LITIGATION EXPOSES ILLEGAL USCIS POLICY MAKING GOOD FAITH INVESTORS "GUARANTORS" OF BUSINESS SUCCESS

by Lincoln Stone[*]

About Broken Promises

Congress did not merely create the EB-5 category as an immigration pathway for investors, it designed the EB-5 category to attract and reward good faith investment. The immigrant investor regional center program, for instance, is intended to promote further interest in US investment and to attract job-creating capital. It therefore is not unreasonable for immigrants investing in good faith in reliance on the promise of the EB-5 investor visa program to expect that US immigration law, adjudication standards, and processes will be transparent, fair, and reasonable.

If successful with the first round of applications, investors are admitted to the United States in the status of conditional lawful permanent residence (CLPR) for a period of two years. The sole legislative purpose of making the investor's initial two years of residence conditional is to establish a second-stage agency review process that should deter investor fraud. Congress sought to eliminate sham applications by investors who only *committed* to make an investment in the new commercial enterprise (NCE) but do not actually part with the investment capital, or who did invest but only for as long as it takes to get the immigration benefit. Considering the limited purpose of CLPR, it is fitting that Congress designed a review process that requires at the end of the two-year CLPR period the filing of a petition to remove conditions on the strength of evidence showing only that the required investment was made and sustained. The implementing regulations governing the review process provide that the investor is deemed to have "sustained" the investment if the investor "in **good faith**, substantially met the capital investment requirement and continuously maintained the investment"[1] over the two-year period of CLPR.

Stunningly, as exposed so poignantly in recent litigation and cases adjudicated by USCIS, the fundamentals of good faith and reason that should determine the fates of immigrant investors and their family members are missing entirely from USCIS adjudications of investor petitions filed by CLPRs. USCIS examiners are denying at least dozens if not hundreds of these I-829 petitions to remove conditions with the consequence that entire families of the investors who have invested in good faith are in peril of forced deportation. It would seem good faith investors have kept their side of the bargain but USCIS has not.

Bad Actors and Business Distress

The Securities and Exchange Commission (SEC) declared in a joint SEC-USCIS announcement in October 2013 that EB-5 program enforcement actions against "bad actors" would be a priority. The announcement made specific mention of the Chicago Convention Center and USA Now cases. In testimony before the Senate Judiciary Committee in February 2016, the SEC further reported on its efforts to investigate and curtail such frauds and violations of securities laws, which presaged by just two months the industry-staggering SEC filing in April 2016 alleging a $350 million fraud by principals in the Jay Peak enterprise. In the Jay Peak and Chicago Convention Center cases, as well as in many other SEC actions, the court appointed a receiver to assume control of all or parts of the subject businesses during the course of the SEC's litigation before the court. The receiver is charged with marshaling the assets of the businesses that the court decides are within its jurisdiction, a process that includes a wide array of further court proceedings, with mind-numbing complexity and complications for the EB-5 investors, as well as further substantial diminution of assets due to receiver fees and other professional fees. In a five-year span, SEC had brought enforcement actions to curtail fraud and misappropriation in at least 19 cases involving capital raised from EB-5 investors. Disturbingly, several SEC cases, and criminal actions, al-

---

[*] This article is an abbreviated version of "Good Faith and Reason: A Framework for Preserving Permanent Residence", appearing in *Immigration Options for Investors & Entrepreneurs* (AILA 4th ed. 2019).

[1] 8 CFR 216.6(a)(4)(iii), and (c)(3)(bold supplied).

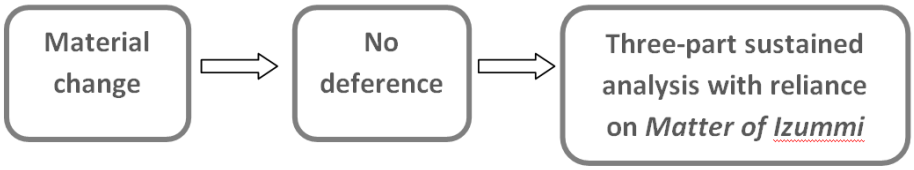
lege fraud and misappropriation by attorneys in the course of representing their immigrant investor clients. All of these enforcement actions for fraud relate to commercial enterprises that have failed or stalled, and the EB-5 investors stand to lose all or much of the capital invested.

Even without the stain arising from fraud allegations in an SEC action or criminal indictment, immigrant investors also are facing substantial losses in a wide variety of other business distress cases. Insufficient capital, poor execution in business or project development, inadequate streams of revenue from operations – the usual suspects in unrealized business expectations – haunt these highly-flawed businesses. Some of these cases of business distress also include bankruptcy reorganizations, liquidations and foreclosures, and commercial disputes among the business parties, often leading to civil lawsuits and various forms of internal warfare that pose very high risks of collateral damage to immigrant investors in their mission to secure permanent residence without conditions.

Flawed Analysis Based on Extraneous Sources

USCIS denials of I-829 petitions in business distress cases are based on fundamentally flawed analysis. These flaws might be summarized as failing to follow the letter of applicable law, failing to distinguish between the essential holding of a precedent decision as compared to dicta and/or language used out of context, imposing new legal standards illegally, and failing to apprehend the implications of legislative intent in granting EB-5 investors CLPR status in the first instance.

