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*"Creating Jobs Through Investments"*



VIA EMAIL – [redacted] March 23, 2012
U.S. Citizenship and Immigration Services ("USCIS")
ATTN: Alejandro N. Mayorkas, Director

**RE: USCIS February 17, 2012 notice titled, "Tenant Occupancy"**

Dear Director Mayorkas:

The Association to **I**nvest **I**n the **USA** (IIUSA), the national trade association of EB-5 Regional Centers ("Regional Centers") and the EB-5 Regional Center Program (the "Program") appreciates your continued leadership of the Program and your often expressed desire for improvements to enhance Program integrity and effectiveness. We have long shared your goal of enhanced business and economic development expertise and capacity at USCIS. We applaud your efforts to develop the necessary capacity to implement Program improvements, as reflected in the May 2011 "Proposed Changes to USCIS's Processing of EB-5 Cases."[1]

However, the recent "Tenant Occupancy" Notice (the "Notice"), circulated to the public on February 17, 2012, and the subsequent flurry of requests for evidence (RFEs) appear to seriously undermine your intent to make the Program predictable and efficient. In our view the Notice constitutes a material change in policy which could, in its implementation, cause much damage to the Program and potentially contravene the Administrative Procedures Act.

Our membership, which includes professionals and experts in U.S. immigration law, U.S. securities law, economic theory, and most importantly economic development have raised several concerns that we feel compelled to bring to your attention. Many of our Regional Center members and their economic development projects have hundreds of millions of dollars riding on the Service's interpretation and implementation of the Notice.

Accordingly, this letter documents the legal context related to the "tenant occupancy" issue, and raises questions regarding the applicability of "excess demand" in the context of the EB-5

[1] See: http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Operartional%20Proposals%20for%20Comment/EB-5-Proposal-18May11.pdf

Program. It also includes the following attached appendices documenting the various layers of uncertainty that are a result of the Notice:

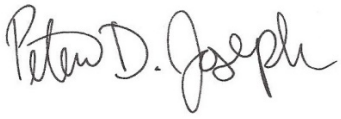
- Appendix A: The Notice in the EB-5 Legal Context
- Appendix B: Theories of Excess Demand and Its Inapplicability in EB-5
- Appendix C: Questions on USCIS Procedure and Considerations
- Appendix D: Economic Theory Questions
- Appendix E: RFE Specific Questions
- Appendix F: General Questions and Concerns

**The USCIS EB-5 Stakeholder meeting scheduled for May 1, 2012, at the California Service Center may be too far off with too large and general an agenda to effectively address this matter.** Those impacted by the new interpretation currently feel adrift in uncertainty on what USCIS is trying to achieve it is new policy and how to meet the potential new requirements, and therefore cannot wait until the May 1 meeting for clarification.

**IIUSA requests immediate public engagement with the policy makers and implementers at USCIS related to "tenant occupancy."** As evidenced by the number of questions and concerns set out in the appendices attached hereto, we urge USCIS to adhere to its commitment to transparency and seek public input in the formulation and implementation of new policy in order to avoid or mitigate the risk of Program uncertainty. The very integrity of the Program is at stake when such uncertainty is introduced to a regulated capital formation marketplace.
We share your commitment to have the Program contribute to sustaining the national economic recovery and we stand ready to work with you and your colleagues at USCIS in proper rulemaking procedures and effective public engagement.

Please contact me with any questions. We look forward to your reply.

Sincerely,



Peter D. Joseph
Executive Director

CC: Mariela Malero, Chief, USCIS Office of Public Engagement
(public.engagement@dhs.gov - [redacted])
Denise Vanison, Chief, USCIS Office of Policy and Strategy
([redacted])

## Appendix A

### *The Notice in the EB-5 Legal Context*

Section 610(c) of the Immigration and Nationality Act, as amended, states:

> … the Secretary of Homeland Security shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through
>
> - revenues generated from increased exports,
> - improved regional productivity,
> - job creation, or
> - increased domestic capital investment
>
> resulting from the pilot program.

