: Which one of these *mutually exclusive* alternative meanings does "indebtedness" have *within the context of the definition of "capital" in 8 C.F.R. §204.6(e)*?

i. The Difference Between Assets and Liabilities Under GAAP

Based on the investment *context* in which it is used and the obvious difference between an "asset" and a "liability" under generally accepted accounting principles (GAAP), "indebtedness" in 8 C.F.R. §204.6(e) makes sense only if one limits its meaning to the NCE's *right to receive* funds in the future. The regulations do not define "indebtedness" (other than to place various restrictions on it), but GAAP define the two possible choices—*liabilities* and *assets*—this way:

- Liabilities are probable *future sacrifices* of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events.
- Assets are probable *future economic benefits* obtained or controlled by a particular entity as a result of past transactions or events.[10]

This liability-vs.-asset question is important to understanding the context of EB-5's *quid pro quo* exchange between the petitioner and the NCE, especially the precise—and limited—meaning of the term "indebtedness" in 8 C.F.R. §204.6(e).

ii. Checking the Asset-vs.-Liability Scoreboard of 8 C.F.R. §204.6(e)

With respect to the *context* of EB-5 regulations, one quick way to get an idea of whether "indebtedness" in 8 C.F.R. §204.6(e) is an asset or a liability is to look at the other terms listed before "indebtedness" appears in that section. All five of them are obviously assets: "cash," "equipment," "inventory," "other tangible property," and "cash equivalents." Therefore, by the time one arrives at the term "indebtedness," the score under GAAP is: Assets 5; Liabilities 0.

From this simple test alone, it is highly likely that the "indebtedness," as the sixth and final term in the definition of "capital," is *also* an asset.[11]

iii. "Indebtedness" Would Need To Be "Contribute[d]" Under 8 C.F.R §204.6(e)

As mentioned above, under 8 C.F.R. §204.6(e), to "[i]nvest means to *contribute* capital." In addition, within the overall *quid pro quo* exchange between the petitioner and the NCE, 8 C.F.R. §204.6(e) further requires that upon receiving the petitioner's *contribution*, the NCE issue the petitioner *ownership* interests in the NCE. Together, this makes sense only if the "indebtedness" that the petitioner "contribute[d]" to the NCE constitutes a valuable *asset* for which a company, such as the NCE, would reasonably be willing to issue ownership interests in return. That could make sense only if the "indebtedness" that the petitioner contributed to the NCE called for the NCE to be the one with the *right to receive* future payments.

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[9] For example, in standard accounting, accounts receivable, notes receivable, and so on all refer to the company's *right to receive* funds in the future (i.e., representing *assets* on the company's balance sheet), whereas accounts payable, notes payable, and so on all refer to the company's *obligation to pay* funds in the future (i.e., representing *liabilities* on the company's balance sheet).

[10] Financial Accounting Standards Board, Statement of Financial Accounting Concepts No. 6: Elements of Financial Statements [As Amended], ¶¶ 38 and 25, respectively (2008) (emphasis added). Although GAAP are set forth by a private, nonprofit entity called the Financial Accounting Standards Board (FASB), these standards are *officially* recognized as authoritative by the Securities and Exchange Commission (SEC) and the American Institute of Certified Public Accountants. See http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495 (accessed June 13, 2015).

[11] More formally, this meaning-by-association concept is called *noscitur a sociis*. *See, e.g.*, http://thelawdictionary.org/noscitur-a-sociis/ (stating that *noscitur a sociis* is a "Latin term for 'it is known by the company it keeps'" and that "it is a concept that the intended meaning of an ambiguous word depends on the context in which it is used"). With respect to "indebtedness" in the EB-5 regulations, the term is clearly ambiguous in that it potentially refers to either an asset or a liability, but in this case appears alongside five other terms that are all obviously assets.

The bottom line is that under the regulations themselves two thoughts are clear about the meaning of "cash" and "indebtedness" under 8 C.F.R. §204.6(e). Both thoughts stem from the overall conceptual *quid pro quo* exchange of value between the petitioner and the NCE, and from generally accepted accounting principles related to investment transactions. First, if a petitioner ultimately contributes *cash* to the NCE as the petitioner's investment in the NCE (irrespective of the *source* of the cash), the petitioner has met the requirement that the form of his or her investment be "capital" under 8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2) because "cash" is the most obvious form of "capital" and is listed *first* among all asset types in 8 C.F.R. §204.6(e). Second, the regulatory term "indebtedness" in 8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2) can logically refer only to loans, promissory notes, etc., in which the NCE itself is the *recipient* of the *right to receive* the related future payments.

