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（1）优先日期保留

美国国土安全部 DHS 提出授权某些 EB-5 申请者保留批准的 EB-5 移民申请的优先日期给任何随后的 EB-5 移民申请，批准的移民申请人在某些超出他们的控制（例如，DHS 可能已经终止了与最初申请相关的一个区域中心）的情况下需要提出新的移民申请，或可能出于其他原因选择这样做（例如，申请人有关合资格投资可能寻求实质上改变）。美国国土安全部一般建议允许 EB-5 申请人保留以前批准申请书的优先期，以避免因失去优先期而进一步延误移民签证。美国国土安全部认为优先日期保留可能会越来越重要，因为很有可能 EB-5 签证类别将在可预见的未来超额认购。 4739

A. 优先日期保留

如果 EB-5 移民申请人符合资格，美国国土安全部建议允许使用其批准的 EB-5 移民申请的优先日期给任何随后提交的 EB-5 移民申请。见提案 8 CFR204.6（d）。这条规定不适用于 DHS 撤销原件的申请基于欺诈的批准，故意歪曲材料事实，或者 DHS 觉得批准的申请书材料错误。同样，优先日期将无法保留一旦投资者在批准的申请书上使用优先期获得有条件绿卡身份（例如，当投资者不能撤销他身份的条件因此失去他或她的有条件绿卡身份）。如果美国国土安全部要撤销移民申请的批准，DHS 将提供有关撤销原因的通知。如果撤销不是基于欺诈，故意歪曲材料事实，或 DHS 材料错误，投资者能利用申请优先日期提交另一份移民申请 EB-5 计划。见提案 8 CFR204.6（d）。寻求保留优先期的投资者应在提交新的 EB-5 移民申请时提供原移民申请批准通知的副本表明其优先期。根据这项提议，被拒绝的申请没有优先期，而且优先期不得转让给其他投资者。见提案 8 CFR 204.6（d）。目前没有规定允许投资者保留批准的 EB-5 移民申请的优先日期给随后的 EB-5 移民申请。见 8 CFR 204.6（d）。美国国土安全部通常允许基于雇佣关系的第一，第二和第三优先类别的收益人保留之前批准的移民申请优先日期除非国土安全部撤销申请批准。见 8CFR 204.5（e）。美国国土安全部最近发布了一份最终规则将扩大优先类的受益者保留优先日期即使他们的请愿已被撤销，只要批准不是基于欺诈，故意歪曲重要事实，重大错误，或撤销或与申请有关的劳工证明无效。

17. 见 8 CFR204.5（E）美国国土安全部允许 EB-5 类别保留优先日期的提议将使这一类别与其他基于雇佣的类别在优先日期保留政策上一致。见提议 8CFR 204.6（d）。

美国国土安全部建议允许保留优先日期以便：（1）申请者等待 EB-5 签证优先日期时在无法控制的情况下变得不合格（例如，区域中心的终止）；（2）提供投资者更大的灵活性处理商业条件的变化。例如，投资者涉及的投资项目表现不佳或失败能够转移他们的投资资金到新的，更多有前景的投资项目而不会失去签证队列。向 EB-5 投资者提供保留优先日期的机会变得越来越重要因为 EB-5 签证需求超过了签证额度而使得签证号码的等待时间加长。自 2007 年至 2009 年期间经济严重衰退以来，EB-5 参与者急剧上升。在 2008 年之前，EB-5 平均每年收到不到 600 名 EB-5 移民申请。在接下来的几年，EB-5 计划已收到平均每年超过 5,500 份请书。在 2014 和 2015 财政年度之间仅此一年，该计划收到超过 25,000 申请。

19. 因此，对 EB-5 投资者的签证需求现已超过年度额度，导致某些申请者及其家庭成员签证积压。受积压影响的个人经常要等待一年或更长时间取得有条件绿卡。2014 年度 EB-5 计划第一次开始经历超额认购（即需求超过签证供应量）。当时，DOS 公布了对于中国出生的 EB-5 签证不可用在本财政年度的剩余时间里。

