U.S. Citizenship and Immigration Services

EB5 Immigrant Investor Eligibility Requirements

November 18, 2020

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Chapter 2 - Eligibility Requirements

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The immigrant investor category requires three main elements:

- An investment of capital;
- In a new commercial enterprise;
- Which creates jobs.

Each element is explained in this chapter in the context of both the stand-alone program and the Regional Center Program.

For the general requirements, the term immigrant investor in this Part of the Policy Manual refers to any EB-5 investor-petitioner, whether investing through the stand-alone program or the Regional Center Program. Where distinctions between the two programs exist, the term non-regional center immigrant investor refers to petitioners using the stand-alone program, and the term regional center immigrant investor refers to petitioners using the Regional Center Program.

A. Investment of Capital

Congress created the immigrant investor category so the U.S. economy can benefit from an immigrant's contribution of capital. This benefit is greatest when capital is at risk and invested in a new commercial enterprise that, because of the investment, creates at least 10 full-time jobs for U.S. workers. The regulations that govern the category define the terms capital and investment with this economic benefit in mind.[1]

1. Capital

The word capital does not mean only cash. Instead, the broad definition of capital takes into account the many different ways in which a person can make a contribution of financial value to a business. Capital includes cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided the immigrant investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.[2] All capital must be valued at fair market value in U.S. dollars.

The immigrant investor must establish that he or she is the legal owner of the capital invested[3] and has obtained the capital through lawful means. Any assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital.[4] To establish that the capital was obtained through lawful means, the immigrant investor's petition must include (if applicable):

- Foreign business registration records;
- Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this list), and personal tax returns, including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within 5 years with any taxing jurisdiction in or outside the United States by or on behalf of the immigrant investor;
- Evidence identifying any other source(s) of capital; or

- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the immigrant investor from any court in or outside the United States within the past 15 years.[5]

Promissory Notes

Capital can include the immigrant investor's promise to pay (a promissory note), as long as the immigrant investor is personally and primarily liable for the promissory note debt and his or her assets adequately secure the note. Any security interest must be perfected[6] to the extent provided for by the jurisdiction in which the asset is located.[7] Further, the assets securing the promissory note:

- Cannot include assets of the company in which the immigrant is investing;
- Must be specifically identified as securing the promissory note; and
- Must be fully amenable to seizure by a U.S. noteholder.[8]

The fair market value of a promissory note depends on its present value, not the value at any different time. In addition, to qualify as capital, nearly all of the money due under a promissory note must be payable within 2 years, without provisions for extensions.[9]

Using Loan Proceeds as Capital

Proceeds from a loan may qualify as investment capital provided the requirements placed on indebtedness are satisfied.[10]

When using loan proceeds as capital, an immigrant investor must demonstrate:

- The immigrant investor is personally and primarily liable for the debt;
- The indebtedness is secured by assets the immigrant investor owns; and
- The assets of the new commercial enterprise are not used to secure any of the indebtedness.

The immigrant investor must have primary responsibility, under the loan documents, for repaying the debt used to satisfy his or her minimum required investment amount.

The immigrant investor must also demonstrate that his or her own collateral secures the debt, and that the value of the collateral is sufficient to secure the amount of debt that satisfies the immigrant investor's minimum required investment amount. A loan secured by the immigrant investor's assets qualifies as capital only up to the fair market value of the immigrant investor's pledged assets.

2. Investment

The immigrant investor is required to invest his or her own capital. The petitioner must document the path of the funds to establish that the investment was made, or is actively in the process of being made, with the immigrant investor's own funds.[11]

To invest means to contribute capital. A loan from the immigrant investor to the new commercial enterprise does not count as a contribution of capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the immigrant investor and the new commercial enterprise is not a capital investment.[12]

To qualify as an investment, the immigrant investor must actually place his or her capital at risk. The mere intent to invest is not sufficient.[13]

Purchasing a share of a business from an existing shareholder, without more, will not qualify, since the payment goes to the former shareholder rather than to the new commercial enterprise.