VI. 2015 Policy-Change Announcement

After twenty-five years of USCIS and legacy INS having consistently interpreted these regulatory provisions the same way, the 2015 Policy-Change Announcement attempts to rewrite that interpretation and apply the new theory retroactively. Specifically, after explaining its preliminary reasoning based on a reading of 8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2), the announcement sets forth the new policy as follows:

> USCIS [now] classifies proceeds of a loan that are used for EB-5 investment as indebtedness governed by these regulatory requirements [8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2)]. When using loan proceeds as EB-5 capital, a petitioner must demonstrate first that they are personally and primarily liable for the indebtedness. That is, they must demonstrate that they bear primary responsibility under the loan documents for repaying the debt that is being used to satisfy the petitioner's minimum required investment amount.
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> In addition, the petitioner must demonstrate that the indebtedness is secured by assets the petitioner owns and that the value of such collateral is sufficient to secure the amount of indebtedness that is being used to satisfy the petitioner's minimum required investment amount. Put another way, indebtedness secured by assets owned by the petitioner qualifies as "capital" only up to the value of such collateralized assets.[12]

VII. S.1501 and the King's Rule Number 42

USCIS issued the 2015 Policy-Change Announcement on "indebtedness" on April 22, 2015, but on June 5, 2015, two U.S. senators introduced S.1501, a bill that proposes, among other things, to amend INA §203(b)(5) to add a new subparagraph (L) that would insert essentially the same rule that the 2015 Policy-Change Announcement implies is *existing* law under the existing regulations.[13] Moreover, S.1501 makes this rule *prospective* only, explicitly exempting cases that have been filed before enactment, which further implies that the rule the 2015 Policy-Change Announcement attempts to impose is *not currently* applicable law.[14]

Equally important, S.1501 *also* calls for adding to the statute a new definition of "capital" that completely eliminates "indebtedness" as a legitimate form of "capital."[15] Logically, the *combination* of *eliminating* "indebtedness" as an acceptable form of capital from the definition of "capital" while *adding* the 2015

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[12] Immigrant Investor Program Office (IPO): EB-5 Telephonic Stakeholder Engagement (April 22, 2015): IPO Deputy Chief's Remarks, *reprinted at* 20 Bender's Immigr. Bull. 548 (App. E) (May 15, 2015). The entirety can be found online at http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_IPO_Deputy_Chief_Julia_Harrisons_Remarks.pdf.

[13] *See* S.1501 (as introduced) at 43, lines 9-15: "(iv) LOAN RESTRICTIONS—Capital derived from indebtedness may be counted toward the minimum capital investment requirement under Subparagraph (C) only if such capital is—'(I) secured by assets owned by the alien entrepreneur'…." As with the 2015 Policy-Change Announcement, this proposed statutory provision of S.1501 focuses on capital *derived* from "indebtedness" to banks or other third parties. In direct contrast, 8 C.F.R. §204.6(e) focuses on "indebtedness" *contributed* to the NCE. These are completely opposite concepts.

[14] As with the rule created in the 2015 Policy-Change Announcement, the proposed rule in S.1501 is the exact *opposite* of what is already written in the existing regulations. This new rule in S.1501 applies to capital "derived" from indebtedness (i.e., a loan that the petitioner has obtained *from a bank or other third party* as a means of *acquiring* "capital" to invest in the NCE), but the term "indebtedness" in the existing 8 C.F.R. §204.6(e) refers instead to loans that the petitioner makes *to the NCE itself* and is *what constitutes* the petitioner's "capital." In other words, the rule in S.1501 (and in the 2015 Policy-Change Announcement) applies to *how* the petitioner "derived" ("obtained") funds to invest, but the current rule in §204.6(e) applies to *what* the petitioner actually "contribute[d]" (i.e., "invested").

[15] See S.1501 (as introduced) at 60, lines 15-22.

Policy-Change Announcement's newly crafted rule about "loan proceeds" as a "*source* of capital" means that the 2015 Policy-Change Announcement's newly crafted rule about classifying loan proceeds as "indebtedness" was never supported in the existing regulatory definition of "capital" in the first place.

The senators' *subsequent* introduction of a bill to make into law the rule that USCIS is *currently* attempting to apply—and to apply retroactively—parallels the logical conundrum that Lewis Carroll created for Alice in *Alice's Adventures in Wonderland*. Specifically, with respect to a "rule number 42" that the King had just announced, Alice replies:

> "[T]hat's not a regular rule: you invented it just now."
>
> "It's the oldest rule in the book," said the King.
>
> "Then it ought to be Number One," said Alice.[16]

VIII. The Normal and Lawful Loan Structures Now at Issue

Before looking at its other underlying technicalities and legal shortcomings, it is important to see what exactly the 2015 Policy-Change Announcement seeks to impact with its new policy. In other words, it is helpful to see what such loans are used for and how they are used in the first place.

The starting point is real property. In addition to having earned substantial funds in their businesses or professional careers, many EB-5 investors, their family members, and other relatives have previously earned substantial amounts of wealth through the rapid growth in real estate values in their home countries. Therefore, many owners desire to retain such property for potential future economic appreciation—just as do many U.S. owners of apartment buildings, office buildings, homes, etc. To acquire EB-5 investment funds for themselves or others in the meantime, many EB-5 petitioners, their family members, or other relatives therefore prefer to take out loans against such properties instead of selling the properties outright.

