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IMPACT OF EB-5 RETROGRESSION ON THE REGIONAL CENTER LOAN MODEL

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In light of the retrogression in the employment-based fifth preference (EB-5) for China, which is predicted to occur as early as May 2015, the delays will once again impede much needed investment into the United States, which in turn will also dampen job creation. The negative effects of priority date retrogression in family and employment-based preferences have already had an adverse impact on families, who are unable to unite, and employers, who cannot employ a much needed worker even after the labor market has been unsuccessfully tested for qualified US workers. Due to retrogression, children may be less likely to be able to seek the protection of the Child Status Protection Act from aging out.

The China EB-5 retrogression will result in other unique problems not experienced in other immigrant visa preference categories. Most EB-5 regional center investments are based on a loan rather than an equity model. EB-5 investors invest into the new commercial enterprise (NCE) of a regional center. The NCE in turn invests in a project or a business, known as the job creating enterprise (JCE). The JCE is a project that will result in at least 10 indirect jobs per EB-5 investor, such as a hotel or assisted living home or some other business operation. The NCE's investment in the JCE can either be through an equity investment or a loan. The loan model is more favored than the equity model in EB-5 projects. Although a direct loan by an EB-5 investor is disallowed, as the investment is not at risk if the loan is guaranteed to be paid back, the EB-5 investor makes an equity investment in the NCE as a limited partner, which in turn loans the investors' aggregated funds to the JCE. Thus, the EB-5 investor still has an equity interest in the NCE, while the NCE makes a loan to the JCE. The loan model has been permitted by the USCIS as the EB-5 investor is really buying an equity interest in the NCE while the NCE makes a loan of the aggregated investors' capital to the JCE.

When the NCE makes a loan to the JCE, there is an agreement for the JCE to pay back the loan to the NCE. If the time frame is 5 years or more, this period would cover the point of time when the investor obtains conditional residence, and two years later, when the investor applies for removal of conditional residence. With the EB-5 quota retrogression, these two events will be stretched out even further in time, and it is likely that by the time that the investor applies for removal of conditional residence, it may be beyond five years from the date of the initial adjudication of the Form I-526 application. Would the USCIS now take the position that the investment is no longer at risk if the JCE pays back the loan to the NCE before the investor has removed the conditions on residence? If retrogression becomes even more severe, like the India and China EB-2 for example, the JCE may have paid the loan back at the time that the investor makes the initial application for conditional residence.

Although the USCIS has not yet addressed this issue, it can be argued that the JCE is paying back the loan to the NCE, and not to the investor, and this did not alter the investment, which was always at risk. The investor is not being paid back on a guaranteed basis, and this arrangement is distinguishable from the facts in *Matter of Izummi*, 22 I&N Dec. 169 (AAO, July 13, 1998). There, the investors were promised that the NCE would repurchase their interests at a fixed price after six years, and such an investment was not considered "at risk." Here, the JCE is paying back the loan to the NCE, and the decision to repay the investor is entirely in the discretion of the general partner of the NCE. The investor is clearly not the beneficiary of the repayment of the loan; rather it is the NCE. The NCE can use the repaid loan for other purposes rather than repay the investors.