In the written denials of I-829 petitions filed by EB-5 investors victimized by operator fraud, there is a pattern to the analysis:



First, USCIS states that because there has been material change there can be no deference accorded in the adjudication of the I-829 petition. In the particulars the USCIS decision cites to the apparent use of the NCE's funds as materially different from what had been set forth in the original business plan submitted in support of the initial I-526 petition. Consequently, USCIS states, no deference is due to "previously approved documents" such as the private placement memorandum, business plan, and job creation report. USCIS then turns to, and just as quickly turns away from, the regulation applicable to adjudication of I-829 petitions. To complete this pattern, USCIS instead relies on the 1998 decision of the administrative appeals unit in *Matter of Izummi*, wrapped inside of a three-part analysis of the sustained requirement, to declare that the EB-5 investor has not met the burden of showing that the investment has been sustained. In a typical denial of the investor's I-829 petition, USCIS states:

"[i]n order to show that the petitioner sustained the action of investing or being actively in the process of investing the required amount of capital, the petitioner must demonstrate that he or she –

i) [h]as placed the required amount of capital at risk for the purposes of generating a return on the capital placed at risk

ii) [t]here must be a risk of loss and a chance for gain, and

iii) In addition, as explained in *Matter of Izummi*, 'the full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.'"[2]

What is first obvious is that this adjudication criterion is found nowhere in the statute (INA 216A) or in the regulation (8 CFR 216.6) concerning adjudication of I-829 petitions. The concept of "at risk" investment is found only in the regulation setting forth requirements for proving initial eligibility in the EB-5

[2] The same formulation is found in the EB-5 Policy Manual, Vol. 6, Part G, Ch. 5, C. *Material Change*, the section for adjudication of I-829 petitions and the subpart concerning material change.

category, and is not carried over into the law concerning removal of conditions. The "full amount of money must be made available" concept is in neither body of law. Consequently, where USCIS uses this three-part sustained analysis to deny I-829 petitions in business distress cases, it is essential to consider whether there is any legal foundation for this test.

Skipping by the Regulation

It is clear USCIS is not following the applicable regulation. USCIS typically cites to and may even quote parts of the regulation at 8 CFR 216.6(a)(4)(iii), which includes the "good faith" clause highlighted in the introduction to this article. But a review of the analysis appearing in denials of I-829 petitions reveals USCIS does not actually rely upon the regulation. A regulation-based analysis would fully address the "good faith" of the EB-5 investor in making the investment and continuously maintaining the investment. This inquiry should focus on the EB-5 investor's intentions as evidenced by actions taken. In distress cases (whether in SEC-litigated diverted funds cases, known criminal prosecutions, or the publicized bankruptcy matters), typically, evidence is presented to meet both the investment requirement and the sustained requirement. That is, the EB-5 investor (i) relinquished total control over the required amount of capital when making an investment in the NCE and signing a subscription document that binds the EB-5 investor to the essential parts of the offering documents, and (ii) has not withdrawn any part of the invested capital. In most of these cases, the EB-5 investor is an owner of a limited partnership or like-formed NCE over which the EB-5 investor has no control, and the NCE is designed to make a loan to a separate entity that will use the loan proceeds in business activities that USCIS will credit for job creating purposes. In these distress cases the evidence would also show that after investing in the NCE the EB-5 investor is a victim of the manager's fraud or incompetence, or of an ordinary business downturn. Either way, the EB-5 investor's immigration application is not designed to serve as the "guarantor" of business success such that a failed investment jeopardizes the immigration. The regulation should be followed.

Due Process Violated

If the law on I-829 petition adjudications were correctly applied, it should be the case that where there is evidence the investor has made and maintained the investment in good faith, then USCIS would determine that the petitioner's burden has been met. The investor is required only to present relevant documentation that meets a preponderance of evidence standard.[3] Thereafter it is left to USCIS to present *contrary evidence*. In the denials of I-829 petitions, vague references by USCIS to general allegations in the SEC's complaint filed against *principal operators* of NCEs without specifying any facts in particular, let alone how such allegations are relevant to evaluation of the *investor's* good faith, is hardly "derogatory information" that an investor could begin to rebut. To the extent USCIS relies on such "derogatory information" without linking it to the investor's lack of good faith, the USCIS is deciding cases without the support of substantial evidence or due process. Similarly, USCIS decisions based on "discrepancies in the evidence" without connecting these assertions to the question of the investor's good faith investment are decisions lacking in reason.[4] With all the maneuvering in these cases to effect a burden shifting back to the investor to overcome vague and irrelevant information, USCIS is illegally holding the investor to a higher standard of proof than is required by law.[5]

Missing the Essence of CLPR

A federal court also is likely to find relevant to its consideration of good faith a presentation on the proper context, including the nature and purpose of CLPR as evident from statutory text and legislative history. The nature of CLPR was intended not as ephemeral, temporary or provisional, but instead as full permanent residence in all its attributes except for the few conditions specified by statute. The conditions specified by Congress not only set the petition adjudication standards, they also illuminate the purpose of CLPR. That purpose is to deter immigration fraud by the EB-5 investor, and nothing more, as can be

[3] EB-5 Policy Manual, Vol. 6, Part G, Ch. 2. E. Burden of Proof.

[4] 5 USC 706(2)(A) provides a cause of action to challenge agency decisions that are arbitrary and capricious.