Guaranteed Returns

If the immigrant investor is guaranteed a return, or a rate of return on all or a portion of his or her capital, then the amount of any guaranteed return is not at risk.[14] For the capital to be at risk there must be a risk of loss and a chance for gain.

Additionally, if the investor is guaranteed the right to eventual ownership or use of a particular asset in consideration of the investor's contribution of capital into the new commercial enterprise, the expected present value of the guaranteed ownership or use of such asset will count against the total amount of the investor's capital contribution in determining how much money was placed at risk. For example, if the immigrant investor is given a right of ownership or use of real estate, the present value of that real estate will not be counted as investment capital put at risk of loss.[15]

Nothing prevents an immigrant investor from receiving a return on his or her capital in the form of a distribution of profits from the new commercial enterprise. This distribution of profits may happen during the conditional residency period and may happen before creating the required jobs. However, the distribution cannot be a portion of the investor's minimum qualifying investment and cannot have been guaranteed to the investor.

Redemption Language

The regulatory definition of "invest" excludes capital contributions that are "in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement."[16]

An agreement evidencing a preconceived intent to exit the investment as soon as possible after removing conditions on permanent residence may constitute an impermissible debt arrangement. [17] Funds contributed in exchange for a debt arrangement do not constitute a qualifying contribution of capital.[18] In general, the petitioner may not enter into the agreement knowing that he or she has a willing buyer at a certain time and for a certain price.[19]

Any agreement between the immigrant investor and the new commercial enterprise that provides the investor with a contractual right to repayment is an impermissible debt arrangement. In such a case, the investment funds do not constitute a qualifying contribution of capital.[20] Mandatory redemptions and options exercisable by the investor are two examples of agreements where the investor has a right to repayment. The impermissibility of such an arrangement cannot be remedied with the addition of other requirements or contingencies, such as conditioning the repurchase of the securities on the availability of funds; the delay of the repurchase until a date in the future (including after the adjudication of the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829)); or the possibility that the investor might not exercise the right. In other words, repayment does not need to be guaranteed in order to be impermissible. It is the establishment of the investor's right to demand a repurchase, regardless of the new commercial enterprise's ability to fulfill the repurchase, that constitutes an impermissible debt arrangement.[21]

The following table describes certain characteristics that might be present in agreements and explains whether their inclusion creates an impermissible debt arrangement.

Characteristics of Redemption Provisions

Type of Provision	Description	Impermissible Agreement?
Mandatory redemptions	Arrangements that require the new commercial enterprise to redeem all or a portion of the petitioner's equity at a specified time or upon the occurrence of a specified event (for example, once the conditions are removed on the petitioner's permanent resident status) and for a specified price (whether fixed or subject to a specified formula).	USCIS considers this an impermissible debt arrangement. Such impermissible obligations are not subject to the discretion of the new commercial enterprise (although it may have some discretion regarding the timing and manner in which the redemption is performed).
Options exercisable by the investor	Arrangements that grant the petitioner the option to require the new commercial enterprise to redeem all or a portion of his or her equity at a specified time or upon the occurrence of a specified event (for example, once the conditions are removed on the petitioner's permanent resident status) and for a specified price (whether fixed or subject to a specified formula).	USCIS considers this an impermissible debt arrangement.

Type of Provision	Description	Impermissible Agreement?
Option exercisable by the new commercial enterprise	A redemption agreement between the immigrant investor and the new commercial enterprise that does not provide the investor with a right to repayment. One example of such an agreement is a discretionary option held by the new commercial enterprise to repurchase investor shares. These options are typically structured similarly to options exercisable by the investor, except that the option is held and may be exercised by the new commercial enterprise. When executed, these options require an investor to sell all or a portion of his or her ownership interest back to that entity.	USCIS generally does not consider these arrangements to be impermissible debt arrangements.[22] However, such an option may be impermissible if there is evidence the parties construct it in a manner that effectively converts it to a mandatory redemption or an option exercisable by the investor(considered a debt arrangement). For example, an arrangement would be impermissible if ancillary provisions or agreements obligate the new commercial enterprise to either (a) exercise the option (at a specified time, upon the occurrence of a specified event, or at the request of the investor) or (b) if it chooses not to exercise the option, liquidate the assets and refund the investor a specific amount.