20. 从那时起，每年中国出生的个人提出的 EB-5 申请一直超过签证额度，结果导致每年签证积压的时间越来越长。

21. 这种趋势预计将继续并可能在可预见的未来恶化，特别考虑到目前中国出生的个人申请文件每年大约占了 EB-5 移民签证的百分之八十。

22. 确实，基于这 20000 份目前正在 USCIS 等待处理的 EB-5 申请，美国国土安全部估计有 16000 份等待处理的 EB-5 申请是由出生在中国的个人提出的。

23. 虽然国会确定了签证数量，美国国土安全部认识到签证的等待可能会造成个人在美国寻求投资的困难。投资者通过一个区域中心投资随后因为不是投资者的错误而被终止也会影响申请的结果。当一个区域中心被终止，通过该区域中心提交的 EB-5 移民申请通常也被拒绝或根据程序撤销申请。这样的申请者可能符合所有 EB-5 申请计划的要求，但是没有保留优先日期会失去他们在移民签证中的位置队列。目前，投资者在这样的情况下想要继续 EB-5 移民签证必须再从新开始投资新的商营企业并排在 EB-5 签证队列的最后。允许保留优先日期将允许这样的投资者保留他们在队列中的位置，从而减轻非投资者错误导致的区域中心被终止或者其他意外的变化而产生的重大后果。最后，保留优先日期也有利于其他 EB-5 移民申请已经批准的投资者，在等待他们的优先日期时发现他们投资的项目严重延迟可能不会成功。根据现行法规，这些投资者如果重新用他们的资金投资就会失去他们在移民签证队列的位置。根据拟议规则，此类投资者能够重新他们的资金投资同时保留他们既定的优先日期。通过允许保留优先日期，美国国土安全部消除了目前扭曲市场力量和增加投资者财务风险的外部因素。 4744

a) 保留优先日期

如果 EB-5 移民申请人符合资格，该规则建议允许使用其批准的 EB-5 移民申请的优先日期给任何随后提交的 EB-5 移民申请。如果申请人尚未根据其批准的请愿获得合法永久居留，并且该请求未因某些理由被撤销，申请人将能够保留其优先日期，从而保留其在签证队列中的位置。美国国土安全部建议允许保留优先日期以便：（1）申请者等待 EB-5 签证优先日期时在他们无法控制的情况下变得不合格（例如，区域中心的终止）；（2）提供投资者更大的灵活性处理商业条件的变化。例如，投资者涉及的投资项目表现不佳或失败能够转移他们的投资资金到新的，更多有前景的投资项目而不会失去签证队列。投资者群体将获得运营利益，因为保留优先日期将使签证分配更加可预测，并且由于区域中心终止而导致大规模波动的可能性较小，在一些大型区域[4756]中心可能会对在特定时间排队的投资者产生负面影响。这种变化将为投资者在美国寻求永久居留提供更大的确定性和稳定性，有助于减轻投资者无法预见的与其投资有关的负担。此外，通过允许保留优先日期，投资者取得将投资资金从潜在风险项目中转移出来的能力，从而潜在地减少欺诈并提高在美国创造就业机会的潜力。国土安全部无法量化保留优先日期条款的净收益或从中获利，或评估可能有多少过去或未来投资者受影响的数量。国土安全部欢迎公众就保留优先日期条款的成本和收益发表意见。 4757

d) 优先日期。

根据条款分类外国人的法案第 203(b)(5) 条资格，批准的 EB-5 移民申请的优先日期给任何随后提交 EB-5 移民申请。被拒绝的申请不会确定优先日期。优先日期不可转让给其他外国人。