[5] Note too that if the case is before an immigration court judge, the government has the initial burden of proof to show that the EB-5 investor did not meet the requirements under INA 216A for removal of conditions. INA 216A(c)(3)(D).

continued

discerned from the text of the law and the legislative history. As it was first introduced, section 204 of the Immigration Act of 1989 was entitled "Deterring Immigration-Related Entrepreneur Fraud."[6] It required a two-year period of CLPR and authorized termination of CLPR if the business was established solely as a means of evading the immigration laws.[7] The statutory scheme furthers the goal of deterring fraud *by the EB-5 investor* by requiring evidence the investment was made and sustained by the EB-5 investor. Notably, there is no evident statutory purpose of making the EB-5 investor the guarantor of business success, or of requiring proof of the good faith of EB-5 project principals. Rather, the clear intent of the statute is to deter the EB-5 investor's fraud, nothing more. Courts have found agency policy choices to be arbitrary and capricious when they are unmoored from the purposes of the statutory objective.[8] Consider that even the investment professionals, venture capitalists, fail in their investment choices in startup businesses between 60 to 75% of the time.[9] It makes abundant sense that Congress never intended to entrap immigrant families acting in good faith in a program where they are likely to fail in their immigration cases a majority of the time.

Misplaced Reliance on Matter of Izummi

As a starting place, one observes that *Matter of Izummi* might have numerous legitimate progeny but seeing it as the basis for denials of I-829 petitions in business distress cases is immediately alarming. The *Izummi* case is not a removal of conditions case that reviews the law for adjudication of I-829 petitions. Rather, *Izummi* reviewed the approvability of an I-526 petition and concerned the eligibility criteria for initial EB-5 qualification. It could be argued that whatever *Izummi* says about what is required to prove an investment is at risk, its binding quality is limited to USCIS adjudications of I-526 petitions.

The key part of the USCIS reliance on its *Izummi*-inspired three-part sustained analysis to deny I-829 petitions is the language "the full amount of money must be made available to the business(es) most closely responsible for creating the employment." That language is paired with the subsequent USCIS emphasis placed on a "job-creating enterprise" or "JCE" – a nomenclature USCIS created without any statutory basis. The formulation that the "full amount of money" must be made available to the businesses most closely responsible for creating jobs violates the statute that authorizes approval of the I-829 petition based on being "in the process of investing,"[10] as well as the regulation that presents the sustainment issue as whether the investor has "substantially met" the capital investment requirement. The "full amount" clearly is not the same as "substantially met" no matter the additional tweaking of those terms. This same regulation is violated by the *Izummi*-based adjudication standard (now appearing in the Policy Manual) because the regulation clearly prioritizes the consideration of the good faith of the investor whereas the new policy standard does not mention good faith at all. The following chart depicts vividly how this policy drawn from *Izummi* is so very disconnected from the actual law.

Factors Indicating Policy Violates Law

Statute/Regulation	*Izummi*-based Policy
good faith	**not considered**

[6] S. 358, 101st Cong. §204 (1989).

[7] S. Rep. No. 101-55, at 22 (1989). See also regulatory commentary: Investors are "admitted as conditional permanent residents as a means to deter immigration-related entrepreneurship fraud." Commentary to Final Rule, 59 Fed. Reg. 26587 (May 23, 1994), *quoting* S. Rep. No. 101-55, at 22 (1989).

[8] *Judalang v. Holder*, 565 US 42, 64 (2011). Also, courts may look to "the design of the statute as a whole and to its object and policy." *Dada v. Mukasey*, 554 US 1, 16 (2008).

[9] *See* articles referring to studies on failure rates for startup businesses: http://fortune.com/2017/06/27/startup-advice-data-failure/; https://www.cbinsights.com/research/venture-capital-funnel-2/; https://www.inc.com/john-mcdermott/report-3-out-of-4-venture-backed-start-ups-fail.html.

[10] INA 216A(d)(1).

substantially met investment requirement	**full amount of money**
in process of investing	**made available**
to new commercial enterprise	**to businesses most closely responsible for job creation**
continuously maintained investment	**not considered**