The regulation at 8 CFR 204.6(m)(7) implements this section of the statute, although it does not reflect the expansion beyond exports as basis for indirect job creation, and in that respect is superseded by the statutory language. 8 CFR 204.6(m)(7)(ii) states more generally:

> (ii) Indirect job creation. 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, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

The four items listed by Congress reflect Congress' intention to recognize indirect job creation through a wide variety of approaches. The reference to "reasonable methodologies" implies that there is some objective standard for the methodologies to be used, and ostensibly that standard is rooted in what is normally accepted among authoritative economists and those who rely on them, including various levels of governments.

For many years USCIS consistently has approved Regional Center filings and investor petitions based on predictions of indirect job creation using well accepted methodologies (e.g., IMPLAN, RIMS II, REMI, REDYN, etc.) applied to projected tenant uses from expenditures on building space. Suddenly, on February 17, 2012, without any prior rulemaking, policymaking process, or stakeholder discussion, USCIS announced the new policy via circulation of the Notice, followed by adjudicators issuing a series of RFEs expressing non-acceptance of "tenant occupancy" job

creation models and imposing new standards of “excess demand” never before used or explained in USCIS practice.

## Appendix B

### *Economic Theories Relating to "Excess Demand" and Its Inapplicability in EB-5*

The concept of "excess demand"[2] implies that such excess is temporary and that markets will, over time, revert to "equilibrium." It is based upon several theories and principles of economics, as follows: Say's Law (J.B. Say) [3], Walras' Law (Leon Walras)[4], Keynsian theory (John Maynard Keynes)[5], and modern economic theory that places value on the cost of capital[6]. All of

[2] **Excess demand** is a situation in which the market demand for a good or service is greater than its market supply, thus causing its market price to rise. Excess demand relates to the quantity demanded of a good or service, at a given price, over its supply at that price. Excess demand usually spurs the price higher. (RE: http://www.businessdictionary.com/definition/excess-demand.html#ixzz1pIlxvk3P)

[3] **Say's Law (J.B. Say)** argues that in the process of producing goods, sufficient purchasing power was generated to take these goods off the market at satisfactory prices. Say's Law holds that overproduction, or "gluts," might occur in particular markets, but it is not possible to have general overproduction for the entire economy over extended periods. What declines in the general level of economic activity take place would be of short duration, because the market would automatically return the system to a full utilization of its resources. Thus, the in the long run there could be no excessive capital accumulation. (J.B. Say, and Say's Law, see John Kenneth Galbraith, *Economics in Perspective*, Houghton Mifflin, 1987.)

[4] **Walras' Law (Leon Walras)** has been the dominant and classic theory relating to excess demand and equilibrium. Excess demand refers to a situation in which a market is not in equilibrium at a specific price because the number of units of an item demanded exceeds the quantity of that item supplied at that specific price. Excess demand yields an economic shortage. In mathematical terms, it is the value of quantity demanded minus quantity supplied, whether positive or negative. Walras' Law implies that the sum of the values of excess demands across all markets must equal zero, whether or not the economy is in a general equilibrium. This implies that if positive excess demand exists in one market, negative excess demand must exist in some other market. Thus, if all markets but one are in equilibrium, then that last market must also be in equilibrium. Walras' Law is ensured by the common sense nature of capital invested in the marketplace, and is related to an agent's budget constraint. An agent's budget constraint is an equation stating that the total market value of the agent's planned expenditures, including saving for future consumption, must be less than or equal to the total market value of the agent's expected revenue, including sales of financial assets such as bonds or money. It must be assumed that the goods will not be obtained for free, and not being given away for free. The total market value of *all* agents' planned outlays for *all* commodities (including saving, which represents future purchases) must equal the total market value of all agents' planned sales of all commodities and assets. It follows that the market value of total value of excess demand in the economy must be zero. Therefore, it must be assumed that if an excess demand situation exists -- i.e., a market is not in equilibrium at a specific price because the number of units of an item demanded exceeds the quantity of that item supplied at that specific price – the overall economy will come back to equilibrium over time and the excess demand will be absorbed. This is explained, in part, by the stimulus of demand caused by the capital investment across an economy which produces an increase in aggregate demand. (Leon Walras, and Walras' Law, see D. Patankin. "Walras' Law," *The New Palgrave Dictionary of Economics*, 2nd Edition. 1987, 2008.)

