GOOD FAITH AND REASON: A FRAMEWORK FOR PRESERVING PERMANENT RESIDENCE

by Lincoln Stone[*]

INTRODUCING GOOD FAITH AND REASON

Immigrants who have invested in good faith in reliance on the promise of the EB-5 investor visa program are no different from applicants in other immigrant categories: They expect that the US immigration law and adjudication standards will be transparent and applied fairly, and there will be a process that is reasonable. Good faith and reason are bedrock principles at the core of countless articulations of legal standards in numerous areas of US law. These fundamental principles speak to fairness where different interests are at stake, and often are guideposts to finding justice no matter the circumstances. This article is not a screed by design, but rather is intended to identify tools for representing immigrant investors adrift in the final stages of the EB-5 application process. These practice tools are founded on the fundamental principles of good faith and reason.

Good faith and reason are specifically indicated in the law applicable to adjudication of petitions filed by EB-5 investors. In the initial Form I-526 petition filed with US Citizenship and Immigration Services (USCIS) an investor seeking immigration in the EB-5 category provides evidence of the investment in a US commercial enterprise that has created or should create US jobs.[1] If successful with the first round of petition and visa application, EB-5 investors and family members are admitted to the United States in the status of conditional lawful permanent residence (CLPR) for a period of two years.[2] The status of CLPR is not "temporary" or "provisional" but is intended to be on the same footing as any other lawful permanent resident, with the exception of the conditions identified specifically in the statute.[3] 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 (as in merely committing to make an investment but not actually parting with the investment capital).[4] 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.[5] 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"[6] over the two-year period of CLPR. And yet, stunningly, as exposed so poignantly in recent 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. USCIS examiners are denying at least dozens if not hundreds of these I-829

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[1] INA 203(b)(5)(enabling statute); 8 CFR 204.6 (implementing regulations).

[2] INA 216A(a)(1).

[3] 8 CFR 216.1.

[4] *See, e.g.*, 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).

[5] INA 216A(d)(1). The petition to remove conditions is Form I-829 and referred to herein as the I-829 petition. For a primer on law and procedure concerning removal of the conditions, *see* Lincoln Stone, *Removal of the Conditions on Permanent Residence for Immigrant Investors*, IMMIGRATION OPTIONS FOR INVESTORS AND ENTREPRENEURS (AILA 1st ed. 2006)(hereinafter "I-829 Primer, 2006"). *See also*, Elsie Arias & Suzan Pilcher, *Updated Practical Guidance in Preparing Form I-829, Petition by Entrepreneur to Remove Conditions*," elsewhere in this volume.

[6] 8 CFR 216.6(a)(4)(iii), and (c)(3)(bold supplied).

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.[7]

Making a deplorable situation even worse, in these same adjudications that are the proximate cause of unfair consequences for perhaps hundreds of investors and families, USCIS decision makers disclaim any responsibility for following its own binding regulation that requires the application of reasoned judgment. In particular, although Congress never imposed proof of "completed job creation" as one of the conditions on CLPR,[8] the agency's regulation does require proof that jobs were created or will be created "within a **reasonable** period of time."[9] But as will be discussed herein, USCIS has not been following that regulation either.

Considering good faith and reason are at the very core of the regulations governing USCIS adjudications of I-829 petitions, and the main objective of the CLPR process has been served when the investor has acted in good faith, it is difficult to fathom how and why good faith and reason magically disappear from these adjudications. In these circumstances -- often fraught with frustration over substantial losses of family savings, dashed dreams for a better family life, deep distrust due to inexplicable delays in the process and the moving goalposts of adjudication standards, family discord directly caused by the dysfunctional process, and pure angst due to the threat of deportation -- investors and their families must resort to the federal courts. Once there, the absence of good faith and reason in USCIS adjudications are just two of the many grounds for pleading arbitrary and capricious decision-making, impermissibly retroactive application of new legal standards, noncompliance with legal requirements to provide advance notice of rulemaking, and a violation of due process. All of that is likely to be understandably difficult for a dubious immigrant family to support let alone comprehend, but in many if not most cases the uprooting, the overwhelming investment of time and treasure, and the many strains and pains characterizing these cases, all cry out for one last push to make it right. And as described here, the law the federal court will consider should be resoundingly favorable to investors and their families.

THE PATHWAY OR THE MINEFIELD?

The typical, well-informed investor understands the EB-5 category laws require investment risk, that all invested capital might be lost in the course of business. The EB-5 investor program requires much of the investor. The essential bargain underlying the EB-5 investor program is the investor risks capital in a commercial venture that holds out a good possibility of creating jobs for U.S. workers. With a legally-compliant investment design that is credible, and by placing capital at risk, the EB-5 investor is supposed to be on the pathway to US permanent residence -- first to CLPR and ultimately to permanent residence without conditions. Whether that investor proceeds diligently with the aid of competent advisors or instead jumps in carelessly at the first spurious promotion, it is not unreasonable for the investor seeking to be part of the intricate fabric of the United States and to embrace its values to count on the US government to administer the program according to existing law.

Unfortunately, hundreds of investors have turned over their hard-earned wealth to swindlers. And, just as carelessly they have entrusted their families' plans for a better future to the inept, the over-ambitious, or the

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[7] INA 216A(c)(3)(D) provides that a final decision to deny the petition to remove conditions shall be reviewed upon request by an immigration court judge. "Deportation" from the United States is now effected through "removal" proceedings presided over by an immigration court judge.

[8] For earlier discussion of the "immigration risk" stemming from misguided USCIS policies and extra-legal or unclear adjudication standards for removal of conditions, *see* Licoln Stone, *Conditional Permanent Residence and Immigration Risk for Investors*, IMMIGRATION OPTIONS FOR INVESTORS AND ENTREPRENEURS (AILA 2nd ed. 2010)(hereinafter *Immigration Risk*, 2010"); Lincoln Stone, *The Certainty of Change and Risk in Investor Immigration*, IMMIGRATION DAILY (Sept. 21, 2010)(addressing USCIS policy memos issued in 2009); Lincoln Stone, *Revisiting Conditional Permanent Residence for Investors*, IMMIGRATION OPTIONS FOR INVESTORS AND ENTREPRENEURS (AILA 3rd ed. 2014)(hereinafter *Revisiting CLPR*, 2014)(addressing policy as of 2013 as declared in USCIS Memo, "EB-5 Adjudications Policy," (May 30, 2013), AILA Doc. No. 13053051).

[9] 8 CFR 216.6(a)(4)(bold supplied).

shyster. Lest we are accused of calling out only the specks in the eyes of others, honesty would require first acknowledging that EB-5 practice is complex and there is likely always something in practice to improve. Certainly, when the goals are not achieved, there is enough blame to go around. All EB-5 program stakeholders have duties and there is no larger stakeholder than the US government. Above all else, in carrying out its obligations in the program, the government should administer the program in a manner that is faithful to its design, seen in the clear language of the enabling legislation. This kind of faithful stewardship, though, appears lacking when it is needed most – when investors and families have lost their investments made in good faith. Even though they are in CLPR status with all the supposed entitlements and protections that status should confer, they are forsaken. Recent experiences in the EB-5 program provide plentiful examples of how the promised pathway is anything but that and is more the minefield.

As is predictable, regrettably, with any program featuring extraordinarily large sums of money, eager and under-informed investors, fierce promotion and competition for investors, and historically unclear policy direction and lax oversight, the Securities and Exchange Commission (SEC) declared EB-5 program enforcement actions against "bad actors" a priority. In a joint announcement in October 2013, the SEC and USCIS posted notice of emergency enforcement actions taken to intervene in ongoing scams involving EB-5 investor capital.[10] The announcement made specific mention of the Chicago Convention Center[11] and USA Now[12] 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,[13] 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.[14] In the Jay Peak and Chicago Convention Center cases, as well as in many other SEC actions, upon a sufficient showing of need the court may appoint a receiver who may assume control of all or parts of the subject businesses during the course of the SEC's litigation before the court.[15] 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,[16] 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 misappropri-

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[10] SEC Investor Alert: Investment Scams Exploit Immigrant Investor Program (Oct. 1, 2013), https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranthtm.html.

[11] *SEC v. A Chicago Convention Center, LLC*, Anshoo Sethi, and Intercontinental Regional Center Trust of Chicago, LLC, Civil Action No. 13-cv-982 (N.D. Ill., Feb. 6, 2013)(alleged fraud on more than 250 investors primarily from China). A copy of the SEC complaint is posted at the SEC website at https://www.sec.gov/divisions/enforce/claims/docs/sethi-accc-complaint.pdf

[12] SEC v. Ramirez, USA Now LLC, et al., No. 7:13-cv-00531 (S.D. Tex., Sept. 30, 2013). A copy of the SEC complaint is available at the SEC website at https://www.sec.gov/litigation/complaints/2013/comp-pr2013-210.pdf. SEC and USCIS issued a Joint Alert cautioning EB-5 investors about fraudulent investment schemes, https://www.sec.gov/news/press-release/2013-210.