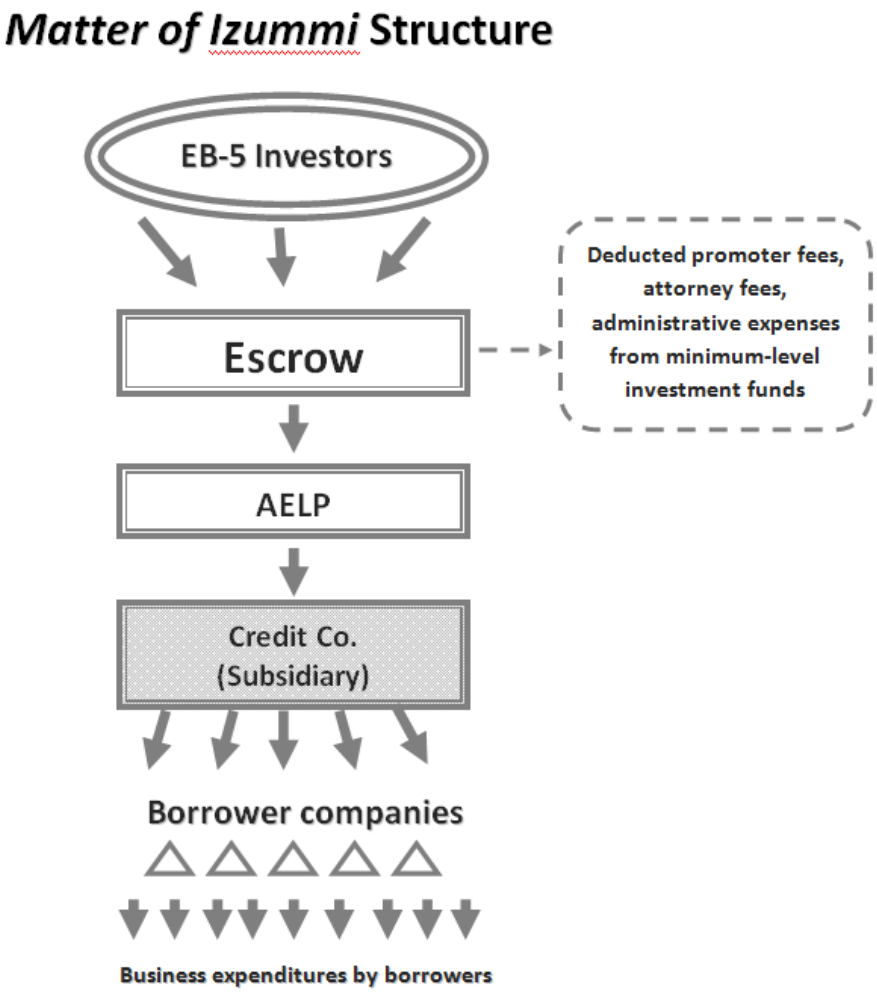
There should be no doubt the *Izummi*-based test for sustainment sets forth a new substantive rule, and as such a federal court may nullify its application because USCIS did not follow notice and comment strictures as required by the Administrative Procedure Act (APA) prior to adoption of the rule.[11] Related to that, but standing as an independent claim of illegality, the new adjudicatory policy is an impermissible retroactive application of an adjudication standard that did not exist when the investor initially invested and commenced the EB-5 process with the filing of the I-526 petition. If litigated, the federal court will consider the interest the USCIS would have in applying the new rule and adjudication criteria retroactively and weigh that against the detriment to the investor and family who – following denial of the I-829 petition – would be subject to deportation.[12]

All of the above is underscored by dissecting the component parts of the *Izummi* case. First, *Izummi* neither decided what is required for approval of I-829 petitions nor says anything in particular about the meaning of sustaining the investment for I-829 approval purposes. That alone should be grounds for *not* relying upon *Izummi* in cases of I-829 adjudication. The language cited by USCIS, about directing EB-5 capital to "the business(es) most closely responsible for creating the employment", is indeed straight out of the *Izummi* decision. But the case did not concern I-829 adjudications, and as stated above due to differences in statutory language and of the purposes of the respective petition processes, the adjudication of the I-829 petition is not the same as the adjudication of an I-526 petition.

The quoted language from *Izummi*, moreover, requires context. The facts of the case were -- EB-5 investors made equity investments in a limited partnership (AELP) that in turn invested to acquire the stock of a commercial credit corporation subsidiary (Credit Co.) that was in the lender business making asset-based loans to multiple borrowers. The plan was that Credit Co. would pool and lend out the capital sourced from three parties – the EB-5 investors (via AELP), another investment firm, and an institutional lender. What the administrative appeals office determined to be disqualifying and grounds for denial of the I-526 petition was that part of the investment structure designed to pay $30,000 of the $500,000 commitment of funding received from each EB-5 investor in the custody/escrow as administrative expenses of AELP, prior to AELP's investment of the EB-5 funds to Credit Co.

[11] 5 USC 553(b),(c)(requiring advance notice of rulemaking and opportunity for comment, except for interpretative rules and general statements of policy).

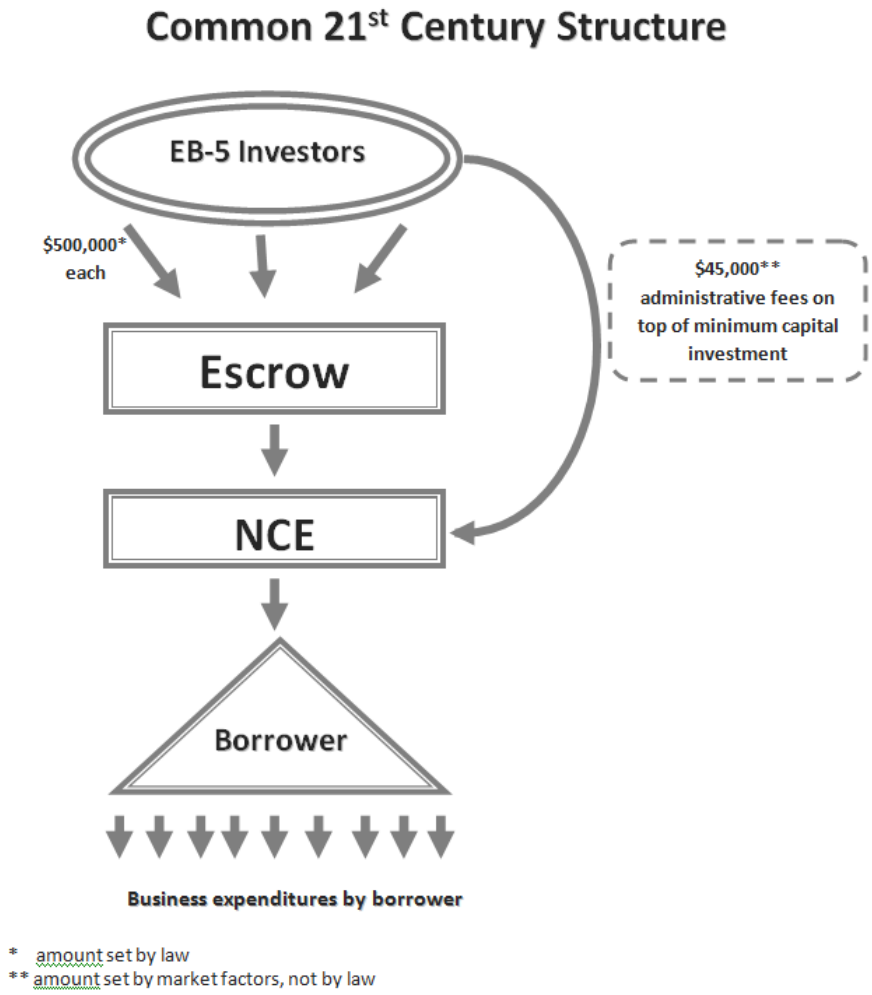
[12] *Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 519 (9th Cir. 2012).