This process of borrowing against such properties is completely legal and is akin to what in the United States is referred to as a "home equity loan" if the property is residential or simply a "commercial loan" if the underlying property is an office building, warehouse, hotel, or other commercial property. Whereas Americans take out such loans to remodel houses, to buy cars or boats, or to pay for their children's education, EB-5 petitioners take out such loans to obtain funds to invest in the EB-5 program and create a future for themselves and their families in the United States.

Also, a large percentage of EB-5 investors come from Asian countries, and for cultural or business reasons, many wealthy business people and professionals hold at least some of their real-property assets in the names of their children, parents, siblings, or other relatives. In the United States, wealthy business people and professionals do the same thing, except that they tend to hold properties in separate legal entities, such as limited liability companies (LLCs), family limited partnerships, and so on instead of simply holding titles to property in the individual names of other family members. Petitioners from Asian countries commonly borrow the required $1,000,000 or $500,000 from a bank or other third party and then use as loan-supporting collateral an asset the petitioner actually owns but had previously chosen to acquire and hold in a parent's, child's, or other relative's name.

In somewhat related contexts, the EB-5 petitioner's parent, child, or other relative actually *does* own the property, yet for love and affection agrees to allow that asset to serve as the collateral for the EB-5 petitioner's loan from a bank or other third party. Essentially, such transactions amount to a *gift* of the right to *use* the property as loan collateral.

Finally, to a lesser extent, some petitioners, particularly those from Western countries with high estate-and-gift-tax burdens, receive their investment funds from a wealthy parent, child, or other relative through an *unsecured* loan instead of through a gift transfer, because doing so as a loan is a completely lawful and appropriate way to reduce or postpone estate-and-gift tax burdens related to the transfer. As with the other issues above, American families also use these legitimate tax-saving strategies when transferring assets to other family members.[17]

Because all of these loan-based transactions are themselves legal and otherwise comply with USCIS regulations—and because whichever loan-based transaction was used, the petitioner had ultimately

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[16] Lewis Carroll, Alice's Adventures in Wonderland 105 (1865).

[17] *See, e.g.,* EisnerAmper 2012 Personal Tax Guide 76:

> **Use loans rather than gifts.** Lending money to your beneficiaries is a viable option to avoid current gift taxes or the use of your lifetime gift exemption. You can then use your annual gift tax exemptions to enable your beneficiary to pay the interest due and/or part of the debt principal each year.

Available at: http://www.eisneramper.com/uploadedFiles/Resource_Center/Articles/Articles/Chapter_14__Estate_and_Gift_Tax_ Planning.pdf.

contributed *cash* to the NCE in the United States—both USCIS and legacy INS had, over the last twenty-five years, approved literally thousands of I-526 petitions in which the petitioner had obtained his or her EB-5 investment funds through such loans.

IX Decoding the Arbitrariness of the 2015 Policy-Change Announcement

For those not directly affected by the 2015 Policy-Change Announcement, it may seem rather dry and uninteresting, merely another ho-hum policy change of the agency. Also, if one fails to look closely enough, one might feel USCIS might actually be on the right path here, because loans do seem like they might appropriately be classified as "indebtedness," as the Announcement proposes.

The reality, however, is that the 2015 Policy-Change Announcement is as arbitrary as any retroactive policy change could be.[18] Certainly, the agency has done a decent job of trying to hide behind a vault door the inherent arbitrariness and devastating impact of this major change.

Fortunately, though, the combination is at hand. It looks like this:

- The Announcement clears the tumblers of the lock by turning several times past "cash." It hopes to avoid stopping on "cash," because "cash" is the very *first and most obvious* form of "capital" under the definition of that term in 8 C.F.R. §204.6(e). Also, in the scenario the Announcement describes, "cash" is obviously what the petitioner has *actually* "contribute[d]" to the NCE.

- The Announcement then reverses the knob past "cash" a few more times and stops at "indebtedness." It does so because "loans" seem, generically speaking, to be a good fit with the term "indebtedness." The Announcement hopes to avoid anyone noticing that the transaction scenario it describes between the petitioner and an unrelated third party has nothing whatsoever to do with the NCE and therefore nothing to do contextually with what the petitioner actually contributed to the NCE.

- The Announcement then rolls the knob forward past "cash" again and past "indebtedness" and stops at "proceeds." It does so because, as noted above, "indebtedness" was obviously *not* what the petitioner actually "contribute[d]" to the NCE, but the petitioner *did* at least "contribute" to the NCE the "*proceeds* of the loan."

- At this point, the Announcement hopes its combination to be safe from cracking, but it turns out that "proceeds"—whether from a loan, a sale, a gift, or whatever—are merely "cash," which is what the petitioner actually "contribute[d]" to the NCE in the first place.