[13] Testimony on the EB-5 Immigrant Investor Program, Stephen L. Cohen, Associate Director, SEC Division of Enforcement, before US Senate Committee on the Judiciary (Feb. 2, 2016), https://www.sec.gov/news/testimony/cohen-testimony-02022016.html.

[14] *SEC v. Quiros, Stenger, Jay Peak, Inc.*, No. 16-cv-21301-DPG (S.D. Fla. Apr. 12, 2016). A copy of the complaint is posted at the SEC website, https://www.sec.gov/litigation/complaints/2016/comp-pr2016-69.pdf

[15] *See SEC v. Path America, LLC*, Civil Action No. 2:15-cv-01350 JLR (W.D. Wash. Aug. 24, 2015)(SEC complaint accessible at https://www.sec.gov/litigation/complaints/2015/comp-pr2015-173.pdf); *SEC v. Chen*, CV-6929 PA (C.D. Cal. Sept. 20, 2017)(SEC complaint accessible at https://www.sec.gov/litigation/complaints/2017/comp23944.pdf). *But see SEC v. Kameli*, 276 F.Supp.3d 852 (N.D. Ill. 2017), where the court denied the request for a receiver as the SEC stumbled over the initial pleadings in the case.

[16] The court-appointed receiver in the Jay Peak case, *supra* note 14, has been particularly effective with achievements including leadership of a collaborative effort to secure a $150 million settlement payout from investment firm Raymond James to benefit defrauded investors. A complex web of proceedings is found at the receiver's website for the Jay Peak case, https://jaypeakreceivership.com/important-legal-notice-notice-of-proceedings-to-approve-settlement-between-receiver-and-raymond-james-associates-inc-and-bar-order-please-read-this-notice-carefully-as-it-may-affect-your-ri/.

ation in at least 19 cases involving capital raised from EB-5 investors. Disturbingly, several SEC cases,[17] and criminal actions,[18] allege 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 of 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.

Whether ultimately characterized as fraud or "mere" business distress cases, USCIS and SEC no doubt have shared investigative notes in many of the parallel SEC and USCIS actions against alleged bad actors. Sometimes before fraud allegations are proven or conceded, USCIS is initiating proceedings to terminate the regional center (RC) that is associated with the commercial enterprise that has been funded with EB-5 capital.[19] RC termination jeopardizes the immigration journey because USCIS policy is that RC termination constitutes material change for purposes of adjudications of individual EB-5 investor cases; more specifically, USCIS policy is that material change requires USCIS to deny the investor's initial I-526 petition or revoke an approved I-526 petition.[20] Isolation or removal of the alleged bad actor does not necessarily cause USCIS to cease proceedings to terminate the RC.[21]

USCIS policy does not require denial of the I-829 petition for removal of condition on account of RC termination alone, however, it does signal that the EB-5 investor effectively will be held responsible and to account for any funds diverted by bad actors and for deficits in job creation.[22] Considered on the whole, USCIS

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[17] *SEC v. Jean Danhong Chen*, No. 3:18-cv-06371 (N.D. Cal., Oct 18, 2018)(copy of SEC complaint is posted at the SEC website at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-241.pdf); *SEC v. Emilio Francisco*, *PDC Capital Group LLC, Caffé Primo International Inc.*, No. 8:16-cv-02257 (C.D. Cal. Dec. 27, 2016)(copy of SEC complaint is available at https://www.sec.gov/litigation/complaints/2016/comp-pr2016-281.pdf).

[18] *See, e.g.*, *United States v. Victoria Chan* (guilty plea on charges of money laundering and filing fraudulent applications with USCIS at https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa).

[19] For example, the filing in *SEC v. Kameli*, *supra* note 15, coincides with USCIS intending to terminate the regional center owned by the defendant attorney. Also, the *SEC v. Quiros* case, *supra* note 14, runs parallel to the USCIS action to terminate the Vermont Regional Center.

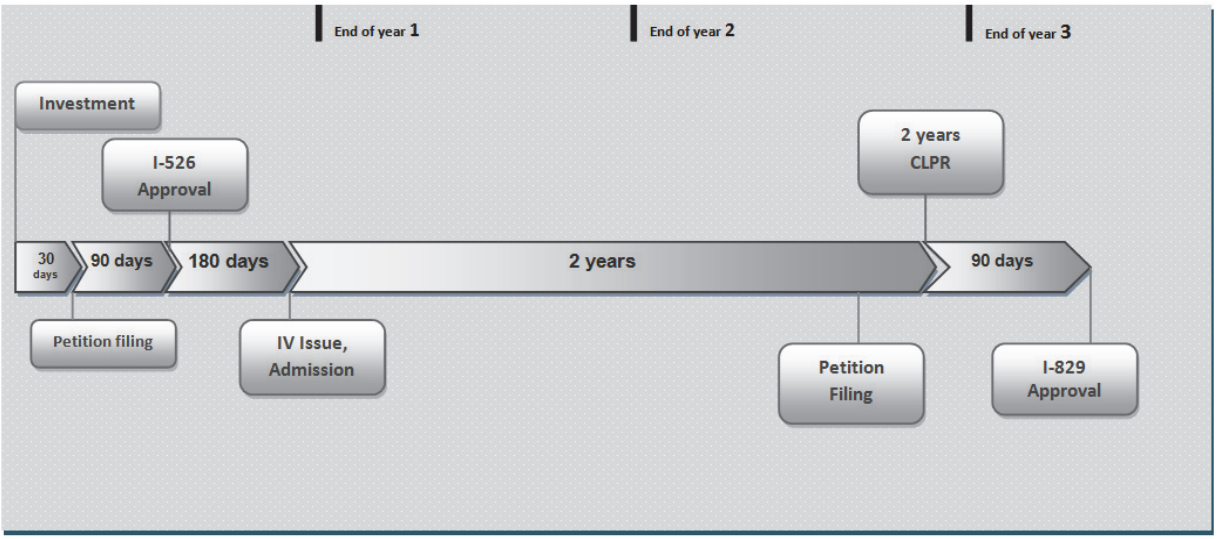
[20] 6 *USCIS Policy Manual*, pt. G, ch. 4, C. *See also* Lincoln Stone, et al., *Regional Center Terminations and Impacts on Immigrant Families*, REGIONAL CENTER BUSINESS JOURNAL, (June 2017).

[21] For example, the separation of the Jay Peak principals from the Vermont RC has not shielded the latter from USCIS assertions of failures in oversight and management of RC operations. See the USCIS termination of the RC in *Matter of P–A–K* (Dec. 4, 2018) for USCIS discussion of why appointment of a receiver to manage RC was an insufficient cure -- http://www.grassmueckgroup.com/cases/pathamerica/Path-America-KingCo-Notice-Termination.pdf. In other cases involving SEC enforcement actions against RC principals, where provision was made to remove alleged bad actors from RC management (*see, e.g.*, *SEC v. Muroff*, No. 1:17-cv-00180-CWD (D. Idaho, Apr. 28, 2017)(SEC complaint *available at* https://www.sec.gov/litigation/complaints/2017/comp23818.pdf) and *SEC v. Edward Chen, et al.*, No. 2:17-cv-06929-PA-JEM (C.D. Cal., Sept. 20, 2017)(SEC complaint *available at* https://www.sec.gov/litigation/complaints/2017/comp23944.pdf), USCIS has not moved to terminate the RC. The Administrative Appeals Office has imposed a balancing test for USCIS to apply before terminating the RC. *Matter of P–A–S, LLC,* ID# 513109 (AAO Dec. 21, 2017)(reversing RC termination); *Matter of S–D–R–C*, ID# 13768 (AAO Mar. 15, 2017)(remanding RC termination for further findings).

