BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

1800 REPUBLIC CENTRE
633 CHESTNUT STREET
CHATTANOOGA, TENNESSEE 37450

PHONE: 423.756.2010
FAX: 423.756.3447
www.bakerdonelson.com

ROBERT C. DIVINE
Direct Dial: (423) 752-4416
Direct Fax: (423) 752-9533
E-Mail Address:rdivine@bakerdonelson.com

New Draft EB-5 Policy Memo from USCIS:

What's really new, and What's Left Undone

by Robert C. Divine, of Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C.

February 17, 2013

On February 14, 2013, USCIS disseminated publicly a draft policy memo concerning the employment-based fifth preference (EB-5). This article (1) notes the relatively few noteworthy changes to the prior disseminated draft from November 2011 and (2) identifies some critical topics not addressed by the memo.

The new draft clarifies a disappointingly small number of issues and continues to many important issues of significant uncertainty. Nevertheless, every effort at clarification should be appreciated, so I list them here:

1. Adds to intro language to set a balanced program tone, including reference to "ensuring program integrity";

2. Makes many small technical legal and stylistic changes;

3. Opposes a guaranteed right of investor's eventual ownership in a particular asset (to be subtracted from capital at risk) [note: USCIS has said this orally in stakeholder meetings and in some adjudications, but never in public writing];

4. Clarifies that payment to investor of return on investment (i.e., profit, vs. redemption of capital) during or after conditional residency is acceptable;

5. Recognizes risk spreading by the single investment enterprise among multiple projects (100% subsidiaries for non-RC sponsored) [but note USCIS has tended to state that the projects must be identified in the I-526 of each investor relying on them);

6. Offers positive examples of restructuring/reorganization for NCEs established before Nov. 29, 1990 (converting restaurant into nightclub, or adding substantial crop production to an existing livestock farm);

7. Suggests that requested RC areas often are best justified by showing significant contribution to the supply chain and labor pool of proposed projects;

8. Recognizes that investors in troubled businesses may combine preserved and newly created jobs;

9. Recognizes, consistent with Director Mayorkas' letter to Senator Leahy a few years ago, that investors may count indirect jobs located outside the RC boundaries [but providing no criteria about any limitations on this option, if any];

10. Hedges from prior discussion, suggesting a need for causation between injection of EB-5 capital and creation of created jobs claimed, while still recognizing that the NCE or JCE creates the jobs;

11. Sets presumptions for I-829 adjudication of "reasonable time": one year generally OK, but beyond that only if "extreme circumstances" such as *force majeure*;

12. Articulates of deference policy to cover prior same-project adjudications not only I-924 but also prior I-526s, though no deference if "material change" meaning having a natural tendency to influence or predictable ability to affect the decision, and deference to I-526 approval when adjudicating I-829 on same plan;

13. Maintains that material change after filing I-526 up through admission as a conditional resident require new I-526 (and any approved I-526 will be revoked), and cites as "material" (a) cure of a deficiency and (b) change of industry group claimed [note: it is not clear whether "another industry group" refers to real change of business plan vs. simple change of NAICS codes claimed to meet USCIS ever-changing perspectives on this];

14. Recognizes that changes after admission as CPR can be significant without preventing I-829 approval as long as capital remained at risk (including being "expeditiously" shifted from one plan to another) in a job creating enterprise within scope of industry approval of the same RC, and as long as there was not a preconceived intent to make the switch;

15. Repeats some policies already articulated in other memos, such as the requirement that jobs last at least two years to be sufficiently "permanent" to be counted (12-11-2009 memo), the requirement at I-526 to show that jobs will be created within 2.5 years of I-526 creation (12-11-2009 memo), that different investors/projects cannot count the same jobs (most recent TO memo).

The February 2013 draft fails to provide desperately needed guidance and clarification on many topics, which I list here from a first reading in hope that readers will share with IIUSA or AILA any other topics they believe need coverage, so that the most effective comments can be provided to USCIS. Such omissions include the following:

1. Whether the new commercial enterprise (NCE) can have the option to buy back an investor's interest after the end of the investor's conditional residence.

2. Whether sale or refinance of the job creating enterprise (JCE), ostensibly because of its success, may occur before the end of conditional residence and generate return of capital to the NCE, even if the NCE does not distribute the capital to investors until after the end of conditional residence.