Thus, the entire obfuscation of the 2015 Policy-Change Announcement is an implicit hope that nobody notices the seemingly smooth, but logically flawed, transitions between "proceeds" (which are obviously "cash" under the definition of "capital" in 8 C.F.R. §204.6(e)) and "indebtedness" (which is merely a *means* through which the petitioner *obtained* that "cash" for investing in the NCE).

The remainder of this article examines in more detail each step in the 2015 Policy-Change Announcement's overall combination of flaws, some overlapping each other and some standing alone.

A. Cannot Ignore That Petitioner Invested "Cash"

As alluded to above, the key logical failure of the analysis set forth in the 2015 Policy-Change Announcement is its attempt to shift seamlessly between "indebtedness," which is obviously *not* what the petitioner actually "contribute[d]" to the NCE under the definition of "invest" in 8 C.F.R. §204.6(e), and "*proceeds* of a loan," which are obviously just "cash" under the definition of "capital" in 8 C.F.R. §204.6(e).

The Announcement tries to smooth over its unwarranted switch between "indebtedness" and "proceeds" by referring to the "debt" or "indebtedness" as what the investor *used* to meet his or her investment requirement, when in fact it was merely a step through which the petitioner *obtained* those investment funds. These two sentences from the Announcement in particular show this attempt (emphasis added):

> That is, they [the petitioners] must demonstrate that they bear primary responsibility under the loan documents for repaying the *debt* that is

[18] The 2015 Policy-Change Announcement provided no reason for USCIS making this abrupt, retroactive change of policy. Also, USCIS personnel argued in public EB-5 stakeholder teleconferences that the announcement does *not* constitute a policy change, but rather is a mere reminder to its staff to harmonize adjudications. For experienced EB-5 practitioners, USCIS's approach is reminiscent of *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), in which the Ninth Circuit admonished legacy INS for applying a substantial new policy change retroactively to pending cases, an approach the court found to violate the Administrative Procedure Act (APA).

> being used to satisfy the petitioner's minimum required investment amount.
>
> In addition, the petitioner must demonstrate that the indebtedness is secured by assets the petitioner owns and that the value of such collateral is sufficient to secure the amount of *indebtedness* that is being used to satisfy the petitioner's minimum required investment amount.

As noted, however, the indebtedness is *not* what the petitioner "invested." This can be confirmed by the fact that *irrespective* of whether the investor actually repays the loan, there is no impact whatsoever on the NCE, which is not even a party to the petitioner's loan between the petitioner and a bank or other third-party lender.

B. "Proceeds of a Loan" are Simply "Cash" Under 8 C.F.R. §204.6(e).

To see more clearly the 2015 Policy-Change Announcement's failed attempt to seamlessly slide between the *divergent* concepts of cash "proceeds of a loan" on the one hand and the underlying loan that gave rise to those cash proceeds on the other, one need only look at GAAP. (GAAP are officially established and published by the Financial Accounting Standards Board (FASB), and the FASB statements of GAAP are by far the most authoritative explanation of financial accounting concepts in the United States.[19]) Specifically, paragraph 198 of the most recent *Statement of Financial Accounting Concepts No. 6*, which addresses very clearly the difference between *liabilities* and *proceeds*, states:

> ***Liabilities and Proceeds***
>
> 198. An entity commonly receives cash, goods, or services by incurring liabilities (paragraph 38), and *that which is received is often called proceeds, especially if cash is received*. Receipt of proceeds may be evidence that an entity has incurred one or more liabilities, but it is not conclusive evidence. Proceeds may be received from cash sales of goods or services or other sales of assets, from cash contributions by donors, or from cash investments by owners, and entities may incur liabilities without receiving proceeds, for example, by imposition of taxes. The essence of a liability is a legal, equitable, or constructive obligation to sacrifice economic benefits in the future rather than whether proceeds were received by incurring it. *Although proceeds received may be a useful attribute in measuring a liability incurred, proceeds themselves are* not *liabilities*.[20]

From this passage, one can clearly see that "proceeds" and underlying loans are *not* the same thing. "Proceeds" are not the liability itself, but merely "that which is *received* … especially if *cash* is received." In the scenario the 2015 Policy-Change Announcement describes, cash is exactly what the petitioner has received from having incurred the underlying liability. Thus, irrespective of the underlying source, the "proceeds" that the Announcement mentions are merely "cash" under the definition of "capital" at 8 C.F.R. §204.6(e).