[22] USCIS policy states that the I-829 petition for removal of conditions would not be denied on account of RC termination alone, however, the investor will be required to prove she invested and sustained the investment by showing "[t]he required amount of capital was made available to the business or businesses most closely responsible for creating jobs." 6 *USCIS Policy Manual*, pt. G, ch. 5, C.

has been adversarial to victimized investors in the sense that it has not announced any safe harbors for defrauded immigrants and it appears not to be cooperating with court-appointed receivers seeking solutions that would preserve earned immigration benefits. For example, the Jay Peak case – which involves CLPR and non-CLPR investors in numerous commercial enterprises with varying degrees of development and distress -- is now three years old and the threat of deportation continues to hang over the heads of immigrants. These cases of business distress (involving fraud, diverted capital, business challenges, and/or operations failure), and the USCIS adjudications of related EB-5 investor petitions, are striking in terms of the extraordinarily high tolls exacted, the cumulative harms suffered, and the senselessness of the adversarial position taken by USCIS. Simply put: EB-5 investors acting in good faith have exposed hard-earned capital to business and commercial risks of loss as the law requires, and many of them have been defrauded in the process, but USCIS would impose adjudication standards that it (not Congress) has created in order to deny immigrants of their earned permanent residence benefits.

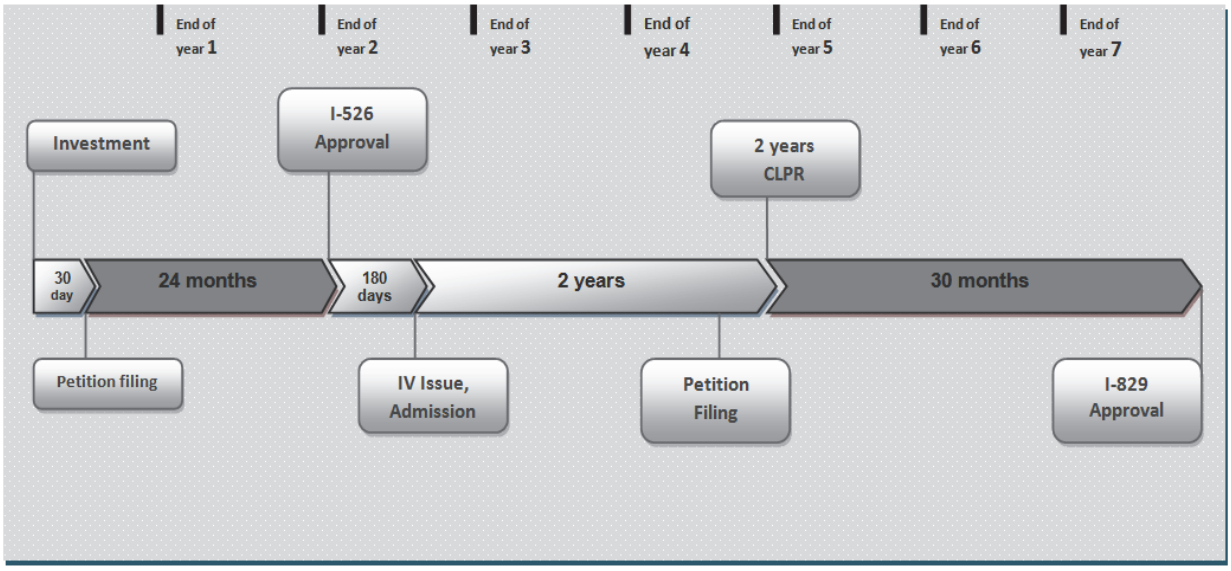
Added to the anxiety of possible deportation and the achingly complex nature of these business distress cases, there is the torment of the exceedingly lengthy immigration case processing. In design, from the time of initial investment to admission as CLPR and ultimately to final removal of conditions, the EB-5 program was conceived as a 3½ year to 4-year program at most. This timeframe aligned with reasonable expectations about taking risks with a substantial investment.[23]



But notwithstanding the growth of a large investor program office, funded with correspondingly high user filing fees,[24] USCIS's internal review of investor petitions has become inefficient, and the entirety of the EB-5 process now runs 7½ or 8 years or double what was originally intended.

[23] Some 15 years ago, the EB-5 program managers at USCIS acknowledged and actually developed informal adjudications policy around the thinking that a 5-year investment timeframe would be more than adequate for covering the entirety of the EB-5 immigration process, and thus a 5-year loan extended by the new commercial enterprise (NCE) to a borrower would be acceptable in the view of USCIS. Consider also USCIS decided for purposes of I-526 petitions to require the NCE business plan to provide for the required amount of job creation within 2½ years of the adjudication of the I-526 petition, based on the expectation that the investor would complete two years of CLPR within 2 ½ years of I-526 approval. 6 *USCIS Policy Manual*, pt.G, ch. 2, E (interpreting 8 CFR 204.6(j)(4)(i)(B)).

[24] Investors pay $3,675 for the I-526 petition, and roughly $4,000 for the I-829 petition and biometrics. RCs pay $17,795 for the I-924 filing for RC designation and/or project approval, and the annual RC fee of $3,035. Consider that the ambitious plan for launch of the Investor and Regional Center Unit, in 2005, called for a total of 4 staff – a program manager, two adjudicators, and a contract economist. The recent staffing of the Immigrant Investor Program office is in the range of 200 personnel.



The extended timeframe for case processing turns upside down many of the assumptions and risk calculations about EB-5 investment, especially in view of the unpredictability of the adjudication standards in the EB-5 application process.[25] When EB-5 visa backlogs are factored into the equation, perhaps adding 2, 3, even 10 more years to the EB-5 application process and further exposure to a distended set of USCIS standards, EB-5 investors caught in the turmoil of distress cases feel acute aggravation.

As if to put a few exclamation marks to the observations above, consider the general timeline for enforcement and immigration case denials in the public cases. In the *SEC v. Wang* ("Velocity Group") enforcement action[26] and related USCIS adjudications, the EB-5 investors were ensnared in a lengthy 8-year process that led ultimately to USCIS denying I-829 petitions:

Year 1 – EB-5 investors make investments in NCE associated with Velocity Group

Year 2 – USCS approvals of conditional lawful permanent residence (CLPR) for EB-5 investors

Year 3 – SEC filing of enforcement action against Wang, Ko and Velocity Group

Year 4 – Filings of I-829 petitions by EB-5 investors based on investments in NCE

Year 6 – SEC settlement with principal defendants[27]

Year 8 – USCIS denies I-829 petitions

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[25] For decades, USCIS has been criticized for failing to provide clear guidelines in the form of regulations. In a report dated April 2005, the U.S. Government Accountability Office (GAO) concluded that one of the principal obstacles to success of the program was the lack of regulations and clear guidance from USCIS. GAO Report to Congressional Committees, "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors," GAO-05-256 (Apr. 2005), AILA Doc. No. 05040475. In a March 18, 2009, report by the USCIS Office of the Ombudsman, USCIS was urged to engage in regulation development in order to provide more certainty in the EB-5 process. Office of the CIS Ombudsman, "Employment Creation Immigrant Visa (EB-5) Program Recommendations" (Mar. 18, 2009), AILA Doc. No. 09031868. But as of the date of this writing, regulations have not been promulgated for 25 years.

[26] *SEC v. Yin Nan "Michael" Wang, Wendy Ko, Velocity Investment Group Inc.*, No. 2:13-cv-07553-JAK-SS (C.D. Cal. Oct. 15, 2013)(SEC complaint *available at* https://www.sec.gov/litigation/complaints/2013/comp-pr2013-233.pdf).

[27] Final Judgment (Nov. 30, 2016), requiring payment of more than $90 million, *available at* https://www.sec.gov/files/Judg13-cv-07553Wang.pdf.

A similar 9-year timeline is found in the fraud case that led to forfeiture and criminal charges, in *United States v. Chan*,[28] for activities surrounding EB-5 investment with California Investment Immigration Fund ("CIIF").

Year 1 – EB-5 investors make investments in NCE associated with CIIF

Year 2 – USCIS approvals of CLPR status for EB-5 investors

Year 3 – Filings of I-829 petitions by EB-5 investors based on investments in NCE

Year 8 – Criminal proceedings initiated against principals of CIIF

Year 9 – USCIS denies I-829 petitions

When USCIS denies the I-829 petition, the EB-5 investor and family members are stripped of their CLPR status, there is no administrative appeal of the decision, and the final agency decision is reviewable in the immigration court where the government is seeking deportation in removal proceedings.[29] The odds are stacked very high.