[5] **Keynesian theory (John Maynard Keynes)** is not intended to undercut the equilibrium arguments advanced by Walrus, but to advance government's role based upon Keynes's conclusions that negative excess demand and consequently, involuntary unemployment, may exist in the labor market, even when all markets for goods are in equilibrium, or that excess demand that permits an excess supply of labor and consequently, temporary involuntary unemployment, even if markets for goods are in equilibrium, also may exist as a rationale for changes in government policy where the private budget constraints do not necessarily exist. It is very important to note that Keynesian arguments for monetary policy (policy actions by the Federal Reserve) and fiscal policy (policy actions by the federal government) are meant to stabilize output of the business cycle, particularly when private sector

these theories posit that "excess demand" is by its nature transitory. It follows that a requirement to measure excess demand as of a moment in time (particularly in the context of stringent EB-5 project and investor processing timelines) is simply not very useful or informative. Thus, the requirements set forth in the Notice and the many RFEs that have been issued based this new requirement are, in IIUSA's view, counterproductive in that they do not provide USCIS with meaningful data, to say nothing of the fact that they are contrary to both legislative direction and USCIS' own well-publicized intention to make the Program more effective.

The role of government and its capacity to reduce the amplitude or momentum of a business cycle has a theoretical limit which has caused a wave of discussion about how much government should be involved in the economy. Most theories of capitalism, going back to Adam Smith and *The Wealth of Nations* and *The Federalist Papers* written by the framers of the U.S. Constitution, posit that it is private persons expecting that their investment risk will have benefit to them that drives the economy and the wealth of a nation. Logically, therefore, a private decision to invest capital has inherent demand risk which cannot be removed (and so should be not attempted by any government agency).

The temporary nature of excess demand conditions and the contribution that capital investment has to aggregate demand are components or considerations in the investment decision made. Therefore, no government agency should define excess demand as a requirement for the investment of capital, nor, in a free market system, should it in any way constrain the decisions of private persons to take on investment risk.

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behavior leads to inefficient macroeconomic outcomes. Keynes's focus is on aggregate demand. The federal government's effort to stimulate the economy in the aftermath of the 2008 global financial crisis is a good example of the Keynesian approach. The point is that even in the context of a mixed economy – private and public sector actions – an economy that experiences excess demand is thought to be in disequilibrium only temporarily and will, eventually, readjust supply and demand to a state of equilibrium. This tenet of modern economic theory is fundamental to understanding actions of firms at the peak and trough of business cycles. The "Keynesian multiplier" posits that capital outlays stimulate a great deal of new production spending which allows businesses to hire more people and pay them, which in turn allows a further increase consumer spending. The increase in spending is smaller than in the previous step, so that the multiplier process tapers off and allows *the attainment of an equilibrium*. (John Maynard Keynes, and Keynesian Economics, see Arthur Sullivan, *Economics: Principles in Action*. Upper Saddle River: Pearson Prentice Hall. 2003.)