The *Izummi* case teaches that it will be grounds for USCIS denial of the I-526 petition if the investment structure is designed so that administrative expenses are withdrawn at the level where EB-5 capital is raised without the minimum required capital reaching that part of the NCE that is engaged in job-creating business activities such as lending.[13] As an aside, *Izummi* was decided more than 20 years ago, and its aftermath featured many wayward adjudication trends that required corrective action.[14] But as to the narrow holding of *Izummi* in terms of the EB-5 capital reaching the NCE, those who design and/or manage EB-5 enterprises these days know well to steer clear of the administrative expenses design problem by requiring EB-5 investors to funds administrative expenses by paying an amount above the minimum required capital of $500,000.

[13] *Id*., p. 179 n. 7, clarifying the appeals office was deciding the minimum required capital must at least reach the lending entity Credit Co.

[14] First, citing *Izummi*, examiners denied any I-526 petition where the EB-5 investor did not "have a hand" in forming the new commercial enterprise. That trend led to a statutory fix, elimination of the "established" requirement in the 2002 amendments. L. Stone, "Congress Eliminates "Established" Requirement," *Immigration Law Today* (July 2003). Then, also citing *Izummi*, examiners conflated investment at risk standards to require capital to be used in employment-creating activities *prior to* the I-526 petition filing. *See* L. Stone, "Immigrant Investment in Local Clusters: Part II," 80 *Interpreter Releases* 937, 941 (July 14, 2003). The current critique of *Izummi*-based policy making has application as well to recent USCIS policies concerning "bridge financing" structures and "redeployment" requirements.



What makes the three-part *Izummi*-anchored sustainment standard especially distressing is that it selectively uses language without the all-relevant context. The very "made available" language that is quoted actually ends with a footnote in the *Izummi* decision, whereby the administrative appeals unit clarified that it was not deciding the question of whether the full $500,000 must be made available to the level of Credit Co. on the one hand or to the level of the borrower companies on the other hand, but rather it was enough to determine that the full amount of capital must pass through to the lender Credit Co. which *Izummi* effectively considered to be part of the NCE. And yet, the Policy Manual makes no mention of this footnote and of the historical fact that *Izummi* did not actually decide that invested funds must be extended by the NCE to the level of borrower companies. It merely decided that the payment of administrative expenses prior to reaching the Credit Co./NCE reduces the capital investment below the minimum level required by law. Notwithstanding that, the Policy Manual enshrines an entire lexicon of sorts around the term "job-creating entity" (or JCE if abiding by this constraining conceptual straitjacket), and essentially declares that *Izummi* mandates that the focus must be on that entity's receipt and use of all required capital.[15]

Note, too, that the Policy Manual reference to the non-statutory term "job-creating entity" is different from *Izummi*'s label of the "business(es) most closely responsible for creating the employment" that

[15] In this lexicon the "capital investment project" (another non-statutory term) was the conceptual predecessor to the "JCE" and according to the 2009 memo that gave birth to it the structure of the EB-5 statutes was so "inflexible" that a change in the business plan would require termination of CLPR status. Memorandum of Donald Neufeld, Acting Associate Director, Domestic Operations, "Adjudications of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions" (AFM Update AD 09-38), Dec 11, 2009, posted on AILA InfoNet at Doc. No 09121561.

would support USCIS approval of a petition. In actual practice USCIS considers the JCE to be at the borrower level as depicted above in the "Common 21st Century Structure." This outcome is exactly what the *Izummi* decision stated clearly it was not deciding. With that in mind, then how could it be that *Izummi* is the averred source of precedent for labeling the borrower in the common structure a JCE, and then for imposing on the EB-5 investor the absolute burden of proving that no part of the minimum required EB-5 investment could be eroded before reaching the borrower/JCE by for example a bad actor's diversion of funds? The *Izummi* case does not support these verbal gymnastics.

Insofar as the "made available" language in the *Izummi* case had nothing at all to say about the sustained requirement for purposes of I-829 petition adjudications, *Izummi* is not precedent for the proposition that the investor cannot prove sustained investment if the investor has been victimized by a bad actor who diverted EB-5 funds away from the intended investment uses. The investors in these cases are likely to have zero chances of showing "the full amount of money was made available to the business(es) most closely responsible for creating the employment upon which the petition is based." The reasons for this inability include not having control over the NCE, not having complete information about all NCE transactions, and perhaps having only intentionally misleading information provided by the bad actors at the center of the fraudulent scheme. On top of that, the bad actors in these cases in fact have diverted funds from intended uses, so it is likely impossible to include in support of the I-829 petition the documentation to prove that all invested EB-5 capital was directed to the entities originally intended. But it is only the misguided new standard found in the Policy Manual, not the law or even *Izummi*, standing in the way of a just outcome in these cases.