While there may be sound legal arguments that can be advanced in the federal court (as will be discussed further in the sections that follow) when the case is in the posture of denied I-829 petition, the EB-5 investor is likely to be extremely dubious about any plan for moving forward. More often than not -- with so much time, financial resources, and emotional wellbeing invested -- investors holding a denied I-829 petition are feeling they have been put through the wringer; little or no trust remains in anything connected with the EB-5 process. There likely is the gnawing feeling that a substantial wealth transfer has passed from the EB-5 investor's family to others (to promoters, agents, attorneys and other professionals, principals of NCEs and regional centers) who have not delivered on their promises. From the perspective of EB-5 investors and families, this minefield stretches far over the horizon. The bewildering circumstances may help explain why EB-5 investors rarely act alone to initiate federal court litigation against the government to challenge the merits of an adverse decision. Most if not all EB-5 cases litigated on the merits in federal court are funded by, and about the legal issues that directly affect, the US-side parties and businesses like the RCs and other groups that are raising money from EB-5 investors. It may be, though, that more EB-5 investors need to go it alone and press the arguments that will be discussed next.

GOOD FAITH AND SUSTAINED INVESTMENT

A distillation of USCIS denials of I-829 petitions in business distress cases reveals fundamental flaws in the analysis USCIS uses to make its findings and reach its outcomes. These flaws might be summarized as failing to follow the letter of the 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 more broadly failing to apprehend the implications of legislative intent in granting EB-5 investors CLPR status in the first instance.

The cases reviewed typically involve an underlying investment structure where the EB-5 investors are investors in and owners of a limited partnership or like-formed NCE over which they have no control. In this structure 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 creation purposes.

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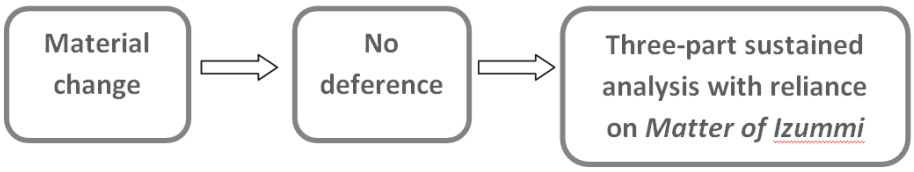
[28] *Attorney Pleads Guilty to Federal Charges Stemming from $50 Million Scheme to Defrauded the EB-5 Visa Program and Chinese Investors* (Nov. 27, 2017), https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa (guilty plea to visa fraud, wire fraud and money laundering charges). *See also* notice concerning civil forfeiture suits, https://www.justice.gov/usao-cdca/pr/us-files-9-lawsuits-seeking-forfeiture-properties-worth-over-30-million-allegedly, and also the shocking details contained in *Application for a Search Warrant Case No. 8:17-MJ-00088*, https://cbsla.files.wordpress.com/2017/04/eb-5-fraud-ciif-search-warrant.pdf.

[29] INA 216A(c)(3)(D); 8 CFR 216.6(d)(2). One legal maneuver possibly available to those who move quickly is to file a motion to USCIS for reopening or reconsideration of the adjudication. *See, e.g.*, Martin J. Lawler & Nam-Gio Do, *Strategies for Overcoming Denials of I-829 Petitions to Remove Conditions from Permanent Residence*, elsewhere in this volume.

As well in the reviewed cases there appears a pattern, a recurring format, that USCIS follows in the written denials of the I-829 petitions filed by EB-5 investors victimized by operator fraud. When that pattern is deconstructed it is clear that it is not moored to law. That pattern could be formulated as:



First to appear in this pattern is the USCIS discussion of deference. Essentially USCIS states that because there has been material change there can be no deference accorded in the USCIS 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. 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 any analysis of the regulation. Nor does USCIS confine its analysis to the enabling statute.

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 considering how to frame a challenge to these denials, there may be a wide range of relevant considerations, and different cases and clients perhaps warrant different emphases. But a return to first principles is in order: What does the actual law say? The enabling statute enacted by Congress clearly formulated the requirements for approval of the petition for removal of conditions. The petition must present evidence demonstrating that the EB-5 investor --

"(A)(i) invested, or is actively in the process of investing, the requisite capital" (*hereafter the "investment requirement"*); and

"(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United States" (*hereafter the "sustained requirement"*); and

"(B) is otherwise conforming to the requirements of section 1153(b)(5) of this title" (*hereafter the "otherwise conforming requirement"*).[30]

In the reviewed cases, USCIS makes no attempt to apply the letter of the enabling legislation or to give effect to what Congress may have intended in its crafting of the law in this form.

As for the regulations concerning the sustained requirement, the entirety of 8 CFR 216.6(a)(4) for removal of conditions bears quoting (bold added):

"Documentation. The petition for removal of conditions must be accompanied by the following evidence:

[30] INA 216A(d)(1), as amended. In 2002, in connection with a very lengthy piece of legislation intended primarily to provide relief for certain EB-5 investors, the "otherwise conforming requirement" was added to this section 216A. Pub. L. No. 107-273, 116 Stat. 1758, Title I, Subtitle B, Ch. 1, 11036(b) (2002). No legislative history, regulations, or policy exist for this particular requirement.

(i) Evidence that a commercial enterprise was established by the alien.[31] Such evidence may include, but is not limited to, Federal income tax returns;

(ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and

(iii) Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has**, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence.** Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements."

USCIS denials of I-829 petitions in business distress cases may cite to the applicable regulation for removal of conditions, however, there is every indication that USCIS does not actually follow the regulation in rendering its decisions. Most telling, in all the cases reviewed there is not a single mention of the term "good faith" in the course of the USCIS analysis of the sustained requirement in distress cases. How could USCIS be applying the law correctly if there is no discussion at all of good faith? Lacking this analysis of a central term appearing unambiguously in the agency's regulation, the decisions are clearly reversible as arbitrary and capricious. The law on federal court relief recognizes that an actionable claim is stated where the plaintiff suffers legal harm as a result of an agency's decision, which may be set aside by the court for failing to follow applicable law such as a controlling regulation.[32]

A decision in accordance with the applicable regulation on the sustained requirement 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.[33] For example, in marriage-based immigration, which is the only other form of immigration involving CLPR status, an immigrant who is no longer married may obtain waiver of the requirement of a joint petition for removal of conditions upon presenting evidence of a good faith marriage.[34] In such cases, evidence of the *intent of the petitioner* is the paramount consideration. Where there is at least some evidence the marriage was bona fide such as admittedly self-serving testimony and two years of joint income tax returns, and the government presents no evidence in opposition, the standard is satisfied. It is not grounds for denial that petitioner presented no wedding photos, witnesses to a wedding, or joint financial documentation.[35] Moreover, there is no "federal dictate" about what a good faith marriage should look like, and immigrants cannot be expected to have more "successful" marriages than citizens.[36]

The same conceptual framework would be controlling if USCIS were to apply the good faith regulation on the sustainment requirement. 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 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 the EB-5 investor has not with-

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[31] The "established" provision was stricken from the statute in 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title I, Subtitle B, Ch. 1 (2002), however, there is no conforming regulation.

[32] 5 USC 702 and 5 USC 706(2)(A).

[33] Note the regulatory commentary includes a discussion of how the agency would approach the adjudication of the I-829 petition where the entire required investment had not yet been made to the NCE. The commentary indicated the investor's "good faith" would be evaluated in terms of subjective factors (as in the intention of the investor) and objective factors (as in proven ability to complete the investment to the NCE). *See* Commentary to Proposed Rule, 59 Fed. Reg. 1317 (Jan. 19, 1994).

[34] INA 216(c)(4); 8 CFR 216.5(e)(2).

[35] *Lara v. Lynch*, 789 F.3d 800 (7th Cir. 2015).

[36] *Bark v. INS,* 511 F.2d 1200, 1201–2 (9th Cir. 1975); *Damon v. Ashcroft*, 360 F.3d 1084 (9th Cir. 2004).

drawn any part of the invested capital. Also, in a typical distress case the evidence would show that the EB-5 investor lacks control over the NCE; the EB-5 investor is a victim of fraud and may be losing all or a substantial part of the invested capital; and there is no evidence of "bad faith" of the EB-5 investor. Furthermore, without a clear policy choice made by Congress in the letter of the statute to strip away the residence status of EB-5 investor families who have sustained their investments, USCIS lacks the legal authority to impose a "federal dictate" that effectively takes the investor to task for having made an investment that has failed. Even the investment professionals, venture capitalists, fail in their investment choices in startup businesses between 60 to 75% of the time.[37] It makes tremendous sense that Congress never intended to trick and 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 – in a purgatory with unlikely passage to immigration heaven.