Business Activity

An immigrant investor must provide evidence of the actual undertaking of business activity. Merely establishing and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant investor has placed his or her capital at risk.[23] Without some evidence of business activity, no assurance exists that the funds will be used to carry out the business of the commercial enterprise.[24]

Made Available

The full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.[25] In the regional center context, the immigrant investor must establish that the capital was invested into the new commercial enterprise and that the full amount was subsequently made available to the job-creating entity or entities, if separate.[26]

In cases with a separate job-creating entity or entities, the payment of administrative fees, management fees, attorneys' fees, finders' fees, syndication fees, and other types of expenses or costs by the new commercial enterprise that erode the amount of capital made available to the job-creating entity do not count toward the minimum required investment amount.[27] The payment of these fees and expenses must be in addition to the minimum required capital investment amount.

Sole Proprietors and Funds in Bank Accounts

A non-regional center investor who is operating a new commercial enterprise as a sole proprietor cannot consider funds in his or her personal bank account as capital committed to the new commercial enterprise. Funds in a personal bank account are not necessarily committed to the new commercial enterprise. The funds must be in business bank accounts.[28] However, even a deposit into a business account over which petitioner exercises sole control, without more, may not satisfy the at-risk requirement.[29]

Escrow Accounts

An immigrant investor's money may be held in escrow until the investor has obtained conditional permanent resident status if the immediate and irrevocable release of the escrowed funds is contingent only upon:

- Approval of the Immigrant Petition by Alien Investor (Form I-526); and
- Visa issuance and admission to the United States as a conditional permanent resident, or approval of the investor's Application to Register Permanent Residence or Adjust Status (Form I-485).

An immigrant investor's funds may be held in escrow within the United States to avoid any evidentiary issues that may arise with respect to issues such as significant currency fluctuations[30] and foreign capital export restrictions.

Use of foreign escrow accounts is not prohibited as long as the petition establishes that it is more likely than not that the minimum qualifying capital investment will be transferred to the new commercial enterprise in the United States upon the investor obtaining conditional permanent resident status.

When adjudicating the immigrant investor's petition to remove conditions,[31] USCIS requires evidence verifying that the escrowed funds were released and that the investment was sustained in the new commercial enterprise for the period of the immigrant investor's residence in the United States.

Deployment of Capital

Before the job creation requirement is met, a new commercial enterprise may deploy capital directly or through any financial instrument so long as applicable requirements are satisfied, including the following:

- The immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk;
- There must be a risk of loss and a chance for gain;
- Business activity must actually be undertaken;
- The full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based;[32] and
- A sufficient relationship to commercial activity (namely, engagement in commerce, that is, the exchange of goods or services) exists such that the enterprise is and remains commercial.[33]

The purchase of financial instruments traded on secondary markets generally does not satisfy these requirements because such secondary market purchases generally:

- Are not related to the actual undertaking of business activity;
- Do not make capital available to the job-creating business; and
- Represent an activity that is solely or primarily financial rather than commercial in nature.