[6] **Modern economic theory also places a value on the cost of capital**. Interest rates are a major determinant in the demand for capital. As capital is allocated on a supply and demand basis, increases in lending rates will decrease the demand for borrowed funds and, indirectly, the demand for equity capital because the return investors require on equity capital also rises with interest rates. This reduces capital investment which leads to decreased economic activity in the short term and impairs businesses' future productive capacity. Of course, decreases in rates have the opposite effects. *If the cost of capital is lower, as it is, generally, in EB5 investments when compared to bank rates and substantially lower for non-bank financing, the interest expense is lower, which materially impacts both the decision to invest and the long-term profit expectations. Government controls money supply and, therefore, interest rates, but in programs where cost of capital is lower, increased capital availability can be said to have a positive effect on overall interest rates.* (Capital availability and cost of capital, see, Eugene F. Brigham, Michael C. Ehrhard *Financial Management: Theory and Practice*, Thomson. 2005, 2008. Also, thttp://www.sjsu.edu/faculty/watkins/costofcapital.htm.)

With respect to the application of this discussion to the EB-5 program, the reasonable and acceptable methodologies for estimating job creation are based upon the aggregate demand created in the economy via the increase in domestic capital from capital investments. Examples of these methods include RIMS II and IMPLAN methodologies which are based upon final demand, i.e., the effects (including and especially employment effects) as capital invested flows through the economy of a region and within an industry. Any controls on investment imposed by a government agency based upon the concept of excess demand would be, on it is face, anti-competitive. They would also stifle investment in areas which have historic and chronic unemployment, and unnecessarily imperil the revitalization of these areas.

[Note: Proofs of excess demand of a temporary nature would be, by definition, primarily, be based on prices and price modeling.]

## Appendix C

### *General Questions on USCIS Procedure and Considerations*

- What are the authoritative underpinnings (*i.e.* authoritative treatises, peer-reviewed journals, or otherwise) for the new approach by USCIS, including specifically: (1) the notion of "excess demand" as a requirement for indirect job creation; (2) the theory that demand for labor with respect to a "tenant occupancy" must precede the demand for the project; (3) that "facilitating" capital investment that promotes enterprise development, revenues and employment does not meet the tests of job creation as it has in the past (4) the apparent conclusion that unless a business activity is owned by the enterprise management, it cannot be credited with indirect job creation?

- Who are the new economists hired by USCIS and what are their educational and professional backgrounds? Are they available for public engagement?

- By what process, other than consulting with the economists identified above, did USCIS arrive at the conclusions expressed in the RFEs? Did USCIS consult any Congressional representatives, committees, or staff? Any association of economics experts? Any university professors? Any other government departments or state or local government representatives? Did it conduct any sort of cost benefit analysis?

- Has USCIS considered whether the RFEs are consistent with legislative direction to allow investors to establish reasonable methodologies for estimation of indirect job creation through increased domestic capital investment? Please describe how USCIS has made such analysis and the conclusions derived.

- Has USCIS considered how a requirement of "excess demand," as described in the RFEs, affects the use of the Program in rural and high unemployment areas? If so, please share the agency's analysis.

- Why has USCIS concluded that a "nexus" between the expenditure of capital on a commercial building and "increased domestic capital investment" insufficient for use of common economic models (e.g., IMPLAN, RIMS II, etc.) to estimate indirect job creation?

- Has USCIS considered that imposing special requirements on investment in buildings may spur reconfiguration of funding mechanisms with no meaningful difference in job creation?

- Has USCIS considered the securities liability that it may have unduly imposed on Regional Centers who have current investments based on previously accepted "tenant occupancy" job creation models?

- In what contexts other than tenant occupancy, if any, has USCIS shifted from its past acceptance of economic models for estimation of indirect job creation? For instance, we have seen at least one RFE that suggests that EB-5 investors in a hotel cannot count indirect job creation resulting from the expenditure of guests in the hotel unless they show that there was excess demand for hotels in the area. Is this now USCIS policy? If so, why? Please provide details concerning the basis for the economic theory in this position and rejection of prior positions accepting such predictions.

- Has USCIS changed its approach to estimation of job creation arising from investment in infrastructure projects? If so, how and why?