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. Thereafter it is left to USCIS to present *contrary evidence*. Although evidence of "derogatory information" is not necessarily designed in the regulatory structure to counterpoise evidence of good faith, such evidence effectively accomplishes burden shifting back to the investor for purposes of removal of conditions. That part of the regulation states:

"If derogatory information is determined regarding *any of these issues* or it becomes known to the government that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs), the director shall offer the alien entrepreneur the opportunity to rebut such information. If the alien entrepreneur fails to overcome such derogatory information or evidence the investment funds were obtained through other than legal means, the director may deny the petition, terminate the alien's permanent resident status, and issue an order to show cause."[38]

Of central concern in this part of the regulation are the questions – What is "derogatory information"? And what is meant by the language "any of these issues"? To the latter question, the regulation is referring only to the few eligibility requirements for removal of conditions, including the sustained requirement. We already know from parsing the regulatory language above that "these issues" in terms of the sustained requirement refers to the EB-5 investor's good faith, substantially meeting the capital investment requirement, and continuously maintaining the capital investment. If the investor lacked good faith or withdrew the investment, then that evidence would be derogatory.

A core objective of this part of the regulation concerning derogatory information is to provide an opportunity to rebut. 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.[39] 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.[40] They also ignore that the investor is required only to present relevant documentation that meets a preponderance of evidence standard.[41] 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

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[37] *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.

[38] 8 CFR 216.6(c)(2)(italics added).

[39] *Abdel-Masieh v INS*, 73 F.3d 579, 586 (5th Cir. 1996); *Spencer Enterprises Inc. v. US*, 345 F.3d 683, 694 (9th Cir. 2003), requiring substantial evidence. 5 USC 706(2)(D), providing a cause of action for failing to follow process prescribed by law.

[40] 5 USC 706(2)(A) provides a cause of action to challenge agency decisions that are arbitrary and capricious.

[41] 6 *USCIS Policy Manual*, pt. G, ch. 2, E.

investor to a higher standard of proof than is required by law.[42] For all these reasons, the reviewed decisions are arbitrary and capricious and actionable in a federal court.

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. Both the nature and purpose of CLPR are ascertainable 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.[43] Instead of making EB-5 investors subject to the same conditions already set forth for married applicants,[44] a separate code section was created specifically for EB-5 investors with CLPR. That section, INA 216A relating to conditions for EB-5 investors, is a relatively lengthy body of law considering it is approximately three times the length of INA 203(b)(5) which describes the requirements for initial eligibility in the EB-5 category visa. INA 216A articulates precisely what conditions Congress intended for EB-5 investors.

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 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."[45] 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.[46] The provision was adopted later in the EB-5 statutes enacted into law and codified at INA 216A. 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, or of the continuity of a particular RC. 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.[47]

Apart from the nature and purpose of CLPR, of probable further interest to a federal court is that the determination of whether the EB-5 investor has sustained the investment is to be *liberally interpreted*. In the comment to the final rule, legacy INS explained:

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[42] 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).

[43] *See* Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990)(providing for conditional residence for EB-5 investors at INA 216A(a)(1)). 8 CFR 216.1, 1216.1, as amended: "A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act, except that a conditional permanent resident is also subject to the conditions and responsibilities set forth in 216 or 216A of the Act, whichever is applicable, and part 216 of this chapter." The reference to 216A of the Act was added in 1994 when legacy INS promulgated regulations for removal of conditions for EB-5 investors. The cited statute, INA 101(a)(20), provides: "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." This includes rights to file petitions for relatives, apply for naturalization, register for Selective Service, and reside permanently in the United States. This is distinct from "temporary residence" conferred on undocumented persons under the IRCA legalization program. INA 245A(a). By statutory definition, the temporary resident was *not a permanent resident*, but rather could get work authorization, was afforded "amnesty" and was free of worries of deportation for the time being, and then was required to apply for permanent residence within 43 months of obtaining temporary residence.

[44] The conditional concept already existed in law as of 1986, as immigrants via marriage also could be subject to conditions under the provisions of the Immigration Marriage Fraud Amendments of 1986 (IMFA).

[45] S. 358, 101st Cong. §204 (1989).

[46] 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).

[47] *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).

> This liberal interpretation of the term "sustained" permits the Service maximum flexibility in determining whether the requirements for removal of conditional resident status have been met, as well as following Congress'[s] intent to ensure that "all aliens receiving visas in this section . . ." continue their new commercial enterprises so that the creation of U.S. jobs and the infusion of capital into the U.S. economy is sustained.[48]

Principles of statutory construction inform that the liberal interpretation of the text is to the favor of the EB-5 investor not to the agency, particularly since the EB-5 investor with CLPR faces removal/deportation proceedings if USCIS denies the I-829 petition.[49] This reference to liberal interpretation is not a green light for USCIS to make up new requirements. USCIS should be viewing the totality of circumstances when considering whether the EB-5 investor in good faith sustained the investment. Hence, among the relevant facts are -- the EB-5 investor has permanent residence rights; the sole purpose of the conditional feature is to deter the EB-5 investor's fraud; the EB-5 investor made an investment in good faith; the EB-5 investor has not withdrawn the investment; and now the EB-5 investor has been victimized by another's fraud or the business is otherwise in distress.

In sum, in order to ascertain whether the EB-5 investor meets the sustained requirement in distress cases, USCIS must acknowledge the purpose of CLPR is to deter the EB-5 investor's fraud not that of other participants, must consider the EB-5 investor's good faith, and should be flexible and reasonable. Where USCIS fails to follow applicable law in denying a petition to remove conditions, that denial is actionable in federal court as arbitrary and capricious.[50]

A FLAWED STANDARD FOR SUSTAINED INVESTMENT

Above all else, USCIS must follow the applicable law regarding the adjudication conditions and not create additional requirements. The reviewed business distress cases expose a new legal standard that USCIS uses to deny I-829 petitions, consisting of a new sustained investment analysis that has three parts. In a typical I-829 petition denial, 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.'"[51]

What is first obvious is that this adjudication criterion is found nowhere in the statute (INA 216A) and nowhere in the regulations (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

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[48] Commentary to Final Rule, *supra* note 45, at 26588.

[49] INA 216A(c)(3)(D). An ameliorative legal standard (arguably, as exists in the removal of conditions statute) should be given an ameliorative interpretation by the agency and courts. *Lopez-Birrueta v. Holder*, 633 F. 3d 1211 (9th Cir. 2011). Statutes that provide for deportation are to be narrowly construed in favor of aliens. *INS v. St. Cyr*, 533 US 289, 320 (2001).

[50] 5 USC 706(2)(A). *See generally Immigration Lawsuits and the APA: The Basics of a District Court Action*, American Immigration Council (June 2013).

https://www.americanimmigrationcouncil.org/practice_advisory/immigration-lawsuits-and-apa-basics-district-court-action. For a compendium of federal case law related to litigation of immigration matters consult KURZBAN'S IMMIGRATION LAW SOURCEBOOK.

[51] The same formulation is found at 6 *USCIS Policy Manual*, pt. G, ch. 5, C, the section for adjudication of I-829 petitions and the subpart concerning material change.

category,[52] and is not carried over into the law concerning removal of conditions. The "full amount of money must be 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.

Arguably, in a general sense the reference to *Matter of Izummi* in denials of I-829 petitions in business distress cases cannot stand as reliance on binding legal authority since 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.

We already established that the law on adjudication of I-829 petitions is not a reprint of the law on adjudications of I-526 petitions; the law governing adjudications of these two forms of EB-5 petitions are different.[53] To demonstrate initial EB-5 eligibility the investor must present documents concerning not only investment, but also concerning a "new" business that is a "commercial enterprise," management participation, and past or future job creation. On the other hand the statutory criteria for removal of conditions are abbreviated, including in specifics only the investment requirement and the sustained requirement.[54] That makes sense given their different objectives, with the I-526 petition typically supported by a forward-looking business plan for using at-risk investment capital that is estimated to create a sufficient number of jobs, and the I-829 petition supported by for the most part backward-looking documentary evidence of what happened after the investment was made. 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.

In instances where Congress has delineated clearly what it requires, the agency "must give effect to the intent of Congress" and not attempt to impose additional requirements not found in the statute.[55] This inherent limitation on agency power is reflected in the maxim of statutory construction *expressio unius est exclusio alterius* ("the explicit mention of one is the exclusion of the other").[56] With such clear legislative distinctions made by Congress it could be argued that no part of the adjudications criteria is left to agency discretion.

Until such time USCIS changes its policy, USCIS is using the three-part sustained analysis identified above in denying I-829 petitions filed by EB-5 investors in distress cases. Of course, the key parts of this are the language "the full amount of money must be made available to the business(es) most closely responsible for creating the employment" and the subsequent USCIS emphasis placed on a "job-creating enterprise" or "JCE" – a nomenclature USCIS created without any statutory basis. In the Velocity-connected investor cases,

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[52] "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." 8 CFR 204.6(j)(2).