Further Deployment After the Job Creation Requirement is Satisfied

Once the job creation requirement has been met and the investment capital is returned or otherwise available to the new commercial enterprise, the new commercial enterprise may further deploy such capital within a reasonable amount of time[34] in order to satisfy applicable requirements for continued eligibility.[35] The capital may be further deployed, as described above, into any commercial activity that is consistent with the purpose of the new commercial enterprise to engage in the "ongoing conduct of lawful business,"[36] including as may be evidenced in any amendments to the offering documents made to describe the further deployment into such activities.[37]

Consistent with precedent case decisions and existing regulatory requirements, further deployment must continue to meet all applicable eligibility requirements within the framework of the initial bases of eligibility,[38] including the same new commercial enterprise[39] and regional center.[40] In addition, because a regional center has "jurisdiction over a limited geographic area,"[41] further deployment must occur within the regional center's geographic area, including any amendments to its geographic area approved before the further deployment. The further deployment, however, does not need to remain with the same (or any) job creating entity or in a targeted employment area.

For example, if a new commercial enterprise associated with a regional center loaned pooled investment capital to a job-creating entity that created sufficient jobs through the construction of a residential building in a targeted employment area, the new commercial enterprise, upon repayment of the loan that resulted in the required job creation, may generally further deploy the repaid capital anywhere within the regional center's geographic area (regardless of whether it would qualify as a targeted employment area) into any commercial activity that satisfies applicable requirements such as one or more similar loans to other entities.

3. Required Amount of Investment

The immigrant investor must invest at least the standard minimum investment amount in capital in a new commercial enterprise that creates not fewer than 10 jobs for U.S. workers. An exception exists if the immigrant investor invests his or her capital in a new commercial enterprise that is principally doing business in and creates jobs in a targeted employment area. In such a case, the immigrant investor must invest a minimum of 50 percent of the standard minimum investment amount in capital.

This means that the present fair market value, in U.S. dollars, of the immigrant investor's lawfully-derived capital must be at least $1,000,000, or $500,000 if investing in a targeted employment area for petitions filed before November 21, 2019.[42] For petitions filed on or after November 21, 2019, those amounts are $1,800,000 or $900,000 respectively, and automatically increase October 1, 2024, and every 5 years thereafter.[43]

An immigrant investor may diversify his or her investment across a portfolio of businesses or projects, but only if the minimum investment amount is first placed in a single new commercial enterprise. In such a case, it is necessary to show how eligibility has been established (for example, the minimum investment amount, evidence of an at-risk investment,[44] and job creation) with respect to each job-creating entity at the time of filing.

For non-regional center investors, the capital may be deployed into a portfolio of wholly owned businesses, so long as all capital is deployed through a single commercial enterprise and all jobs are created directly within that commercial enterprise or through the portfolio of businesses that received the capital through that commercial enterprise.

For example, for a petition filed before November 21, 2019, based on an investment in an area in which the minimum investment amount is $1,000,000, the non-regional center investor can satisfy the statute by investing in a commercial enterprise that deploys $600,000 of the investment toward one business that the commercial enterprise wholly owns, and $400,000 of the investment toward another business that the commercial enterprise wholly owns.[45] In this example, the two wholly owned businesses would have to create an aggregate of 10 new jobs between them. However, a non-regional center investor cannot qualify by investing $600,000 in one commercial enterprise and $400,000 in a separate commercial enterprise, since these are not wholly owned by a single commercial enterprise.

In the regional center context, where indirect jobs may be counted, the commercial enterprise may create jobs indirectly through multiple investments in corporate affiliates or in unrelated entities, but the regional center investor cannot qualify by investing directly in those multiple entities. Instead, the regional center investor's capital must still be invested in a single commercial enterprise, which can then deploy that capital to multiple job-creating entities as long as the portfolio of businesses or projects can create the required number of jobs.