## Appendix D

### *Economic Theory Questions*

- Has USCIS consulted the Council of Economic Advisors or the Federal Reserve Board on the advisability of adopting a standard for approval that is based on inflationary impacts resulting from the requirements for increasing rents and congestion externalities?

- Has the USCIS consulted with appropriate agencies (*i.e.* Small Business Administration or Department of Justice) about the advisability of adopting a requirement for approval of indirect jobs that may be anticompetitive to developers using EB-5 financing compared to other developers of commercial real estate who do not have to wait for "excess demand" to appear before moving ahead on projects?

- Has USCIS considered the inflationary impact of requiring a showing of "excess demand" before indirect jobs can be considered?

- North American Industrial and Office Properties' (NAIOP) guidance on estimating the economic impact of commercial real estate refers to the "jobs enabled"[7] by the creation of commercial real estate; they refer explicitly to the jobs at tenant companies occupying the space. On what basis, if any, does USCIS disagree with the NAIOP methodology?

- Can projections of future demand be used to meet the excess demand standard?

[7] Fuller, Stephen S. *How to Calculate the Economic Contribution of Office, Industrial and Retail Real Estate to the Local Community*. North American Industrial and Office Parks (NAIOP). 2005. (See: http://www.naiop.org/foundation/calecon.pdf)

## Appendix E

### *RFE Specific Questions*

- The Notice states: "I-526 Immigrant Petitions by Alien Entrepreneurs and I-829 Petitions by Entrepreneurs to Remove Conditions will have predictability in connection with early regional center adjudications." This appears to acknowledge the harm that could be done to the Program from retroactively applying rules that have changed. What administrative oversight mechanism would USCIS utilize to determine which I-526 and I-829 petitions fall into this special category? What are the specific situations in which the rules will not be applied? A list of hypothetical scenarios are listed as follows:

    - **I-526 approved based on tenant occupancy model.** *Will new policy be applied to I-829?* The public statement seems to say no (and retroactivity would violate Chang v. U.S.[8]).

    - **I-526s approved for some investors in project based on tenant occupancy model.** *Will new policy be applied to I-526 petitions of other investors in the same project?* Please realize that if so applied, this would likely have tremendous practical impact on the already-approved investors in the project, who need the other investors for the project to be completed and the jobs created, so that approval of the other investors is crucial to the already-approved investors obtaining I-829 approval later.

    - **I-526s filed for some or all investors in a project based on tenant occupancy model approved in RC application.** *Will the new policy be applied to them?* Please realize that if so applied, undue burden will be put on them to take upon the task making expensive and time-consuming arrangements that have been set up, mostly like, in reliance on the terms under which the Regional Center was approved initially.

    - **I-924 approved for specific project based on tenant occupancy model.** *Will new policy be applied to the investors to file I-526?* If so applied, this would undermine credibility of USCIS adjudication and the confidence of the Regional Center, project developer, and investor in the Program. It would also undermine project commitments already made in reliance on the I-924 approval and the representations of the Regional Centers and agents in the marketplace of investors, and would frustrate the interests of committed investors (particularly if investment already made without escrow to I-526 approval).

[8] *Chang v. U.S.*, 327 F.3911, 928-29 (9th Cir. 2003).

- **Regional Center approved for tenant occupancy model for original or hypothetical project, and I-924 pending for amended designation to include specific new project using tenant occupancy model.** *Is USCIS imposing the new policy on such projects?* If so applied, this would destroy the Regional Center and/or project developer's significant investment in the project. The investors may already have made their investment (perhaps without escrow arrangements), and the I-924 might have been technically unnecessary (if within RC geography, industry, and methodology parameters) but filed to provide forum to resolve any minor issues about tweaks to offering arrangements, so applying new policy could undermine investor reliance.

- **Regional Center/I-924 approved for tenant occupancy model for original or hypothetical project.** *Will new policy be applied to subsequent projects of that Regional Center (with or without I-924 amendment, which may not be required if within Regional Center geography, industry, and methodology parameters)?* If so applied, it frustrates the reasonable reliance of Regional Center developers who invested in the model and may be in the process of making arrangements for the new project. If not, USCIS will have created two classes of Regional Centers: those grandfathered indefinitely under the old practice, and those whose designation was not approved before the policy changed.