如果外国人依照第 203 法案的 (b) (5) 合法地提出申请美国有条件居住条款，或是美国移民局基于以下理由撤销对该计划的批准。

- (1) 申请人詐欺或是任性歪曲重要事实
- (2) 美国公民及移民服务局(USCIS)确定的签证批准是基于文件错误

(1) Priority Date Retention

DHS proposes to authorize certain EB-5 petitioners to retain the priority date 1 of an approved EB-5 immigrant petition for use in connection with any subsequent EB-5 immigrant petition.² Petitioners with approved immigrant petitions might need to file new petitions due to circumstances beyond their control (for instance, DHS might have terminated a regional center associated with the original petition), or might choose to do so for other reasons (for instance, a petitioner may seek to materially change aspects of his or her qualifying investment). DHS is proposing to generally allow EB-5 petitioners to retain the priority dates of previously approved petitions so as to avoid further delays on immigrant visa processing associated with the loss of

priority dates. DHS believes that priority date retention may become increasingly important due to the strong possibility that the EB-5 visa category will remain oversubscribed for the foreseeable future. 4739

A. Priority Date Retention

DHS proposes to allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 immigrant petition for which the petitioner qualifies. See proposed 8 CFR 204.6(d). This provision would not apply where DHS revoked the original petition's approval based on fraud, willful misrepresentation of a material fact, or a determination that DHS approved the petition based on a material error. *Id.* Similarly, priority date retention would not be available once the investor uses the priority date

to obtain conditional LPR status based upon the approved petition (e.g., when such an investor fails to remove the conditional basis of that status and thus loses his or her LPR status). Should DHS seek to revoke the approval of an immigrant petition, DHS would provide notice of the revocation detailing the reasons for revocation.¹⁶ If the revocation is not based on fraud, a willful misrepresentation of a material fact, or material DHS error, the investor would be able to utilize the priority date of that petition should he or she seek to file another immigrant petition under the EB-5 program. See proposed 8 CFR 204.6(d). An investor seeking to use a retained priority date should provide a copy of the original immigrant petition's approval notice indicating the earlier priority date when filing the new EB-5 immigrant petition. Under this proposal, denied petitions would not establish a

priority date, and a priority date would not be transferable to another investor.

See proposed 8 CFR 204.6(d).

The current regulation does not permit investors to use the priority date of an approved EB-5 immigrant petition for a subsequently filed EB-5 immigrant petition. See 8 CFR 204.6(d). DHS has generally allowed beneficiaries in the employment-based first, second, and third preference categories to retain the priority date of their previously approved immigrant petitions unless DHS revokes petition approval. See 8 CFR 204.5(e). DHS recently issued a final rule that will expand the ability of beneficiaries in these preference categories to retain their priority dates even when their petitions have been revoked, so long as the approval was not revoked based on fraud, willful misrepresentation of a material fact, material error, or the revocation or invalidation of the labor certification

associated with the petition.¹⁷ See 8 CFR 204.5(e)(2). DHS's proposal in this regulation to allow priority date retention for those in the EB-5 category would bring the EB-5 priority date retention policy into harmony with those other employment-based preference categories. See proposed 8 CFR 204.6(d).

DHS is proposing to allow priority date retention in order to: (1) Address situations in which petitioners may become ineligible through circumstances beyond their control (e.g., the termination of a regional center) as they wait for their EB-5 visa priority date to become current; and (2) provide investors with greater flexibility to deal with changes to business conditions. For example, investors involved with an underperforming or failing investment project would be able to move their investment funds to a new, more

promising investment project without losing their place in the visa queue. Providing EB-5 investors with the opportunity to retain their priority dates is increasingly important as the demand for EB-5 visas outpaces the statutorily limited supply of such visas, which lengthens wait times for visa numbers. Since the severe economic recession between 2007 and 2009,¹⁸ the EB-5 program has experienced a dramatic increase in participation. Prior to 2008, the EB-5 program received an average of fewer than 600 EB-5 immigrant petitions per year. In the following years, the EB-5 program has received an [4743] average of over 5,500 petitions per year. And between FY 2014 and FY 2015 alone, the program received over 25,000 petitions.¹⁹ As a result, demand for EB-5 visas by investors has now outpaced the annual supply, resulting in visa backlogs for certain petitioners and their

family members. Individuals affected by those backlogs frequently wait for one year or more before they can obtain conditional permanent residence.