C. Not Even the "Loan" Itself is "Indebtedness" Under 8 C.F.R. §204.6(e).

Beyond the fact that "*proceeds* of a loan" are merely "cash" under the definition of "capital" at 8 C.F.R. §204.6(e) is the question of whether the *loan itself* constitutes "indebtedness" under that "capital" provision. Certainly, a loan—as an obligation to pay and as a *corresponding* right to receive—constitutes indebtedness in a *generic* sense. The question, however, is whether the "loan" described in the 2015 Policy-Change Announcement is merely *generic*

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[19] Policy Statement, SEC, Rel. Nos. 33-8221, 34-47743, IC-26028, FR-70, Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter (Apr. 25, 2003), *available at* https://www.sec.gov/rules/policy/33-8221.htm:

> The Securities and Exchange Commission has determined that the Financial Accounting Standards Board (FASB or Board) and its parent organization, the Financial Accounting Foundation (FAF), satisfy the criteria in section 108 of the Sarbanes-Oxley Act of 2002 and, accordingly, FASB's financial accounting and reporting standards are recognized as "generally accepted" for purposes of the federal securities laws. As a result, registrants are required to continue to comply with those standards in preparing financial statements filed with the Commission, unless the Commission directs otherwise. Our determination is premised on an expectation that the FASB, and any organization affiliated with it, will address the issues set forth in this statement and any future amendments to this statement, and will continue to serve investors and protect the public interest. This policy statement updates Accounting Series Release No. 150, issued on December 20, 1973, which expressed the Commission's intent to continue to look to the private sector for leadership in establishing and improving accounting principles and standards through the FASB with the expectation that the body's conclusions will promote the interests of investors.

[20] FASB, Statement of Financial Accounting Concepts No. 6: Elements of Financial Statements ¶ 198 (2008) (emphasis added).

indebtedness or is also the *specific* "indebtedness" contemplated in the definition of "capital" in 8 C.F.R. §204.6(e).

To answer this question requires a look at the underlying *contexts* in which the specialized meaning of "indebtedness" arises within the EB-5 context generally and within the definition of "capital" itself at 8 C.F.R. §204.6(e). The underlying context of EB-5 is that the statute establishes a *quid pro quo* exchange between the petitioner and the NCE. The regulations, through the definition of "capital" in 8 C.F.R. §204.6(e), require the petitioner to contribute to the NCE something of value from the list of assets in the definition of "capital" at 8 C.F.R. §204.6(e) (i.e., cash, equipment, inventory, etc.). The sixth and final asset on the list is "indebtedness." In addition, the definition of "capital" at 8 C.F.R. §204.6(e) also requires the petitioner to become an *owner of*, not a lender to, the NCE.[21] In that context, when the petitioner provides assets to the NCE, the NCE must issue the petitioner ownership equity, not a promise to repay the petitioner. Within the overall context of EB-5, there is nothing odd at all about the regulations in this respect.

Also, the regulations very closely parallel GAAP in this regard, as can be seen from this passage, which explains the characteristics of owners making investments in companies:

> ***Characteristics of Investments by and Distributions to Owners***
>
> 68. Investments by owners and distributions to owners are transactions between an enterprise and its owners *as owners*. Through investments by owners, an enterprise obtains resources it needs to begin or expand operations, to retire debt securities or other liabilities, or for other business purposes; as a result of investing resources in the enterprise, other entities obtain ownership interests in the enterprise or increase ownership interests they already have. Not all investments in the equity securities of an enterprise by other entities are investments by owners as that concept is defined in this Statement. *In an investment by owners, the enterprise that issues the securities acquired by an owner* always *receives the proceeds or their benefits; its net assets increase*.[22]

As noted in the final line of this discussion of GAAP, the enterprise issuing the securities (i.e., the NCE in the EB-5 context) "always receives the proceeds or their benefits; its net assets increase." This statement that the enterprise "always receives" the *proceeds or benefits* of the petitioner's investment dovetails with the EB-5 regulations' definition of "invest," which states that the petitioner must "contribute" that benefit. In this context, "indebtedness" in 8 C.F.R. §204.6(e) can logically refer *only* to "indebtedness": a) that the petitioner "contributes" to the NCE (per the definition of "invest" in 8 C.F.R. §204.6(e)); and b) for which the NCE "always receives the proceeds or their benefits" of that contribution (per GAAP). For the NCE to receive the "proceeds or their benefits" of a petitioner's "contribut[ion]" of "indebtedness," the petitioner must be promising to pay future funds *to the NCE*.

Also, this fundamental concept of the petitioner "contribut[ing]" and the NCE "receiv[ing]" the investment capital fits well into the overall *context* of the EB-5 statute and regulations related to the requirement that the petitioner "has already invested *or is actively in the process* of investing"[23] the required amount of capital. Specifically, because of the time value of money, opportunity costs, and other related business reasons, most investors in *any* early-stage company, which is the most common scenario in the EB-5 context, desire to split their investment contribution between a *cash* contribution to cover the initial period of operating expenses and a *promissory note* to demonstrate the investor's commitment to provide additional cash as the company needs it in the future.

In that regard, "indebtedness" (as an asset to the NCE) fits directly into the overall EB-5 context. For example, if an NCE wanted confirmation that the petitioner could actually "make good" on the promissory note in the future, the NCE would want the petitioner's promissory note (i.e., the "indebtedness") to be secured by sufficient assets.[24] In addition, the NCE would want to ensure that the petitioner did not use the NCE's own assets to secure the petitioner's promissory note (or anyone else's promissory note), because those assets are already in the ownership of the NCE and it would do the NCE no good to pursue legal action against its own assets if the petitioner (or other note maker) were to default on the promissory note to the NCE.