4. Lawful Source of Funds

The immigrant investor must demonstrate by a preponderance of the evidence that the capital invested, or actively in the process of being invested, in the new commercial enterprise was obtained through lawful means.[46] Any assets acquired directly or indirectly by unlawful means, such as criminal activity, are not considered capital.[47] In establishing that the capital was acquired through lawful means, the immigrant investor must provide evidence demonstrating the direct and indirect source of his or her investment capital.[48]

As evidence of the lawful source of funds, the immigrant investor's petition must be accompanied, as applicable, by:

- Foreign business registration records;
- Corporate, partnership, or any other entity in any form which has filed in any country or subdivision thereof any return described in this list, and personal tax returns, including income, franchise, property (whether real, personal, intangible), or any other tax returns of any kind filed within 5 years, with any taxing jurisdiction in or outside the United States by or on behalf of the immigrant investor;
- Evidence identifying any other source(s) of capital; or
- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the immigrant investor from any court in or outside the United States within the past 15 years.[49]

The immigrant investor is required to submit evidence identifying any other source of capital. Such evidence may include:

- Corporate, partnership, or other business entity annual reports;
- Audited financial statements;
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by the immigrant investor's own assets, other than those of the new commercial enterprise, and for which the immigrant investor is personally and primarily liable;
- Evidence of income such as earnings statements or official correspondence from current or prior employers stating when the immigrant investor worked for the company and how much income the immigrant investor received during employment;

- Gift instrument(s) documenting gifts to the immigrant investor;
- Evidence, other than tax returns,[50] of payment of individual income tax, such as an individual income tax report or payment certificate, on the following:
  - Wages and salaries;
  - Income from labor and service or business activities;
  - Income or royalties from published books, articles, photographs, or other sources;
  - Royalties or income from patents or special rights;
  - Interest, dividends, and bonuses;
  - Rental income;
  - Income from property transfers;
  - Any incidental income or other taxable income determined by the relevant financial department;
- Evidence of property ownership, including property purchase or sale documentation; or
- Evidence identifying any other source of capital.

5. Targeted Employment Area

A targeted employment area (TEA) is a rural area or an area that has experienced high unemployment.[51] A rural area is any area other than an area within a standard metropolitan statistical area (MSA) (as designated by the Office of Management and Budget) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.[52] A high unemployment area is an area that has experienced unemployment of at least 150 percent of the national average rate.[53]

Congress provided for a reduced investment amount in a TEA to encourage investment in new commercial enterprises principally doing business in and creating jobs in areas of greatest need. For the lower capital investment amount to apply, the new commercial enterprise into which the immigrant invests or the actual job-creating entity must be principally doing business in the TEA.

A new commercial enterprise is principally doing business in the location where it regularly, systematically, and continuously provides goods or services that support job creation. If the new commercial enterprise provides such goods or services in more than one location, it will be principally doing business in the location most significantly related to the job creation.

Factors considered in determining where a new commercial enterprise is principally doing business include, but are not limited to, the location of:

- Any jobs directly created by the new commercial enterprise;
- Any expenditure of capital related to the creation of jobs;
- The new commercial enterprise's day-to-day operation; and
- The new commercial enterprise's assets used in the creation of jobs.[54]

Investments through regional centers allow the immigrant investor to seek to establish indirect job creation. In these cases, principally doing business will apply to the job-creating entity rather than the new commercial enterprise. The job-creating entity must be principally doing business in the TEA for the lower capital investment amount to apply.[55]

To demonstrate that the area of the investment is a TEA, the immigrant investor must demonstrate that the TEA meets the statutory and regulatory criteria by submitting:

- Evidence that the area is not located within any MSA as designated by the Office of Management and Budget, nor within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States;[56]
- For petitions filed before November 21, 2019, either:

- A letter from the state government designating a geographic or political subdivision located outside a rural area but within its own boundaries as a high unemployment area;[57] or
- Unemployment data for the relevant MSA or county;[58] or

- For petitions filed on or after November 21, 2019, either:
  - Unemployment data for the relevant MSA, specific county within an MSA, county in which a city or town with a population of 20,000 or more is located, or the city or town with a population of 20,000 or more which is outside an MSA;[59] or
  - A description of the boundaries and unemployment statistics that allows USCIS to make a case-specific designation as an area of high unemployment.[60] The area must consist of the census tract or contiguous census tract(s) in which the new commercial enterprise is principally doing business, and may also include any or all census tracts directly adjacent to such census tract(s).[61] The immigrant investor must demonstrate that the weighted average of the unemployment rate for the subdivision (that is, the area comprised of multiple census tracts), based on the labor force employment measure for each census tract, is at least 150 percent of the national average unemployment rate.[62]