[53] *Compare* INA 216A *with* INA 203(b)(5). *See* earlier discussion in Stone, *I-829 Primer*, 2006, *supra* note 5, and an appellate court's observation that the I-526 petition requires "much more comprehensive documentation of the petitioner's plans and resources." *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006)(where the language in a statutory scheme is distinct in different sections, the intention is to give effect to the distinction); *Iselin v. United States*, 270 U.S. 245, 250 (1926)(warning against "enlargement" of a statute when the task is "construction" of it as written); *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted").

[54] The general, catch-all "otherwise conforming requirement" was added in 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title I, Subtitle B, Ch. 1, 11036(b) (2002). The 2002 amendments also eliminated from the petition adjudication conditions the requirement that the investor "established" the new commercial enterprise.

[55] *See, e.g., Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997); *Almero v. INS*, 18 F.3d 757, 760 (9th Cir. 1994). Deference to the agency is not warranted if the agency's standards are contrary to statute. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

[56] *See, e.g., Ardestani v. INS*, 502 U.S. 129, 145-46 (1991); *Carlson v. Reed*, 249 F.3d 876, 882 (9th Cir. 2001); *Gee v. INS*, 875 F. Supp. 666 (N.D. Cal. 1994).

for example, although the EB-5 investors stand a chance of losing their entire capital investment, the denial reads: "Lack of genuine actions by the JCE, and material change in the use of the NCE's funds, establishes the petitioner's capital is not at risk." With the petitioner failing to show the capital investment is "at risk" in this sense, USCIS decided the investment has not been "sustained". Similarly, because the EB-5 investors in the CIIF-connected cases could only document $2.5 million of expenditures made of the total $9.5 million received by the NCE from EB-5 investors, the petitioners could not show they "continuously sustained the capital investment requirement" as required by law.

There perhaps is no better evidence that USCIS ignores the distinctions in law, and conflates the two statutory schemes, than the fact that the analysis used by USCIS for denial of an I-829 petition to remove conditions in for instance the Velocity-connected case (material change>>>no deference>>>three-part sustained analysis with reliance on *Matter of Izummi*) is the very same analysis used by USCIS for denial of the I-526 petition to establish initial EB-5 category eligibility filed by an EB-5 investor in a Velocity-connected case. In effect, in adjudicating the I-829 petition for removal of conditions the agency ignores the binding law on removal of conditions and instead applies the law and its policies concerning its adjudications of I-526 petitions for initial EB-5 category eligibility. In cases where the statutory scheme is clearly different and the distinctions are ignored in the agency decision, the federal court is likely to nullify the decision.[57]

To repeat, USCIS is denying I-829 petitions filed by investors in business distress cases for the reason that the bad actor fraud or a diversion of funds violates the *Izummi* prescription that the "full amount of funds must be made available to the businesses most closely responsible for job creation." I have assumed it is necessary to confront the *Izummi* case head on in order to advocate for EB-5 investors in business distress cases. *Izummi* is a precedent decision of the agency and it is not that fact that is contested; rather it is the application of *Izummi* to the circumstances that should be challenged vigorously. Numerous grounds exist, and each standing alone could serve as grounds for the federal court to enter an order approving the I-829 petition. At the heart of the challenge in federal court is the contention that the application of the *Izummi* formulation as a standard for the sustainment requirement in the adjudication of I-829 petitions is arbitrary and capricious. The *Izummi*-anchored formulation that the "full amount of investment" 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,"[58] 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
substantially met investment requirement	full amount of money
in process of investing	made available

[57] *Kucana v. Holder*, 558 US 233 (2010), concerning interpretation of IIRIRA to bar motions to reopen.

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

to new commercial enterprise	**to businesses most closely responsible for job creation**
continuously maintained investment	**not considered**

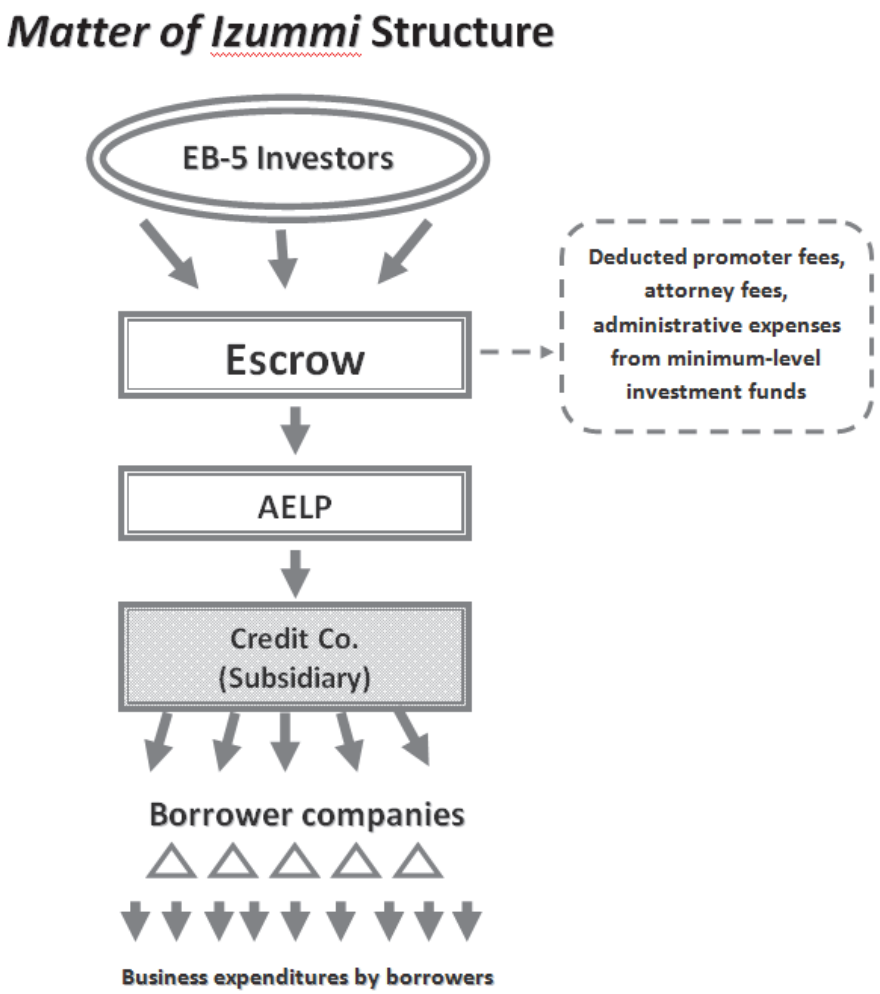
There should be no doubt the *Izummi*-based test for sustainment sets forth a new substantive rule, and as such a federal court may nullify its application because USCIS did not follow notice and comment strictures as required by the APA prior to adoption of the rule.[59] Related to that, but standing 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 detriment to the investor and family who are now subject to deportation and weigh those harms against the interest the USCIS would have in applying the new rule and adjudication criteria retroactively.[60]

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.

[59] 5 USC 553(b)(c)(requiring advance notice of rulemaking and opportunity for comment, except for interpretative rules and general statements of policy).