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[21] The ownership requirement is achieved by 8 C.F.R. §204.6(e) prohibiting the petitioner from receiving investment-related credit for any contribution that the NCE promises to repay.

[22] FASB, Statement of Financial Accounting Concepts No. 6: Elements of Financial Statements ¶ 68 (2008) (emphasis added).

[23] *See* INA § 203(b)(5)(A)(i), 8 U.S.C. §1153(b)(5)(A)(i); 8 C.F.R. §204.6(j)(2).

[24] Theoretically, the NCE would not care whose assets secured the loan.

In direct contrast, the 2015 Policy-Change Announcement's attempt to conceptually cram loans between the petitioner and unrelated third parties into the term "indebtedness" within the definition of "capital" in 8 C.F.R. §204.6(e) simply does not fit the fundamental context of the petitioner having "invested" or being in the process of investing in the NCE. The Announcement takes "indebtedness" completely out of its obvious context as an *asset* within the EB-5 program's fundamental *quid pro quo* exchange between the petitioner and the NCE.

D. 8 C.F.R. §204.6(e) Contemplates Cash "or" Indebtedness

The reality underlying the loan scenario described in the 2015 Policy-Change Announcement is that in such cases in which the petitioner obtained "proceeds of a loan" from a bank or other unrelated third party and then invested those proceeds in the NCE, the petitioner virtually always proves the contribution of that "capital" by providing the documents expressly mentioned as suitable under the regulations for proving contributions of "capital" in the form of "cash," namely copies of "[b]ank statement(s) showing *amount(s) deposited* in United States business account(s) for the enterprise [i.e., the NCE]."[25] Nothing more is required.

Specifically, both 8 C.F.R. §204.6(e) and 8 C.F.R. §204.6(j)(2) set forth *alternative* asset types and corresponding evidence types that constitute "capital" under the statute and regulations. The fact that the evidentiary paragraph related to "capital"—i.e., 8 C.F.R. §204.6(j)(2)—contains an "or" in it means that proving contribution of "capital" in the form of "cash" (the *first* asset class on the list) is sufficient. There is no logical requirement that the *cash* proceeds of the loan *also* somehow constitute "indebtedness" (the *last* asset class on the list in 8 C.F.R. §204.6(j)(2)), as proposed by the 2015 Policy-Change Announcement. In this regard, the Announcement violates the simple logic of USCIS's own regulations.

E. 8 C.F.R. §204.6(j)(3) "Lawful Means" Test Is What Applies to Source of Capital

In addition to applying a legally indefensible *mechanism* for assessing whether cash "proceeds of a loan" are "capital," the 2015 Policy-Change Announcement attempts to impose that test in the *wrong location* along the petitioner's overall from-acquisition-to-contribution investment path. Specifically, as mentioned above, the EB-5 regulations impose two tests—the "capital" test set forth in 8 C.F.R. §204.6(j)(2) and the "lawful means" test set forth separately in 8 C.F.R. §204.6(j)(3). The "capital" test focuses on what was "invested" (i.e., what the petitioner "contributed"), but the 2015 Policy-Change Announcement attempts to apply the "capital" test to the *means through which* the investor obtained the funds. Structurally and logically, however, the test that the regulations place on the *means* of acquisition is the "lawful *means*" test, not the "capital" test.

Also, there is no legal or policy reason that the *source* of the "capital" must *also* be "capital." All that matters is whether the source was lawful, which is exactly what the "lawful means" test examines.

For example, as mentioned, *intangible* property is *not* "capital" under 8 C.F.R. §204.6(e), but that would not preclude the famous author J.K. Rowling from selling or borrowing against the enormous amount of wealth she holds in the *intangible* property related to her authorship of the *Harry Potter* books. The 2015 Policy-Change Announcement's implication that the *source* of the "capital" must also be "capital" would be logically equivalent to saying that an investment of *cash* by J.K. Rowling in the EB-5 program would not be "capital" because the *source* of that capital was not "capital." In other words, because the *source* of Ms. Rowling's investment was *intangible* property, the Announcement would call for USCIS to adjudicate Ms. Rowling's "proceeds of property" under the "other tangible property" category in 8 C.F.R. §204.6(e). Of course, such a re-classification would cause Ms. Rowling's investment of the "proceeds of property" to be *excluded* from being "capital" under 8 C.F.R. §204.6(e), because that section explicitly states that it must be "other *tangible* property." Unfortunately, the *logic* for doing so would be *identical* to the logic the Announcement uses to attempt to re-classify "proceeds of a loan" as "indebtedness" under 8 C.F.R. §204.6(e).