To promote predictability in the capital investment process, an officer identifies the appropriate date to examine in order to determine that the immigrant investor's capital investment qualifies for the lower capital investment amount according to the following table:

Targeted Employment Area (TEA) Analysis

If the Investment of Capital…	Then…
Is made in to the new commercial enterprise, and made available to the job-creating entity in the case of investment through a regional center, before the filing of the Immigrant Petition by Alien Investor (Form I-526).	The TEA analysis should focus on whether the area in which the new commercial enterprise, or job-creating entity in the case of investment through a regional center, is principally doing business qualifies as a TEA at the time of the investment.
Has yet to be made in to the new commercial enterprise, or made available to the job-creating entity in the case of investment through a regional center, at the time of the Form I-526 petition filing.	The TEA analysis should focus on whether the area in which the new commercial enterprise, or job-creating entity in the case of investment through a regional center, is principally doing business qualifies as a TEA at the time of the filing of the Form I-526 petition.

A geographic area that once qualified as a TEA may no longer qualify as employment rates or population increase over time. Immigrant investors occasionally request eligibility for the reduced investment threshold based on the fact that other immigrant investors who previously invested in the same new commercial enterprise qualified for the lower capital investment amount. The immigrant investor must establish, however, that at the time of investment or at the time of filing the immigrant petition, as applicable, the geographic area in question qualified as a TEA. An immigrant investor cannot rely on previous TEA determinations made based on facts that have subsequently changed.

The area in question may qualify as a TEA at the time the investment is made or the Form I-526 immigrant petition is filed, whichever occurs first, but may cease to qualify by the time the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829) is filed. The investor is not required to demonstrate that the area in question remains a TEA at the time the Form I-829 petition is filed. Changes in population size or unemployment rates within the area during the period of conditional permanent residence are acceptable, since increased job creation is a primary goal, which has been met if the area was a TEA at the time the investment was made, or the Form I-526 was filed.

A State's Designation of a Targeted Employment Area Before November 21, 2019

A state government's designation of a geographic or political subdivision within its boundaries as a TEA will not satisfy evidentiary requirements for petitions filed on or after November 21, 2019. For petitions filed before November 21, 2019, a state government could designate a geographic or political subdivision within its boundaries as a TEA based on high unemployment. Before the state could make such a designation, an official of the state must have notified USCIS of the agency, board, or other appropriate state governmental body that would be delegated the authority to certify that the geographic or political subdivision was a high unemployment area.[63] The state was then able to send a letter from the authorized body of the state certifying that the geographic

or political subdivision of the MSA or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business had been designated a high unemployment area.[64]

Consistent with the regulations in effect before November 21, 2019, USCIS deferred to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the TEA. However, for all TEA designations, USCIS still ensured compliance with the statutory requirement that the proposed area designated by the state had an unemployment rate of at least 150 percent above the national average. To do this, USCIS reviewed state determinations of the unemployment rate and assessed the method or methods by which the state authority obtained the unemployment statistics.

Acceptable data sources for calculating unemployment included U.S. Census Bureau data (including data from the American Community Survey) and data from the Bureau of Labor Statistics (including data from Local Area Unemployment Statistics).

There has never been a provision allowing a state to designate a rural area.

B. Comprehensive Business Plan

A comprehensive business plan should contain, at a minimum, a description of the business, its products or services (or both), and its objectives.[65]

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market and prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources.

The plan should detail any contracts executed for the supply of materials or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the basis of such projections.