By roping the *Izummi* language into the purported articulation of an adjudication standard, USCIS endeavors to claim authority for a renewed assessment of EB-5 eligibility *as if* it were the review of the I-526 petition, not the I-829 petition. Considering all the above, the language quoted from *Izummi* by USCIS adjudicators of I-829 petitions, as detached as it is from the eligibility criteria stated in the statute and regulations for removal of conditions, would not likely stand upon closer review by a federal court – no matter the standard of deference due – because the reasoning is patently arbitrary and capricious. Dismayingly, to date the advocates for EB-5 investors in business distress cases have not pressed this argument in federal court.[16]

In response to the possible counterargument that the Policy Manual is merely restating the test for a qualifying investment as described in the policy for adjudication of I-526 petitions, there are at least two points. First, the counterargument simply buttresses the EB-5 investor's contention that USCIS is blindly applying I-526 adjudication standards to I-829 petitions. Second, and related, it is entirely reasonable to have adjudication standards whereby the USCIS review of the I-526 petition contemplates the *design* of an at risk investment to involve infusion of the EB-5 capital beyond the NCE and into a "JCE" (whether or not that is the same as the NCE is immaterial to the point) without dilution, and yet the USCIS review of the I-829 petition contemplates the *actual* investment as having been made at risk in the NCE without necessarily passing entirely to a "JCE." What makes this possible (both reasonable and perfectly aligned with legislative intent) is the statutory design: Congress determined that for removal of conditions purposes the EB-5 investor must show only that the investment to the NCE was genuinely made and sustained. The statutory design for removal of conditions does not make the EB-5 investor the guarantor of all commercial events. Instead, the USCIS adjudication on the investment and sustainment issues must focus on relevant questions – Did the investor place the required capital with the NCE? Has the investor

---

[16] *See, e.g.*, *Doe v. Johnson*, No. 15-cv-01387 (E.D. Ill. March 28, 2017)(granting summary judgment for the government in case challenging denial of I-829 petition based on investment in NCE connected with Chicagoland Foreign Investment Group), at p. 13: "Plaintiff does not challenge USCIS's reliance upon *In Re Izummi*, 22 I&N Dec. 169 (BIA 1998)(sic), and its requirement that the petitioner demonstrate that the full amount of his investment was 'made available to the business(es) most closely responsible for creating the employment upon which [his] petition is based." https://www.govinfo.gov/content/pkg/USCOURTS-ilnd-1_15-cv-01387/pdf/USCOURTS-ilnd-1_15-cv-01387-1.pdf. Case on appeal: Doe v. Nielsen, No. 17-2040 (7th Cir. Feb. 26, 2018)(disqualifying on conflict of interest grounds the regional center principal acting as legal counsel for appellant EB-5 investor) http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D02-26/C:17-2040:J:Sykes:aut:T:op:N:2113372:S:0.

withdrawn capital? Has the EB-5 investor demonstrated good faith? Did the EB-5 investor have a role in the diversion of funds? Did the EB-5 investor know about and provide informed consent to the diversion of funds? Did the EB-5 investor conspire in any way to facilitate the bad actor?

A review of I-829 adjudications and of USCIS policy reveals that at the heart of USCIS adjudications of I-829 petitions in business distress cases is an extra-legal standard for sustained investment. This cannot stand, and better still, USCIS should conform its adjudications policy to the law that has existed for some 25 years.

Job Creation Arguments

Because USCIS is using the independent factor of insufficient job creation to support denials of I-829 petitions,[17] attention to job creation in business distress cases is imperative. Three themes stand out when contesting this prong of the USCIS denial of the I-829 petition – (i) the entirety of the job creation requirement as a petition adjudication condition for I-829 petitions amounts to an obligation created and added by the agency, not by or intended by Congress, and therefore it may be challenged as *ultra vires* and in contravention of the statute; (ii) even assuming the regulation on proof of job creation is applicable law, USCIS should heed the clear architecture of the regulations and not impose the job creation requirement in adjudicating regional center-associated I-829 petitions; and (iii) if it applies the regulation, USCIS should allow a "reasonable" period of time as determined by the totality of circumstances not by the arbitrary maximum three-year time frame appearing in recent policy pronouncements.

Earlier publications highlight that Congress created a pathway to unconditional permanent residence for EB-5 investors without requiring proof that jobs in fact were created. The statute for removal of conditions does not require proof of job creation for the reason that Congress clearly rejected the concept. As part of the EB-5 law making process some 30 years ago, Congress had rejected an earlier proposal that would have required all jobs to be created within a two-year period of making the investment,[18] as well as another proposal that would have required all job creation to occur within a reasonable time, but no later than six months after the investor's admission to the United States.[19] Hence, the statute concerning initial EB-5 category eligibility does not set a timeframe for future job creation, and the statute concerning removal of conditions does not require proof of job creation at all. This construction of statutory intent – designing a platform to attract job-creating capital, and yet not pegging the ultimate removal of conditions to the investor's proof of having created jobs -- is reasonable on its face. For example, according to the US Small Business Administration, 50% of all new small businesses with employees will go out of business within the first five years.[20] Congress had set out to attract job-creating capital. An open mind could understand how legislators would want to create an appealing opportunity for immigration to the United States, based on an investment that is intended to be job creating and on a plan that is thoroughly vetted to be credible, but without setting unrealistic barriers to fully realizing the immigrant benefits. Congress never intended that the immigrant investor, as a condition for removal of conditions, would bear the burden of having to prove that ten jobs had been created.