3. Whether and under what conditions a NCE may identify a business plan to generate jobs in and remove capital from an initial job creating enterprise and move the capital into subsequent enterprises during the investors' conditional residence (particularly, must all future such JCEs be fully documented in I-526, must they be principally doing business in RC or TEA, and must they create any new jobs if the original JCE maintains the jobs).

4. Whether a NCE may condition release of funds from escrow until a certain number of investors' I-526 petitions are approved (as opposed to only the approval of the respective investor's I-526).

5. Whether direct jobs created outside the RC area or TEA may be counted even when most jobs are created within the area ("principally doing business, and creates jobs in"), and whether indirect jobs arising from such direct jobs can be counted.

6. Whether investment across a portfolio of businesses must provide in I-526 a Matter of Ho compliant business plan for all of the businesses in the portfolio.

7. What constitutes the location of a job for purposes of such determinations as whether the enterprise is principally doing business in a RC or TEA. (Note questions of where the employee is physically and how often, where facilities are located, whether the employee reports to a remote location, etc.)

8. Whether a TEA investment may span multiple TEAs in multiple states.

9. Whether an area other than a county or MSA may be considered a TEA even without state designation, such as a single census tract, if publicly available data demonstrates the area has 150% of the national average unemployment.

10. Whether an NCE making loans to nonprofit entities may qualify.

11. Whether the investor may take credit for job creation arising from other funds not only invested in the NCE (the subject of the pre-RC regulation about "multiple investors") but also from other funds invested in or loaned to the JCE [Note: this seems generally

accepted in practice, but the memo mentions only the language of the regulation that preceded RCs].

12. Whether investors in entities other than limited partnerships having very limited control similar to limited partners may be considered to be sufficiently "engaged in management" [Note: current USCIS' training manuals have clarified this, but the draft memo omits reference].

13. Whether "verifiable detail" and "detailed statement" is consistent with the amended law concerning regional centers that requires only "general proposal" and "general predictions."

14. Whether regional centers must be involved in developing, promoting/ marketing, managing specific projects to foreign investors, as opposed to merely promoting the economy of the region including seeking, monitoring, and reporting to USCIS about qualifying projects whose developers can market and manage the projects themselves [generally accepted, but the memo omits].

15. Whether a RC amendment MUST (vs. MAY, per I-924 instructions) be filed and approved in order for I-526s to be filed by investors in projects using different job prediction methodology [stated in the negative twice in stakeholder meetings but nothing written down], or under sponsorship of RC that has undergone administrative change (ownership or management) [USCIS has stated in stakeholder meetings and I-924 instructions that only email notification is necessary, but some emails from the Immigrant Investor Program suggest otherwise].

16. Exactly which types of expenses of a project may or may not be paid with EB-5 capital (interest on loan of EB-5 capital, broker dealer fees, project development fees, etc.)

17. Whether a worker authorized to work in the U.S. under TPS, deferred action, pending application for suspension of deportation or cancellation of removal, may be considered a qualified employee [Note: what is "an alien remaining in the U.S. under suspension of deportation"?]

18. What is the legal basis for USCIS application of a policy requiring that RC-sponsored jobs be created before the end of conditional residence.

19. A host of questions USCIS addressed orally in recent stakeholder meetings but has not written down anywhere, such as to what extent part-time jobs and jobs employed by the JCE outside the U.S. are factored in.

20. Under what circumstances can the jobs of a tenant of the JCE, or jobs arising from visitor spending, be counted. [Note: USCIS has written only indecipherable memos on tenant occupancy, and no known decisions in contested cases].

21. When direct vs. indirect construction jobs can be counted, as a practical matter, how "hard" and "soft" costs must be analyzed separately.

22. What USCIS means when in requests for evidence it requires "verifiable detail" about various items.

23. How NAICS codes are required, and on what legal basis.

24. When capital is considered "invested" for purposes of TEA designation, troubled business assessments, etc.

25. Whether the point to which an investor must maintain investment and show jobs is the filing of I-829, the expiration of conditional residence (shown on card), or the adjudication of I-829.

26. Whether and under what circumstances EB-5 capital may be used to repay bridge financing (debt or equity).

27. Whether jobs count if they were created on an indefinite basis during conditional residence but were lost before I-829 filed.

USCIS simply is not keeping up with the number of questions that reasonably arise for well intentioned developers and investors-- questions that need predictable answers for prospective planning of major enterprises and projects. The government is not making EB-5 Program attractive to developers and investors when they can only find out what the rules might be until after they spend hundreds of thousands or even millions of dollars in project development and marketing and the investors file their I-526 petitions.