The EB-5 program began to experience oversubscription (i.e., demand that outpaced the supply in visa numbers) for the first time during FY 2014. At that time, DOS announced that EB-5 visas were no longer available for the remainder of the fiscal year for individuals born in China.²⁰ Since then, the program has continued to experience annual demand from individuals born in China that has outpaced the supply in visas, resulting in increasingly long backlogs every year for those individuals.²¹ This trend is anticipated to continue and likely worsen for the foreseeable future, especially considering that individuals born in China currently file about 80 percent of the EB-5 immigrant visas

granted on an annual basis.²² Indeed, given the 20,000 EB-5 petitions currently pending with USCIS, DHS estimates that there are currently 16,000 EB-5 petitions pending for individuals born in China.²³

Although Congress sets visa numbers, DHS recognizes that having to wait for a visa can create difficulties for individuals seeking to invest in the United States. There are also consequences for investors who invest through a regional center that is subsequently terminated through no fault of the investor. When a regional center is terminated, EB-5 immigrant petitions filed through that regional center are generally also denied or revoked depending on the procedural status of the petition. The filers of such petitions may have met all requirements to participate in the EB-5 program, but absent priority date retention they will lose their place in the immigrant visa

queue. Currently, an investor in this situation who wants to continue with the EB-5 immigrant visa process must start the process all over again by investing in a new commercial enterprise and going to the end of the EB-5 visa queue. Allowing priority date retention would allow such an investor to retain his or her place in the queue, thereby alleviating the harsh consequences of regional center terminations and other material changes that occur unexpectedly and through no fault of the investor.

Finally, priority date retention would also benefit other investors with approved EB-5 immigrant petitions who, while waiting for their priority dates to become current, learn that they have invested in severely delayed projects that are likely not to succeed. Under current regulations, such investors cannot reinvest their

investment funds without losing their place in the immigrant visa queue. Under the proposed rule, such investors would be able to reinvest in new projects while retaining their previously established priority dates. By allowing priority date retention, DHS is thus eliminating an external incentive that currently distorts market forces and increases financial risk for investors. 4744

a. Retention of Priority Date

This rule proposes to generally allow an EB-5 immigrant petitioner to use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 immigrant petition for which the petitioner qualifies. Provided that petitioners have not yet obtained lawful permanent residence pursuant to their approved petition and that such petition has not been revoked on certain

grounds, petitioners would be able to retain their priority date and therefore retain their place in the visa queue. DHS is proposing to allow priority date retention to: (1) Address situations in which petitioners may become ineligible through circumstances beyond their control (e.g., the termination of a regional center) as they wait for their EB-5 visa priority date to become current; and (2) provide investors with greater flexibility to deal with changes to business conditions. For example, investors involved with an underperforming or failing investment project would be able to move their investment funds to a new, more promising investment project without losing their place in the visa queue. There would be an operational benefit to the investor cohort because priority date retention would make visa allocation more predictable with less

possibility for massive fluctuations due to regional center termination that could, in the case of some large regional [4756] centers, negatively affect investors who are in the line at a given time. This change would provide greater certainty and stability for investors in their pursuit of permanent residence in the United States, helping lessen the burden of situations unforeseen by the investor related to their investment. In addition, by allowing priority date retention, investors obtain more ability to move their investment funds out of potentially risky projects, thereby potentially reducing fraud and improving the potential for job creation in the United States. DHS cannot quantify or monetize the net benefits of the priority date retention provision or assess how many past or future investors might be impacted. DHS welcomes public comment on the costs and benefits of

the priority date retention provision. 4757

(d) Priority date. The priority date of an approved EB-5 immigrant petition will apply to any subsequently filed petition for classification under section 203(b) (5) of the Act for which the alien qualifies. A denied petition will not establish a priority date. A priority date is not transferable to another alien. The priority date of an approved petition shall not be conferred to a subsequently filed petition if the alien was lawfully admitted to the United States for conditional residence under section 203(b) (5) of the Act based upon that approved petition or if at any time USCIS revokes the approval of the petition based on:

(1) Fraud, or a willful misrepresentation of a material fact by the petitioner; or

(2) A determination by USCIS that the petition approval was based on a material error. 4766