Legacy INS and USCIS changed that statutory design. First, legacy INS adopted a regulation imposing the requirement that the petition for removal of conditions include evidence of job creation. The petition must demonstrate the EB-5 investor "created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees."[21] Over time, the agency has articulated policy that negates the intent of Congress. In its framing of requirements for removal of conditions – particularly as to job creation – the agency has transformed the very nature of CLPR status. A two-year conditional period that tests the good faith of the investor in making the investment (the original intent of Congress) is a world apart from a two-

---

[17] *See, e.g.*, Doe v. Johnson, *supra* note 16.
[18] 134 Cong. Rec. S2119 (1988).
[19] S. Rep. No. 101-55, at 21 (1989).
[20] SBA Office of Advocacy, Small Business Facts (June 2012), https://www.sba.gov/sites/default/files/Business-Survival.pdf
[21] 8 CFR 216.6(c)(1)(iv).

year conditional period that tests whether the investor has fully satisfied the job creation requirement (the current policy). USCIS brought forth that policy in 2009 with a statement that the "primary purpose" of CLPR status is to confirm completed job creation, restated it in 2013, and memorialized it in the Policy Manual in 2018. These policy statements, however, do not serve to repair the problem that the agency is acting without the authority from Congress.

Separate from arguing that USCIS lacks the legal authority for requiring proof of completed job creation at all, the EB-5 investor in distress cases should be arguing that the regulatory framework points to certain conclusions about the timeframe for job creation. For instance, in the regulation concerning the initial I-526 petition, part (iii) relating to *Immigrant Investor Pilot Program*-associated petitions does not impose a time requirement for job creation. Contrast part (i) relating to *General* petitions clearly states that the plan for job creation should cover the period "within the next two years", and part (ii) relating to *Troubled business* petitions clearly requires maintaining employees "for a period of at least two years." In the regulation concerning the I-829 petition for removal of conditions, the job creation requirement is for "qualifying employees" not the "persons" that are referenced in connection with regional center-based petitions. Notwithstanding the clear architecture of the controlling regulations that have been parsed above, drafted to treat regional center-associated petitions differently, USCIS has imposed in I-829 adjudications an absolute temporal requirement for creating regional center-associated jobs. That policy cannot be reconciled with the expansive intent of the regional center program or with the laws that bind USCIS adjudications. The letter of the regulations signals that no timeframe is required for regional center-associated job creation.

Turning to the actual language of the regulation concerning adjudication of I-829 petitions for removal of conditions, USCIS is charged with evaluating whether the EB-5 investor has "created or can be expected to create within a reasonable period of time ten full-time jobs for qualifying employees."[22] Earlier USCIS policy guidance had provided that an examiner should consider a broad range of factors in determining what is a reasonable period of time.[23] But in the policy memo of May 30, 2013, USCIS shifted direction and declared three years of CLPR would be the outer limit of time for job creation.[24] This stance continues in the current Policy Manual.[25] Insofar as there is no indication of any studies conducted, data collected, or collaboration with the Small Business Administration (or like agency with subject matter expertise) that would support this hard three-year deadline as a reasonable period of time for creating jobs, and noting that USCIS has no apparent expertise in the fields of venture startups, business funding, economic development, or business workouts, it is questionable whether a court would grant any deference to the USCIS interpretation of what is a reasonable period of time.[26]

Investors in distress cases may have numerous reasons for contending that sufficient job creation will occur over a lengthier period of time. It is relatively common for example to encounter construction delays. Business operations may not ramp up as quickly as reasonably estimated in the original business plan. The enterprise may have encountered so much competition or soft demand that expenses far outstrip revenues and reorganization in bankruptcy is required. Then there are the enterprises further challenged by bad actors

---

[22] Id.

[23] *Adjudicator's Field Manual* §25.2(e)(5)(D); Memorandum from D. Neufeld, Acting Assoc. Dir., Domestic Operations, June 17/09; HQDOMO 7/6.18, AD99-04, at 3–4.

[24] USCIS Policy Memorandum, EB-5 Adjudications Policy, p. 22 (superseded, but still available at USCIS website -- https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5_Adjudications_PM_Approved_as_final_5-30-13.pdf).

[25] "Jobs projected to be created more than 3 years after the immigrant investor's admission in, or adjustment to, conditional permanent resident status usually will not be considered to be created within a reasonable time unless extreme circumstances (footnote) are presented." The footnote to this statement is: "For example force majeure." EB-5 Policy Manual, Vol. 6, Part G, Ch. 5, Sec B.2.

[26] A federal court may defer to the agency's interpretation of its regulations, but probably not where there is no subject matter expertise and the agency's reasoning is unpersuasive. *United States v. Mead Corp*., 533 US 218 (2001); *Skidmore v. Swift & Co*., 323 US 134 (1944).

continued

alleged to have compromised the continuity of the business by diverting its capital. Where successful enforcement proceedings by the SEC, for example, involve an aggressive receivership that is effective in restoring diverted funds in trust for use by the aggrieved EB-5 investors, substantial additional time may be required for recovery of funds and possible redeployment in job-creating uses.[27] In most EB-5 distress cases at least one of these factors makes up the totality of circumstances that should be considered when evaluating whether the delay in job creation beyond a three-year period is reasonable.