- The RFEs are unclear as to whether USCIS will exclude all jobs from tenant occupancy unless proof can be furnished or whether it will specifically count indirect/induced jobs from this method. Will Indirect/induced jobs from tenant occupancy be allowed?

- Please define the following terms, all new to EB-5 policy: (1) "Congestion externalities"; (2)"Low Vacancy-to-Unemployment Ratio", and (3) "Upward Wage and Rental Pressures in Specific Regional Sectors."

- The RFE says the excess demand assessment should: (*a) Analyze whether prospective tenants . . . are currently suffering from a lack of a unique or specialized business space . . . . ; or, (b) Provide a data-based analysis . . . which establishes whether there is 'pent-up' demand for the specific professional and business services relevant to your project.*

  1. Are "a." and "b." above sufficient <u>individually</u>, or must they <u>both</u> be included in the excess demand analysis?
  2. Can the uniqueness of a business space include where the space is located, such as proximity to the business's target market (e.g. a hotel is next to a huge new convention center or airport)?
  3. Can the uniqueness of a business space include tenant incentives associated with that space (e.g. landlord payment for design and renovations according to tenant specifications), without which the business would have difficulty starting up or expanding?

4. For a commercial real estate development, should "pent-up" demand (in part "b.") be shown for the businesses that will lease commercial space in the development, or for the commercial space itself?

- The RFE states: "*The jobs that become located within the tenant space of the project should be shown to be a result of an expansion in specific services driven by your project as opposed to tenant shifting and/or relocation of already existing jobs. Please explain how it will be verified that the jobs that will become located within the tenant space of the project can be considered 'new' jobs.*"

  1. Does this mean the Regional Center should have the tenant provide evidence they are a new company or have expanded in the new space and have not moved, for example, across town; or, does this language imply the requirement of an economic analysis of whether there is job dislocation due to the investment project?

## Appendix F

### *General Questions and Concerns*

- If the enterprise that finances the building using EB-5 capital (through equity or loan from the new commercial enterprise) also owns some part of the tenant, then may job creation arising from the tenant activity be credited to the EB-5 investors? Is there any lower limit on the amount of such ownership required to count the tenant's jobs?

- If the enterprise that finances the building using EB-5 capital (through equity or loan from the new commercial enterprise) spends some of the capital on fitting of the space to fit the unique needs of the tenant, thereby financing for the tenant certain expenses necessary for the tenant to occupy the space and operate its business therein, then may job creation arising from the tenant activity be credited to the EB-5 investors? Is there any amount or proportion of such expenses required to be paid by the landlord to count?

- If the prospective tenants of a building to be constructed form a cooperative organization that uses EB-5 financing to commission the construction of the building they will occupy to operate their businesses, then may job creation arising from the tenant activity be credited to the EB-5 investors without showing of "excess demand"?

- If a company uses EB-5 financing to build a building for a single business who contracts with that company for such construction and lease back of the building (build to suit), then may job creation arising from the "tenant" activity be credited to the EB-5 investors?

- If a new or expanding business uses EB-5 capital on the construction of a building and purchase of equipment where workers in new positions will be employed using such equipment, must the EB-5 investors show that the business could not have found any other space or any other source for the equipment in order to count those jobs? If not, then why must an entity building a structure to be leased to such a business show excess demand for such tenant's services and unavailability of other suitable space?

- If a new or expanding business uses EB-5 capital on the leasing of a building and leasing of equipment where workers in new positions will be employed using such equipment, must the EB-5 investors show that the business could not have found any other space or any other source for the equipment in order to count those jobs? If not, then why must an entity building a structure to be leased to such a business show excess demand for such tenant's services and unavailability of other suitable space?