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MEMORANDUM

TO: Alejandro N. Mayorkas, Esq.
Director

FROM: AILA EB-5 Committee

RE: Impact of Change of USCIS Policy Regarding Indirect Job Creation Using Tenant Occupancy Economic Methodology
"Tenant Occupancy" Announcement February 17, 2012

DATE: March 26, 2012

Dear Director Mayorkas:

The American Immigration Lawyers Association, through its EB-5 Committee, offers the following comments in connection with the USCIS announcement on February 17, 2012, regarding "Tenant Occupancy" methodology in the adjudication of cases under the EB-5 program.

Introduction

The USCIS "Tenant Occupancy" position announced on February 17, 2012, regarding counting of indirect jobs in regional center projects using a tenant occupancy economic methodology must be applied in a manner that does not detrimentally impact regional centers, developers and investors who justifiably relied on economic methodologies previously accepted by USCIS.

USCIS has made tremendous strides in transparency and engagement in the past few years. For this reason the fact that that there was no specific notice to stakeholders, nor an opportunity to comment on this new position prior to its announcement, came as a daunting surprise to us.

We note that USCIS previously approved a multitude of cases using the tenant occupant methodologies that are now at issue. USCIS' February 17, 2012, announcement was followed by numerous RFEs. USCIS's current position on tenant occupancy economic methodologies will

adversely impact regional centers, developers and investors as well as others who relied on USCIS's prior position on this issue.

The extensive outreach in which USCIS typically engages on the EB-5 program is crucially important because of the job-creating impact of the projects planned under this program and our clients' investments in those projects, already committed to these projects, as required. A change in course by the agency on an aspect of this program has an immediate and profound impact on both the planning process for EB-5 projects under consideration, and on investor value in the context of projects that are the subject of pending unadjudicated petitions that might be affected by such a change. Given the impact of such changes on the business plans of our clients, AILA believes that the better course would have been to have a subject-specific engagement on "tenant occupancy" issues in advance of any announcement on the subject. We hope that this observation is received in the spirit of ongoing dialogue and collaboration with which it is offered.

Despite USCIS's publishing a four month target processing time for regional center designation, USCIS's position on tenant occupancy methodology will now subject regional center applications that have been pending as long as eighteen months to even greater delays. Moreover, due to USCIS's current position on tenant occupancy methodology, many of these projects will no longer be approvable as they are currently structured, even though they were structured and in many cases, subsequently marketed based on then-current USCIS standards. The unfairness of this outcome will, we hope, guide USCIS's application of its new position to purely prospective cases.

Purpose of This Paper

The purpose of this paper is not to debate economic methodologies and whether previous approved economic methodologies or the new economic methodologies referenced in the RFEs are better or worse. These issues will be the subject of input from expert economists.

Rather, the purpose of this paper is to discuss legal issues raised and significant policy issues, including the impact on developers, investors and the future of the EB-5 program. We hope to provide guidance to USCIS regarding to whom this new policy should be applied and to whom it should not be applied as a matter of good and fair policy and as a matter of avoiding significant economic loss and potential litigation.

Legal Issues

1. The regulations regarding the Immigrant Investor Pilot Program are worded very generally and in a way that is open to acceptance of many economic methodologies consistent with the purpose of the regional center pilot program. 8 C.F.R § 204.6 (j)(4)(iii) states that indirect jobs "may be demonstrated by reasonable methodologies including [but not limited to] those set forth in paragraph (m)(3) of this section." (Emphasis added). Paragraph (m)(3)(v) states

that the forecasting tools must be "economically or statistically valid." It further states that there may be many types of economically or statistically valid forecasting tools, "including, but not limited to... multiplier tables." This language is restated in 8 C.F. R § 204.6 (m)(7) which states:

> To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables… and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

Read together, the regulations clearly do not define one acceptable economic methodology. Even if one methodology is considered by some to be preferable to another, the issue is whether the methodology used is "reasonable."

It now appears that USCIS is establishing a new standard by administrative fiat. The new standard appears to be that the economic methodology must be the economic methodology that the Service at any given point in time deems to be the best. The recent spate of RFEs do not indicate that the developer or investor has the option of responding by a showing that the economic methodology used – and previously approved by USCIS – is "reasonable" or "statistically valid." Rather, the RFEs state, or at least strongly imply, that methodologies that USCIS previously approved, and that its previous economist deemed "reasonable" and "economically or statistically valid," are now considered to be "unreasonable" and not "economically or statistically valid."