The only exception appearing in the Policy Manual to the three-year limitation is *force majeure*. One definition of *force majeure* states it is "[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (*e.g.*, floods and hurricanes) and acts of people (*e.g.*, riots, strikes, and wars.)"[28] The very deep body of commercial law on *force majeure* may yield helpful cases with a broad range of circumstances including human folly, but it appears to be a very slender reed for preserving a family's permanent residence.[29] There is every reason to fear that EB-5 investors in distress cases will be held to a rigid, maximum three-year timeline for presenting evidence of sufficient job creation.

Nowadays, USCIS has re-conceptualized the conditional period as a two or three-year crucible for business success and fully realized job creation. When questioned before the Senate Judiciary Committee in July 2009 about the limited fraud-deterrent objectives of the conditional residence period, and how USCIS's self-appointed task of counting jobs at the removal of conditions stage seemed to transform the original intent of the law and unduly burden the process, USCIS countered that it interprets the law in a way that it must demand that all required job creation occur within the two-year conditional period.[30] USCIS allowed that "unexpected weather" that delayed progress in a project could be the justification for the job creation occurring after the filing of the I-829 petition. In a faint signal of where USCIS actually was headed with this sphere of adjudication, no other possibilities were offered. Later, the internal compromise that was cemented in the 2013 policy memo left us a three-year "fully realized jobs" rule, still reflected in the Policy Manual.

Only when USCIS purports to promulgate substantive or legislative rules with the force and effect of law would it be required to follow notice-and-comment procedures that comply with the strictures of the APA.[31] If the agency policy statements, instead, are intended to address "non-legislative" rules such as "interpretative rules, general statements of policy, or rules of agency organization procedure or practice,"[32] then APA-compliant notice-and-comment is not required. Where USCIS sets a three-year deadline for proof of fully realized job creation it would appear to be a substantive rule that has not been promulgated in accordance with the APA.

There also is a retroactivity argument. At the time of investment, and having filed the I-526 petition and applied for an immigrant visa and then immigrated to the United States, the agency had maintained a consistent adjudicatory practice of accepting the totality of evidence on the issue of what is a reasonable period of time for creating jobs. Then abruptly the agency departed from this practice in adjudicating I-829 petitions by requiring investors to show creation of jobs within three years of commencing CLPR status. Investors could be successful with a challenge to retroactive application of this new rule, provided there is evidence presented of the harms that would befall to families, the threat of deportation, and possible separation of children from their families due to aging out as a dependent.

---

[27] *See, e.g.*, *SEC v. Quiros*, No. 16-cv-21301-DPG (S.D. Fla. Feb 6, 2018) where the court allowed redeployment of settlement funds collected by receiver in Jay Peak receivership.

[28] *Black's Law Dictionary* at 657 (7th ed. 1999).

[29] *See, e.g., Elavon, Inc. v. Wachovia Bank, et al.*, 841 F.Supp.2d 1298, 1307–08 (N.D. Ga. 2011) (finding that 2008 economic crisis was not an external force majeure that prevented the defendants from continuing to perform under agreement for electronic credit/debit processing).

[30] Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (July 22, 2009).

[31] 5 USC 553(b)-(c).

[32] 5 USC 553(b)(A).

While preserving legal arguments for a reviewing court, practitioners must make a complete record concerning the totality of circumstances, including macro-economic conditions, trends and cycles in the particular industry, loss of significant customers and other events concerning the particular business including diverted capital, likely additional capital infusions from any sources, and well-reasoned estimates of when more jobs will be created.

A Final Word on Fair Adjudications

Most investors and their families uproot themselves during the conditional residence period in order to settle in the United States. These families are relying heavily on the legal foundation of CLPR and reasonable conditions that can be met with the investor's good faith in making and sustaining an investment. Unfortunately, though, USCIS has not honored that statutory design. Also, as observed above, if regulations are the standards that control adjudications of I-829 petitions for removal of conditions then such adjudications should be grounded in evaluation of the EB-5 investor's good faith and open to a wide array of evidence concerning what is a reasonable period of time for meeting job creation requirements.

Understandably, USCIS policymakers take seriously the legislative objective of job creation, and USCIS examiners care about the integrity of the EB-5 program. It is not difficult to see that both of the policy standards criticized in this article likely grow out of genuine interest in furthering those objectives. However, it is just as well that the legislative design emphasized in this article also advances the same objectives. The difference is that Congress did not select the approaches advocated by USCIS in the policy articulations that are challenged in this article. USCIS therefore is not at liberty to impose its own statutory design, and its policies should not be forged midstream on the backs of investors and their families. Faced with fraud and diverted capital, or with business results that do not match up with the original reviewed business plans, USCIS need not penalize EB-5 investors by denying I-829 petitions for removal of conditions. Nothing in the statutory design of Congress requires it. Indeed, the legislative intent appears to be exactly the opposite and current USCIS policy must give way to that intent.

Policy for the EB-5 program should be based on studies, empirical data, and on a well-informed conception of how to attract transforming investment capital that has the real potential to create jobs in the United States. Were USCIS or Congress to commission such a study and conclude from it that the EB-5 program in its current form does not meet the desired objectives of attracting capital that creates jobs, the law could be changed or eliminated altogether. But it would be done rationally and prospectively. And with such changes, prospective EB-5 investors would have sufficient advance notice of standards and risks before deciding whether to invest.