Moreover, the Announcement does *not* apply USCIS's newfound desire to re-classify cash "proceeds" of any of the *other* five asset classes listed as "capital" under 8 C.F.R. §204.6(e). For example, the Announcement does not attempt to re-classify cash "proceeds" of property sales as "other tangible property" under 8 C.F.R. §204.6(e). Instead, it attempts to re-classify cash "proceeds" *only if* USCIS feels that those proceeds relate to the "indebtedness" asset class. Logically, this means that under 8 C.F.R. §204.6(e), the Announcement and its choice to *selectively* re-classify "proceeds" *only* with respect to "indebtedness" means that it is not about the proceeds themselves, but about the "means" through which the petitioner "obtained" those proceeds. That is, the *location* of the Announcement's test for "capital" is on the petitioner's "*means" of "obtain[ing]*" the capital, but as noted previously, the only regulatory test available to evaluate the "*means" of "obtain[ing]*" the capital is the

[25] 8 C.F.R. §204.6(j)(2) (emphasis added).

"lawful *means*" test set forth separately in 8 C.F.R. §204.6(j)(3).[26]

X. APA and Policy Considerations: *Déjà Vu* 1998

Beyond its many legal defects, the 2015 Policy-Change Announcement presents serious administrative and policy problems. Those in the EB-5 field for many years will recognize USCIS's efforts as both exactly the same as and also completely different from what legacy INS did with a different issue related to "indebtedness" in 1998.[27]

A. Similar to 1998: Attempt to Create and Apply New Policy Retroactively

In the mid-1990s, in response to legacy INS issuing informal correspondence and agency notices implying that it would be acceptable for investors to use a particular investment approach that would be completely normal and reasonable in non-EB-5 cases, petitioners started structuring their EB-5 investments in accordance with those instructions. Then legacy INS changed its mind—and tried to apply the new policy retroactively.

It all started when legacy INS correspondence opined (correctly) that the regulations allow the petitioner to qualify for approval of an I-526 petition by meeting, for example, the TEA-based minimum investment of $500,000 by contributing $125,000 in cash, plus a promissory note for the remaining $375,000. Of course, the petitioner's promissory note still needed to have met all of the requirements for the "indebtedness" class of assets under 8 C.F.R. §204.6(e) (i.e., petitioner personally and primarily liable for the loan, petitioner owning the collateral, NCE not providing any collateral, etc.).

As with the type of transactions the 2015 Policy-Change Announcement now seeks to prohibit, the loan structures legacy INS initially found to be acceptable were completely normal and legal ways of financially structuring investments in new companies. Unfortunately, legacy INS nonetheless became worried that some investors might be able to create all required ten jobs without ever needing the remaining $375,000 of capital represented by the promissory note. The Administrative Appeals Office ultimately issued precedent decisions that these investment structures that legacy INS had previously opined were acceptable under the regulations actually were not acceptable after all (even though no regulation changed).

When legacy INS tried to impose this major policy change retroactively on pending cases, EB-5 petitioners who received I-526 denials sued the government over violations of the APA), and the court of appeals ultimately decided in favor of the plaintiffs. In *Chang v. United States*,[28] the Ninth Circuit held that legacy INS's attempt to abruptly change major adjudication rules and then apply them *retroactively* violated the APA.

Because the 2015 Policy-Change Announcement is attempting to make a drastic change in policy after twenty-five years of a completely different direction without complying with applicable notice and rulemaking procedures of the APA (despite USCIS's position that the Announcement is essentially a public reminder of existing policy), the Announcement is very similar procedurally to the tactics the Ninth Circuit found to have violated the APA in *Chang*.

B. Dissimilar to 1998: No Rational Legal or Policy Basis

Despite similarities with legacy INS's retroactivity-based APA violations expressed in *Chang v. United States*, the 2015 Policy-Change Announcement also *differs* from those prior violations in a couple of fundamental ways. In the prior case, legacy INS was actually interpreting the law correctly — it was just changing *how* it would adjudicate cases despite the otherwise correct reading of the law. In the 2015 Policy-Change Announcement, USCIS is also changing the way it adjudicates cases, but it is doing so on a legal basis that cannot be squared with the regulations. For example, the novel interpretation of the term "indebtedness," which serves as the cornerstone of the Announcement's new policy, cannot rationally stem from the regulations as written. It is merely an *outcome-driven* interpretation that has no legal basis in the regulations, GAAP, or the general context of the overall *quid pro quo* exchange between the petitioner and the NCE.

More important, in 1998, legacy INS's new position at least arguably could prevent at least theoretically plausible violations of the law. For example, one might argue that if someone invested

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[26] Also, as mentioned above, S. 1501 proposes to *add* to the EB-5 statute the new theory created in the 2015 Policy-Change Announcement and simultaneously *remove* "indebtedness" from the list of acceptable assets within the definition of "capital," which means the Announcement's new theory was never justified in the definition of "capital" in the first place.