In light of the crushing backlogs in the EB-2 and EB-3 preferences, Gary Endelman and this author have proposed various ameliorative solutions through administrative fixes, including not counting derivatives separately from the principal beneficiary, and these should apply with equal force to prospective EB-5 backlogs too. The Obama administration has been actively considered administrative fixes in the face of Congressional inaction to expand visa numbers and reform the broken immigration system, and it is urged that the administration also broadly interpret the "at risk" element of the investment so as to relieve EB-5 investors from uncertainty if the loan of the JCE is paid back to the NCE. Even if the JCE has paid back the loan to the NCE, the investor's investment was always at risk at the time of the project's inception, and at the time of filing the initial I-526 application. It is this point of time that ought to be considered when adjudicating EB-5 applications, in the case of potential crushing EB-5 China retrogression, and the administration has ample flexibility to maintain that the capital was "at risk" despite the JCE repaying the loan to the NCE prior to the investor either obtaining conditional residence or filing an application to remove conditional residence. After all, the requirement that the capital be "at risk" is found in the regulation and not the INA at 8 CFR 204.6(j)(2), and it only applies at the point of filing the I-526 application. Moreover, in a similar context where the EB-5 financing replaces bridge financing, the jobs were created at the point of bridge financing and not when the EB-5 capital replaced bridge financing. According to the May 2013 EB-5 Policy Memo, the use of bridge financing is permitted and is given credit for purposes of job creation so long as replacement financing, even if it was not EB-5 financing, was contemplated. Therefore, in the context of bridge financing, the length of time when the investment remains at risk, or when the investment creates the requisite number of jobs is irrelevant. What should really count is that the investment was "at risk" at some point of time and that investment did result in job creation at some point in time, although it can be legitimately argued that the investment still remains at risk even if the loan has been repaid to the NCE and not to the investor. Similarly, the requirement that the investment have been sustained under INA 216A(d)(1)(A)(ii) throughout the conditional residency period be broadly construed so long as the repaid loan is still in the NCE and the investor has not been repaid.

The ethical risks in representing a client have been further exacerbated by the prospect of EB-5 quota retrogression. There is also more cause for conflicts of interest if the same attorney who represents the NCE and/or project also represents the EB-5 investor, given that the repayment of the loan, which will benefit the JCE, may adversely affect the investor if the investment is no longer considered "at risk" or continue to be "sustained." There is no prohibition under ABA Model Rule 1.7 for an attorney to take on multiple clients where there is a potential conflict of interest, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing. The attorney representing both the investor and the NCE/JCE has to be mindful about the conditions pursuant to Rule 1.7 when undertaking or continuing the joint representation. In the event that the attorney faces an irreconcilable conflict, it may be incumbent upon the attorney from withdrawing representation of both clients. In some situations, an attorney may be able to represent one client and withdraw from the other one when the conflict was not foreseeable and was "thrust upon" the attorney. See e.g. New York City Bar Formal Opinion 2005-05. NYC Bar Op. 2005-5, which also discusses how other jurisdictions have dealt with "thrust upon" conflicts, characterizes such a conflict between two clients that 1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where 2) the conflict was not reasonably foreseeable at the outset of the representation, 3) the conflict arose through no fault of the lawyer, and 4) the conflict is of a type that is capable of being waived. NYC Bar Op. 200505 further requires the lawyer to apply a balancing test in deciding whether to withdraw from the representation of one client and continue representation, with the other client. The opinion requires the lawyer to factor in whether there would be any prejudice that will be caused to the client due to confidences being placed at risk, and whether representation of one client over the other would give an unfair advantage to the client. A lawyer may wish to carefully use the "thrust upon" conflict doctrine if the conflict regarding the repayment of the loan was not foreseen prior to the announcement of the EB-5 quota retrogression, and the lawyer needs to decide whether to withdraw from representing both parties or one party.

Finally, the immigration attorney when performing due diligence of an EB-5 regional center and project needs to also factor in the timing of the repayment of the loan and the delays caused by EB-5 retrogression. While most immigration attorneys should provide only immigration related due diligence rather than investment advice, investment advice may wittingly or unwittingly be factored into the general advice the attorney may provide when assessing the viability of an EB-5 project on behalf of an investor client. While it is always advisable for an immigration attorney to limit his or her representation to immigration advice, and refer the investment advice out to another qualified professional who is a registered investment adviser or broker dealer, Section 202(a)(11) the Investment Advisers Act of 1940 does indeed carve out an exception for attorneys, accountants, engineers and teachers so long as the investment advice provided is incidental to their profession. According to an advisory by the Stroock law firm, the factors that will be considered are whether the professional holds himself or herself out as an investment adviser, whether the advice is reasonably related to the professional services, and whether the charge for advisory services is based on the same factors that determine the professional's usual charge.