Analysis of USCIS Draft Policy Memo Regarding Adjudication of EB-5 Petitions Affected by Visa Cutoff Date

On August 10, 2015, USCIS released a draft of a long-awaited policy memorandum prompted by the China EB-5 visa backlog. Titled "Guidance on the Job Creation Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829" (Draft PM-602-0121), the draft policy memorandum "draft memo") clarifies how USCIS will take into account delays caused by China visa retrogression when adjudicating I-526 and I-829 petitions. USCIS has posted the draft memo on its website for public comment through September 8, 2015. (See http://www.uscis.gov/outreach/feedback-opportunities/draft-memoranda-comment/draft-memorandum-comment.)

The draft memo attempts to answer two major concerns raised by the China EB-5 visa cutoff date and anticipated retrogression.

First, delayed visa availability for Chinese EB-5 investors means that they will be admitted as conditional permanent residents and file I-829 petitions long after they invest. This means that by the time those investors file I-829 petitions, the job creation window (which tracks an investor's 2-year conditional permanent residence period) will not match the 2.5-year timeframe that was set forth in the I-526 business plan, and jobs created by their investment may no longer exist.

Second, given that an investor must sustain his or her investment in the EB-5 new commercial enterprise (NCE) throughout his or her 2-year conditional permanent residence period in order to obtain I-829 approval, the delayed start of conditional permanent residence means the investor must keep his or her capital at risk for longer than is needed by the NCE-funded project. In other words, the project may be completed before the investor's conditional residence period ends. At that point, the question becomes whether the investor's capital must remain tied up in the completed project, or whether the NCE may liquidate the project and either keep what remains of the investor's capital in its bank account or redeploy it for other business purposes.

Below is a summary of the clarifications the draft memo provides on both the job creation and sustainment of investment requirements.

1. **<u>On job creation</u>:**

- **USCIS will continue to apply the 2.5 year job creation rule at the I-526 stage.** This means that Chinese EB-5 investors, like all other EB-5 investors, must still submit I-526 business plans showing that the requisite job creation is expected to occur within 2.5 years of I-526 approval—even if those investors likely will not obtain conditional resident status within that 2.5-year period due to visa backlogs.
- **USCIS will *not* require that jobs actually created by the NCE in which the I-829 petitioner invested still be in existence at the time of I-829 adjudication in order to be credited to the petitioner.** Instead, an I-829 petitioner can satisfy the job creation

requirement by showing that (1) the NCE created at least 10 full-time jobs for U.S. workers as a result of the petitioner's investment, and (2) those jobs "were considered to be permanent jobs when created." The draft memo declines to provide a bright-line test for what jobs may be "considered permanent when created" but provides two guideposts. First (in keeping with USCIS's existing policy), an employment position generally should be expected to last for at least two years in order to be characterized as permanent as opposed to intermittent, temporary, seasonal or transient in nature. Second, the position must have been described as continuous full-time employment in the underlying I-526 petition.

- **If the requisite job creation has not yet occurred within an investor's conditional residence period and the investor's I-829 petition therefore seeks to show that the requisite jobs will be created "within a reasonable time" (as allowed by the regulations), USCIS will only consider jobs that will be created within three years from the start of the investor's conditional residence period as created within a reasonable time.** Jobs projected to be created beyond this 3-year time horizon usually will not be considered to be created within a reasonable time absent extreme circumstances, such as *force majeure*. On this point, the draft memo simply reiterates existing policy as set forth in the May 30, 2015, "EB-5 Adjudications Policy" memorandum (p. 22), without making a special exception for Chinese EB-5 investors impacted by visa backlogs.

2. **<u>On sustainment of the EB-5 investment during the conditional permanent residence period</u>:**

- **An EB-5 investor's investment will not be considered "at risk" if it is merely held in the NCE's bank account or an escrow account during the conditional permanent residence period.** If the NCE uses capital from EB-5 investors to make a loan to a job creating entity (JCE) and the JCE later repays the NCE, the NCE must continue to deploy the repaid capital in an "at risk" activity for the remainder of the investor's conditional residence period. The draft memo does not define "at risk" activity, but the examples it provides indicate that USCIS will require deployment of capital into business activity as opposed to passive investment such as a investment in a stock portfolio.
- **Following I-526 approval and before I-829 adjudication, if an investor's investment is used to fulfill the I-526 business plan and is then redeployed into another "at-risk" activity, USCIS will not consider the redeployment a material change that would cause revocation of the investor's approved I-526 petition or denial of the investor's I-829.** Since an investor's EB-5 eligibility at the I-526 stage would have been based on the commercial activity and job creation described in the I-526 business plan, the investor's EB-5 eligibility would be confirmed once the I-526 business plan is fulfilled even if the NCE subsequently undertakes different/additional activities.
- **If an investor's I-526 petition was submitted with NCE documents stating the NCE would loan EB-5 capital to a JCE and then liquidate after receiving repayment from the JCE, the NCE may subsequently amend its organizational documents to remove the liquidation provision in order to allow it to continue operating after being repaid**

by the JCE (through the investor's conditional permanent residence period). USCIS would not consider such amendment a material change triggering petition denial or revocation because it would not change the investor's EB-5 eligibility under the I-526 petition.

The draft memo will not constitute final USCIS policy until it is issued in final form, after USCIS has received and considered public feedback.