We ask that USCIS revisit its policy and its RFEs issued after February 17, 2012, to cite to the language of the regulations and make clear that it will accept any economic methodology that meets the language of the regulations -- "reasonable methodology" -- whether or not USCIS and the economists it may hire at any given point in time consider it to be the best economic methodology.

2. In order to meet its burden of proof to obtain an approved regional center designation, or an approved exemplar I-526 petition, a regional center developer must undertake a rigorous process to satisfy USCIS that it has developed a project with a specific economic methodology to estimate indirect job creation and including specifically a business plan that meets the standards of a "comprehensive business plan" under Matter of Ho. Only after USCIS determines that the specific economic methodology and business plan meet the requirements of the law does USCIS issue an approval notice. The approval notice is not general in nature – rather, it approves the specific job creation methodology set forth in the regional center proposal or the exemplar I-526 petition, and states that the indirect job creation already has been established. USCIS has stated that regional centers, project developers and investors can rely on these approval notices to move forward with projects and with investments as

long as there is no material change or fraud. The application of any policy change should not conflict with approvals previously granted and relied upon by all stakeholders.

3. Serious securities law issues are at stake. These securities law issues go beyond the bounds of this paper and are being dealt with separately by members of the securities law bar. However, as a general matter, it is obvious that there are securities law implications when offering documents are issued to investors with specific EB-5 related provisions that are retroactively rendered incorrect, including statements of immigration risks that do not reference the risk that the agency governing the program might change its mind in the middle of the securities offering, deeming a previously-approved reasonable economic methodology unreasonable.

Policy Issues Regarding to Whom the Change in USCIS Policy Should Apply

USCIS must make a critical determination to whom its change of policy will apply. Presumably, USCIS agrees that its policy should be applied prospectively, and not retroactively. There are significant legal and policy reasons for doing so. However, the difficulty is in determining the meaning of "prospective application" in the complex scenario of EB-5. Below we set forth an analysis that is meant to assist the Service in its prospective application of the change in policy:

1. Investors with approved I-526 petitions: The Service has stated that the approved petition would not be reopened and, therefore, presumably, the investor would be able to proceed with immigrant visa processing and the condition removal based upon application of the indirect job creation methodology accepted at the time the I-526 petition was filed. This is required by Chang v. U.S., 327 F.3d 911 (9th Cir. 2003). However, USCIS must clarify that it will not apply the new economic methodology standard to already-approved I-526 petitions and related I-829 petitions.

2. Investors who have already invested in (a) an approved regional center with an approved exemplar I-526 petition or (b) an approved regional center with a capital development project utilizing an economic methodology that was approved by USCIS as part of its regional center application: Investors are expected to perform due diligence regarding the financial risks and the immigration risks of a project before they invest. Investors are required to assume the risk of loss of some or all of their investments and the immigration risk that the projections in the economic report and the business plan may not be met at the time of condition removal. However, investors should not be asked to assume the risk that USCIS will change its mind midstream. Investors should be required to conduct due diligence on their investment, but due diligence should not include the employment of an economist to advise them on the "reasonableness" of the economic methodology used. There

must be predictability in the EB-5 application process. How can a reasonable investor ever invest in a project knowing that no matter how "reasonable" an economic methodology is, USCIS could always find a better economic methodology and invalidate any previously approved economic methodology?

Investors, who invested in reliance on private placement memoranda, business plans and economic projections that are consistent with the USCIS approval notice issued to the regional center, should not be subject to this change. In some cases, these investors' investments are irretrievable, being already utilized in the construction of the capital development project. In other cases, although the investment money may be in escrow and therefore retrievable in the event of denial of an I-526 petition, the investor may have a child who has turned 21 and will be unable to immigrate if the investor is required by this new USCIS pronouncement to make another investment. In either event, the investor would be seriously harmed by an after–the–fact change in policy by USCIS that renders an approvable petition unapprovable. Class action lawsuits under the securities laws, as well as lawsuits by investors against developers would result. This scenario would likely cause otherwise eligible and interested investors to avoid EB-5 investments, thereby ensuring the demise of the program.

3. Projects with investors, some of whom have not yet invested or not yet filed I-526 petitions: Once a regional center receives an approval of a proposal, with or without an exemplar I-526 petition, where the tenant occupancy economic methodology is clearly stated in the proposal, the regional center and the developer are able to move forward with expenditures that are often in the hundreds of thousands of dollars or more and that are necessary to have a shovel-ready project available for investors' investments. Some investors in the project may have approved I-526 petitions with their money already being used in construction. Other investors may have pending I-526 petitions. As stated above, the change in policy should not apply to any of those investors.