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

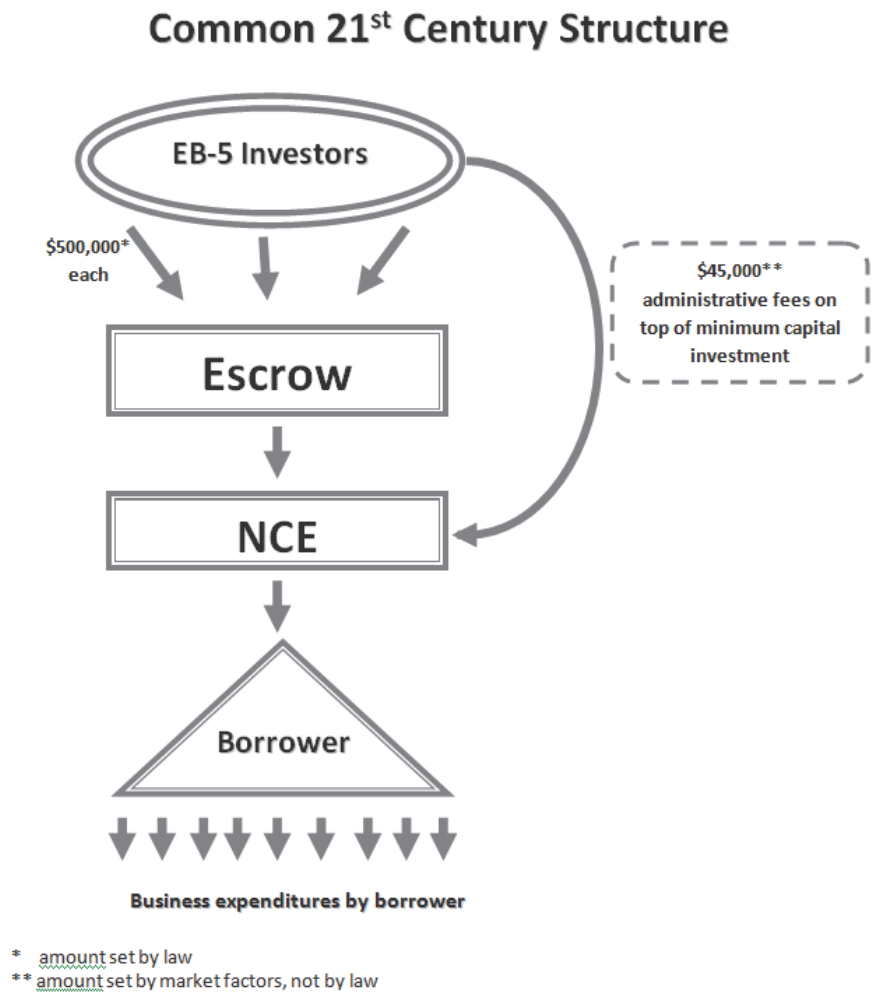


Considering the *ratio decidendi* of this part of *Izummi*, the case teaches that it will be grounds for USCIS denial of the I-526 petition if the investment structure is designed so that administrative expenses are withdrawn at the level where EB-5 capital is raised without the minimum required capital reaching that part of the NCE that is engaged in job-creating business activities such as lending.[61] As an aside, *Izummi* was decided more than 20 years ago, and its aftermath featured many wayward adjudication trends that required corrective action.[62] 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

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

[62] 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. Lincoln 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* Lincoln Stone, *Immigrant Investment in Local Clusters: Part II*, 80 *Interpreter Releases* 937, 941 (July 14, 2003). Other practitioners have encountered different kinds of "pre I-829" problems caused by what appears to be the USCIS insistence that "Izummi-isms" lurk everywhere. *Izummi* has penetrated USCIS thinking on permissible bridge financing structures, *see* Carolyn Lee, *Izummi: 20 Years Later*, elsewhere in this volume; *see also* discussion of USCIS policy on redeployment of capital that is premised on the unfounded determination that the sustainment period requires the investment to be "at risk". H. Ronald Klasko, *At Risk, Debt Arrangement, Guaranteed Redemption: Important Distinctions*, ILW.COM, (July 12, 2018).

design problem by requiring EB-5 investors to funds administrative expenses by paying an amount above the minimum required capital of $500,000.



What makes the three-part *Izummi*-anchored sustainment standard especially distressing is what might be called an ill-advised sleight of hand. The *Policy Manual* completely ignores the context, and thus is an act of *contextomy* -- the practice of misquoting someone by shortening the quotation or by leaving out surrounding words or sentences that would place the quotation in 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.[63]

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 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. If so, 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 probability 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[64] – 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.[65]

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[63] 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, AILA Doc. No 09121561.

[64] Federal court review of agency decisions typically is subject to the arbitrary, capricious or abuse of discretion standard, meaning the agency interpretation receives deference so long as the interpretation is a reasoned evaluation of relevant factors. An agency's interpretation of its own rules and regulations also is entitled to deference, *Auer v. Robbins*, 519 US 452 (1997), but the deference will not shield an erroneous interpretation of clear and unambiguous language. *Pereira v. Sessions*, 585 US __ (2018).

[65] *See, e.g*., *Doe v. Johnson*, No. 15-cv-01387 (E.D. Ill. Mar. 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.

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.

As indicated earlier in this writing, USCIS denials of I-829 petitions in these business distress cases rely significantly on statements that there is no deference due to earlier determinations where there has been material change, and consequently, the petitioner must show that all invested capital has been "made available" to the businesses involved most closely in job creation. On the face of it, these statements appear to be a detour in reasoning, or a *non sequitur*, since the law on adjudication of I-829 petitions already is set forth in statute and regulations. For all the potential good that flows from application of deference in agency decision making,[66] it is odd how a (no) deference determination is blended with the mess of material change to concoct an entirely new set of legal standards. Unfortunately, it is not clear that USCIS limits its deference/no deference determinations to the small set of issues that carry over from the I-526 petition adjudication to the I-829 petition adjudication (as in for example, that the job creation *methodology* is "reasonable"). Under the heading of "material change" the *Policy Manual* acknowledges change may be beyond the investor's control, and material change does not automatically defeat the I-829 petition for removal of conditions.[67] However, it is also under this same heading of material change that the *Policy Manual* imposes a new legal requirement, that is, the I-829 petition must show the EB-5 capital "was made available to the business or businesses most closely responsible for creating jobs."[68]

If the formulation alleged to exist in *Izummi* is not a statutory or regulatory-based requirement for removal of conditions in the first place, then how does that formulation become a part of the law in cases where there is no deference on account of the existence of material change? It is not clear why deference and its material change corollary must be interjected into the analysis of sustained investment when adjudicating I-829 petitions for EB-5 investors in business distress cases. Apart from other available arguments, as already stated above, changes in the legal standards for removal of conditions during the time the investor is an applicant in the EB-5 program are prohibited as impermissibly retroactive because the investor should be able to expect the standards for removal of conditions are predictable from the outset.[69]

When the transitory nature of policy guidance is combined with (i) the reality that change is almost everywhere in the course of a business, and (ii) the uncertainties about what USCIS considers to be a "material"

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[66] Deference can help preserve agency resources, preventing the constant revisiting of issues already decided. For example, the approval of one I-526 petition that necessarily involves USCIS finding that a business plan is "comprehensive" should also decide the same issue of "comprehensive" for the next USCIS examiner adjudicating the I-526 petition filed by a co-investor in the same NCE. 6 *USCIS Policy Manual*, pt. G, ch. 6.

[67] "USCIS recognizes the process of carrying out a business plan and creating jobs depends on a wide array of variables of which an investor may not have any control… In order to provide flexibility to meet the realities of the business world, USCIS permits an immigrant investor who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed." 6 *USCIS Policy Manual*, pt. G, ch. 5, C.

[68] *Id*.

[69] *Chang, supra* note 60. Ironically, what the court in *Chang* found impermissibly retroactive was the imposition of new standards announced by the agency precedent decisions of 1998, including *Izummi*, to the adjudication of I-829 petitions. Yes, it is *the rubble of our sins*, and we have been here before. (Lyrics to Pompeii by Bastille, 2013).

change,[70] it is time to rein in a misplaced reliance on principles of deference and material change. Better to peg adjudications of I-829 petitions to the statutory criteria. 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 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.

DISTRESS CASES, JOB CREATION, AND REMOVAL OF CONDITIONS

Because USCIS is using the independent factor of insufficient job creation to support denials of I-829 petitions,[71] attention to job creation in business distress cases is imperative. A thorough discussion concerning the evidence of job creation for I-829 petition purposes is outside the scope of this article.[72] Also, the procedures for challenging an adverse decision by USCIS are addressed separately.[73] The final section of this article is concerned with the narrower objective of challenging USCIS determinations based on insufficient job creation in business distress cases.

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 policy.

Ultra Vires Regulation and Policy

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.[74] 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,[75] 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.[76] 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

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[70] *See* Robert Divine, *What Happens When Things Change in EB-5 World?*, elsewhere in this volume.

[71] *See, e.g.*, *Doe v. Johnson*, *supra* note 65.

[72] *See* Michelle Franchett, *Job Creation for I-829 Petitions*, elsewhere in this volume, for discussion of evidence of job creation in support of I-829 petitions.

[73] *See* Martin Lawler & Nam-Giao Do, *Strategies for Overcoming Denials of I-829 Petitions to Remove Conditions from Permanent Residence*, elsewhere in this volume.

[74] *See, e.g.*, Stone, *Revisiting CLPR*, 2014, *supra* note 8.

[75] 134 Cong. Rec. S2119 (1988).

[76] S. Rep. No. 101-55, at 21 (1989).

small businesses with employees will go out of business within the first five years.[77] 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."[78] Because precepts of statutory construction require the conclusion that Congress intended to omit job creation as a petition adjudication condition for I-829 purposes, this regulation may be *ultra vires* and held invalid by a federal court. To mask the *ultra vires* action in the shape of a regulation does not lend legality to the agency action, because an agency cannot promulgate regulations that are beyond its statutory authority.[79] A regulation that "operates to create a rule of harmony with the statute is a mere nullity."[80]

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-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.[81] These policy statements, however, do not serve to repair the problem that the agency is acting without the authority from Congress.