[27] For an excellent and more detailed analysis of the retroactive defect underlying the 2015 Policy-Change Announcement, see Lincoln Stone & Susan Pilcher, *Investing Cash from Loan Proceeds: A New Interpretation of "Indebtedness,"* blog post for Invest in the USA (IIUSA), available at https://iiusa.org/blog/uncategorized/investing-cash-loan-proceeds-interpretation-indebtedness-lincoln-stone-susan-pilcher/.

[28] 327 F.3d 911 (9th Cir. 2003).

$125,000 in cash and $375,000 in a promissory note, but never ended up needing to cash out the $375,000 note, then perhaps he or she actually obtained a green card without ever having contributed the entire $500,000 of capital required. The flip side, of course, is that the government would merely be punishing those with a sufficiently higher level of business acumen (or luck) needed to create the required ten jobs economically more efficiently, using only $125,000 of the cash instead of the entire $500,000.

No such similarly plausible policy argument exists that the 2015 Policy-Change Announcement is needed to prevent some sort of violation of the underlying requirement that the petitioner invest the minimum of $500,000 in capital. Most obvious is that the Announcement itself makes clear that there is nothing unlawful or otherwise fundamentally wrong with these loan arrangements, because the Announcement is not claiming that these transactions are somehow inherently "unlawful" as a "means" of "obtain[ing]" investment funds under the "lawful means" test of 8 C.F.R. §204.6(j)(3). Instead, the Announcement is asserting that the loans will no longer comply with the requirement that the investment funds be "capital" under 8 C.F.R. §204.6(j)(2), a completely different provision.

Also important is the long-term policy *effect*—i.e., the effect *after* the retroactive-application problem is resolved. Since the 1990s retroactive upheaval, legacy INS and USCIS essentially have been requiring all petitioners to invest the entire $500,000 of capital in an asset form *other than* promissory notes. The long-term effect of the 2015 Policy-Change Announcement is also relatively easy to comply with—once the rule is known—but even setting aside the retroactive-application problem, it seems that virtually nothing is accomplished by the Announcement as a policy matter.

Specifically, before this major policy change, EB-5 petitioners and their close family members have used loans because they desired to retain the underlying property for potential further growth. The most the 2015 Policy-Change Announcement could do is cause these property owners to *sell* their property instead of just *leveraging* it (i.e., borrowing against it). The U.S. policy benefit of the petitioner and family members selling their property instead of leveraging or collateralizing it seems merely theoretical at best.

Another side effect of this policy change is simply to encourage a petitioner's family members to *give* the petitioner investment funds instead of having the petitioner use his or her own funds, because the Announcement applies only to "proceeds *of a loan*," not to "proceeds of a *gift*." This also seems to be of little or no benefit to the United States.

Unfortunately, the 2015 Policy-Change Announcement itself provides no rationale for the change, instead presenting the Announcement as though it were merely a reminder of a policy already known. The lack of a policy rationale is particularly unfortunate because preferring selling property instead of borrowing against it seems to be a pretty weak reason for announcing such a major policy change. Also, the agency's attempt to impose it retroactively seems to be an incredibly harsh imposition on petitioners in the EB-5 program when so little, if any, benefit flows to the United States as a policy matter.

XI. Conclusion

The EB-5 program is typically a win-win for the petitioner investing in the United States and for the United States itself, but the program's long-term success requires the federal government to adjudicate petitions and applications fairly and reasonably consistently with the rules in place at the time the petitioner makes his or her investment and files the I-526 petition. In addition to attempting to be harshly and unfairly retroactive, the 2015 Policy-Change Announcement is fundamentally inconsistent with USCIS's own regulations. It is also at odds with the EB-5 program's fundamental *quid pro quo* exchange between the petitioner and the NCE, and with authoritative, long-standing, and noncontroversial generally accepted accounting principles. S. 1501's simultaneous inclusion of this new rule and elimination of "indebtedness" from the list of acceptable assets in the definition of "capital" shows that this new rule was never in the definition of "capital" to begin with. On top of this, the Announcement sets forth no policy explanation for completely reversing twenty-five years of previously consistent adjudications on this issue.

Ultimately, the 2015 Policy-Change Announcement amounts to little more than administrative activism at great cost to U.S. businesses and thousands of investors who have collectively contributed hundreds of millions of dollars to the U.S. economy to create tens of thousands of new jobs for U.S. workers, only to be told in the Announcement that their families' American dreams are to be smashed for an unforeseeable, legally unsupportable bureaucratic change of mind. For these reasons, USCIS should withdraw this ill-advised policy—or at the very least apply it proactively instead of wasting taxpayer dollars defending a new policy of no stated benefit to the United States.

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Editor's Note: On June 23, 2015, a lawsuit was filed challenging the new USCIS EB-5 cash/indebtedness policy discussed in this article: Zhang v. USCIS, No. 1:15-cv-00995, D.D.C. See: http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2015/06/24/eb-5-class-action-lawsuit-filed-zhang-v-uscis-cash-is-cash.aspx.