   But, what is to be done about the investors who have not yet made their investments? Although those investors may not be impacted, the impact on the developer and on the earlier investors is enormous. In many cases, EB-5 financing is being utilized because no other source of funding is available; and the developer relies on a certain amount of EB-5 investment money to go forward. If, for example, four I-526 petitions have been filed or approved on a project and, all of a sudden, based on application of the new economic policy announced by USCIS, there is insufficient job creation for the number of EB-5 investors required to complete the project, the project would not be able to continue to completion, resulting in untold consequences. Investors with already-approved I-526 petitions would be unable to remove conditions because the project did not move forward. Some investors with pending I-526 petitions may be able to get their money back, and some may not.

For the developer, the consequences are enormous. The developer may have already invested millions of dollars on entitlement, architects, land acquisition deposits, legal fees, other professional fees, permitting, zoning and interest on bank loans. Developers may have personal liability on recourse loans, which could put the developer out of business. In addition to the millions of dollars of lost expenditures, usually hundreds of man hours have been devoted to getting the project to the point of filing an application with USCIS. Many employees may already be employed and will now have to be laid off. Construction jobs will be lost, and contractors and subcontractors will be dismissed. The economic consequences that would follow an unanticipated and unannounced change by USCIS can turn an EB-5 program from an economic benefit, the purpose of the program, to an economic detriment.

The lawsuits that might well be generated by this USCIS change in policy would be inestimable. The general partner of a limited partnership would be subject to suit by the limited partners. Suits could be filed by tenants who have given up other locations in reliance upon commitments by a developer to have a property available for occupancy by a certain date. If there is government financing and the city advanced funds, lawsuits could be filed by the city for nonperformance and misrepresentation regarding availability of EB-5 money.

4. Previously-approved regional centers with pending exemplar I-526 or no pending project: Any policy change should not be applied in a way as to render nugatory a regional center designation that is based upon a specific economic methodology. Although the harm is not as evident, it is critical to the future of the EB-5 program that a regional center designation be sacrosanct, absent fraud or sanctionable action or inaction. The fact that USCIS considers economic methodology to be a critical part of its approval process for regional centers is manifested by the fact that the approval notice specifies the approved economic methodology and also by the fact that any change in the economic methodology requires an amendment application. Developers should not be expected to expend hundreds of thousands of dollars necessary to create an approved regional center only to be told subsequently that USCIS changed its mind. The approval of the regional center designation must be meaningful and not subject to changes of opinions of USCIS economists who may happen to be employed by USCIS at any given point in time. Investors must be able to believe that Regional Center designation means something!

5. Pending I-924 applications: This is the most difficult issue. Irrespective of any legal considerations, and irrespective of whether changes in policy are applied to pending petitions in other contexts, the unique circumstances of the regional center application provide a strong argument for applying the change

in policy prospectively only to I-924 applications filed after February 17, 2012. To begin with, it is relevant that, in promulgating the new form I-924, USCIS established a four month target processing time for initial regional center designation applications. Regional center developers relied on this public statement of USCIS in preparing regional center projects and proposals. However, many I-924 petitions were pending for fourteen to eighteen months when the change of policy was announced. To subject these regional center developers to a policy issued long after they filed their applications, and to have them be subject to the policy only because of USCIS delays, is patently inequitable.

In some cases, bridge financing had allowed the project to move forward during the USCIS delay. These loans may be subject to default if the project can no longer be financed. Where the bridge financing was extended based on the expectation that it would be repaid with EB-5 financing, the ramifications go beyond the existing regional center developer. Once financing sources realize that they cannot rely on existing government EB-5 polices in deciding whether to extend financing to a project, they might well be expected to shy away from financing any future EB-5-dependent projects.

Conclusion

For all of these reasons, the change announced on February 17, 2012 and implemented by subsequent requests for evidence, is gravely flawed as a matter of law and policy. We ask you to consider withdrawing and reconsidering your position on this. If USCIS decides to move forward with this change, we ask that there be public comment prior to implementation. If this is not done, we ask that USCIS notify stakeholders regarding the applicability of the change in policy to developers and investors as specified in this memorandum. The only way that the new policy would not have the harmful effects of retroactive application is if it is applied only to new regional center applications filed after appropriate notice and opportunity to comment in accordance with the APA. Applying the change in policy in this manner, and not in a manner that negatively impacts existing stakeholders in the EB-5 process, is absolutely critical to the future viability of the EB-5 program.