Arbitrary Application of Regulation to Regional Center-Associated Cases

Assuming for the sake of this discussion that the regulation on proof of job creation is applicable law for removal of conditions purposes, then next is the task of interpreting that regulation. Earlier publications present an exhaustive analysis of the arbitrary interpretation of the regulation to impose a requirement of "completed job creation" that contravenes the clear architecture of the regulatory scheme to treat regional center-associated investor petitions.[82] To abbreviate the argument, it starts with the observation that there is a clear design that is evident in the regulations concerning job creation. The regulation requiring job creation evidence in support of the initial I-526 petition has three parts—(i) *General*, (ii) *Troubled business*, and (iii) *Immigrant Investor Pilot Program*. That part (iii) of the regulation stands on its own and is the exclusive standard for Pilot Program-based cases, is clear from the history of regulatory development. When first promulgated, 8 CFR §204.6(j)(4) included only parts (i) and (ii).[83] The Pilot Program was enacted thereafter, and legacy INS

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[77] SBA Office of Advocacy, Small Business Facts (June 2012), https://www.sba.gov/sites/default/files/Business-Survival.pdf

[78] 8 CFR 216.6(c)(1)(iv).

[79] The legal claim would be advanced under the Administrative Procedures Act (APA), 5 USC 706(2)(C); *United States v. Larianoff*, 431 U.S. 864, 872 (1977). *See also Mart v. Beebe*, No. CIV. 99 1391 JO, 2001 WL 13624 (D. Or. Jan. 5, 2001); *Ali v. Smith*, 39 F. Supp. 2d 1254 (W.D. Wash. 1999); *Tenacre Foundation v. INS*, 892 F. Supp. 289 (D.D.C. 1995). *See also INS v. Cardoza-Fonseca*, 480 US 421, 446 (1987) regarding statutory interpretation.

[80] *Manhattan General Equipment Co. v. Commissioner*, 297 US 129, 134 (1936).

[81] Stone, *Immigration Risk*, 2010, *supra* note 8 (addressing USCIS policy memos issued in 2009); Stone, *Revisiting CLPR*, 2014, *supra* note 8 (addressing adjudications policy memo of 2013).

[82] *Id*.

[83] Final Rule, 56 Fed. Reg. 60897 (Nov. 29, 1991).

promulgated the implementing regulations by adding part (iii) to indicate what is required for Pilot Program-based petitions.[84]

It is clear that both parts (i) and (ii) require evidence of tax records and I-9 forms of the "qualifying employees" of the commercial enterprise. Notably, part (iii) relating to Pilot Program-based investor petitions does not require evidence of tax records and I-9 forms for "qualifying employees," but instead refers to reasonable methodologies for creating positions for 10 "persons." Such petitions may be supported by evidence of job creation based on "reasonable methodologies"[85] or expert economic analysis concerning indirect job creation that goes beyond evidence of actual payroll records and I-9 forms.[86]

Legacy INS and Congress understood well that workers in indirect jobs in the regional center sense of the term are different from the directly employed workers of a business. In the regulation quoted in full above, which addresses the required evidence of job creation in an EB-5 case, use of the term "qualifying employees" is in the subpart relating to *General*—that is, for a standard EB-5 case that is not regional center associated. The initial I-526 petition must demonstrate that the investor "will create not fewer than ten (10) full-time positions for qualifying *employees*." On the other hand, where the regulation treats the required evidence for *Immigrant Investor Pilot Program*—that is, for a regional center-associated EB-5 case—the regulation requires the I-526 petition to include "evidence that the investment will create full-time positions for not fewer than 10 *persons*."

The two different terms are used because there is a specific purpose in making the distinction. Evidence of future jobs in a standard EB-5 case consists of identified "employees" who are working directly for and on the payroll of the NCE. Evidence of jobs in a regional center-associated EB-5 case, on the other hand, consists of a much broader category of unknown "persons" who may work in jobs throughout the economy, as estimated by reasonable methodologies in the opinion of an expert economist. Consequently, when legacy INS promulgated the regulation concerning removal of conditions -- just one month after promulgating regulations for regional center-associated cases -- and required the I-829 petition to include evidence of "qualifying employees," it clearly intended that requirement to apply only to the I-829 petitions in standard EB-5 cases not to the I-829 petitions in regional center cases.

These clear distinctions in language used in regulations are passed over by USCIS policy makers, and thus examiners who review the I-829 petition will consider the CLPR period to be a crucible for measuring regional center-associated job creation. Although these are difficult textual arguments that perhaps do not curry favor with policymakers and may not survive the promulgation of new regulations or statutory revision, such changes in law would be prospective. Until then, EB-5 investors in distress cases connected with designated regional centers should be advancing the arguments that the agency's decision, practice, policies, rules, criteria, and interpretations of law are arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law.[87]

Timeframe for Job Creation

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,

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[84] Final Rule, 59 Fed. Reg. 17920 (Apr. 15, 1994).

[85] 8 CFR §204.6(m)(7)(ii). For a discussion of reasonable methodologies, see Paul Sommers & Lincoln Stone, *Job Creation Methodologies for EB-5 Immigrant Investors*, elsewhere in this volume.

[86] For a thorough discussion of the investor pilot program and regional centers, see Lincoln Stone, *Policy Considerations in the Immigrant Investor Pilot Program*, IMMIGRATION OPTIONS FOR INVESTORS AND ENTREPRENEURS (AILA 1st ed. 2006). The "pilot" subsequently was dropped from the name.

[87] 5 USC 706(2)(A). Although deference is due to agency interpretation of its own regulation, the interpretation cannot be upheld if it is plainly erroneous or inconsistent with the regulation. *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998), citing *United States v. Larianoff*, 431 US 864 (1977).

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."[88] 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.[89] 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.[90] This stance continues in the current *Policy Manual*.[91] 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.[92]

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.[93] 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.[94] Then there are the enterprises further challenged by bad actors 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 pos-

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[88] 8 CFR 216.6(c)(iv).

[89] *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.

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

[91] "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." 6 *USCIS Policy Manual*, pt. G, ch. 5, B.2.

[92] 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).

[93] Franchett, *supra* note 72 (relying on study revealing delays in construction are common, Syed Ahmed & Salman Azhar, *Construction Delays in Florida: An Empirical* Study, https:schoolofconstruction.fiu.edu//ResearchReports/Delays_Project.pdf).

[94] *In re Lucky Dragon Hotel & Casino LLC*, 2:18-bk-10792 (Dist. Nevada, Feb. 16, 2018).

sible redeployment in job-creating uses.[95] 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.)"[96] 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.[97] 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. USCIS views the conditional residence period as a crucible for meeting job creation requirements. 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.[98] 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.[99] 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 Administrative Procedure Act (APA).[100] 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,"[101] 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.

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[95] *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.

[96] BLACK'S LAW DICTIONARY at 657 (7th ed. 1999).

[97] *See*, *e.g., Elavon, Inc. v. Wachovia Bank*, 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).

[98] 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).

[99] *Id.*, response to question 5.

[100] 5 USC 553(b)-(c).

[101] 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.

CONCLUSION

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.

As stated at the outset this article is concerned with what the law is, and not with policymaking. But a few closing comments are warranted. Suffice to say, USCIS policies should be aligned with statutory objectives. 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.

By way of comparison, the legal structure of the EB-5 program could be analogized to the legal structure of the new markets tax credit (NMTC) program. With the NMTC program the investor receives a substantial benefit – a federal tax credit – in return for having made an investment that Congress seeks to promote. The investment must be made in a community development entity (CDE), which in turn must use substantially all of the invested funds in qualified low-income investments.[102] With the NMTC program, in specific statutory language Congress established there would be "recapture" or the tax credit would not be allowed if for whatever reason the funds are not used in a low-income community business.[103] Furthermore, in the legal structure of the NMTC program the bankruptcy of a CDE would not constitute a recapture event, that is, the investor would not lose the tax credit.[104] The NMTC example is provided here merely to demonstrate how in a somewhat comparable federal benefit-investment program the critical policy choices have been made about unintended outcomes, and those policy choices are enshrined in a body of law that was created according to the appropriate legislative process. Congress did that, too, for the EB-5 program. It chose to require the EB-5 investor to make a good faith, long-term investment that could create jobs. It did not choose to make the EB-5 investor the guarantor of business success.

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

[102] 26 USC 45D *et seq*.

[103] 26 USC 45D(g)(3).

[104] 26 CFR 1.45D-1(e)(4).

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.