Most importantly, the business plan must be credible.[66]

USCIS reviews business plans in their totality. An officer must determine if it is more likely than not that the business plan is comprehensive and credible. A business plan is not required to contain all of the detailed elements, but the more details the business plan contains, the more likely it is that the plan will be considered comprehensive and credible.[67]

C. New Commercial Enterprise

A new commercial enterprise is any commercial enterprise established after November 29, 1990.[68] Therefore, the immigrant investor can invest the required amount of capital in a commercial enterprise established after November 29, 1990, provided the remaining eligibility criteria are met.

A commercial enterprise is any for-profit activity formed for the ongoing conduct of lawful business.[69] This broad definition is consistent with the realities of the business world and the many different forms and structures that job-creating activities can have.

Types of commercial enterprises include, but are not limited to:

- Sole proprietorship;
- Partnership (whether limited or general);
- Holding company;
- Joint venture;
- Corporation;
- Business trust; or
- Other entity, which may be publicly or privately owned.[70]

A commercial enterprise can consist of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. Noncommercial activities, including owning and

operating a personal residence, do not qualify.[71]

The commercial enterprise must be formed to make a profit, unlike, for example, some charitable organizations.

1. Enterprise Established On or Before November 29, 1990

A new commercial enterprise also includes a commercial enterprise established on or before November 29, 1990, if the enterprise will be restructured or expanded through the immigrant's investment of capital.

Purchase of an Existing Business that is Restructured or Reorganized

The immigrant investor can invest in a business that existed on or before November 29, 1990, provided that the existing business is simultaneously or subsequently restructured or reorganized such that a new commercial enterprise results.[72] Cosmetic changes to the décor, a new marketing strategy, or a simple change in ownership do not qualify as restructuring.[73]

However, a business plan that modifies an existing business, such as converting a restaurant into a nightclub or adding substantial crop production to an existing livestock farm, could qualify as a restructuring or reorganization.

Expansion of an Existing Business

The immigrant investor can invest in a business that existed on or before November 29, 1990, provided a substantial change in the net worth or number of employees results from the investment of capital.[74]

Substantial change is defined as a 40 percent increase either in the net worth or in the number of employees, so that the new net worth or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.[75]

Investment in a new commercial enterprise in this manner does not exempt the immigrant investor from meeting the requirements relating to the amount of capital that must be invested and the number of jobs that must be created.[76]

2. Pooled Investments in Original EB-5 Program

A new commercial enterprise may be used as the basis for the petitions of more than one non-regional center immigrant investor. Each non-regional center immigrant investor must invest the required amount of capital and each immigrant investor's investment must result in the required number of jobs. Furthermore, the new commercial enterprise can have owners who are not immigrant investors provided that the sources of all capital invested are identified and all invested capital has been derived by lawful means.[77]

3. Establishment of New Commercial Enterprise

To show that the new commercial enterprise has been established, the immigrant investor must present the following evidence, in addition to any other evidence that USCIS deems appropriate:

- As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;
- A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the state or municipality does not issue such a certificate, a statement to that effect; or
- Evidence that, after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred.

  This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth or number of employees.[78]

4. Investment in New Commercial Enterprise

To show that the immigrant investor has committed the required amount of capital to the new commercial enterprise, the evidence presented may include, but is not limited to, the following:

- Bank statements showing amounts deposited in U.S. business accounts for the enterprise;

- Evidence of assets which have been purchased for use in the U.S. enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- Evidence of property transferred from abroad for use in the U.S. enterprise, including U.S. Customs and Border Protection commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing secured by the immigrant investor's assets, other than those of the new commercial enterprise, and for which the immigrant investor is personally and primarily liable.[79]

5. Engagement in Management of New Commercial Enterprise

The immigrant investor must be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial responsibility or through policy formulation.[80]

To show that the immigrant investor is or will be engaged in the exercise of day-to-day managerial control or policy formulation, the immigrant investor must submit:

- A statement of the position title that the immigrant investor has or will have in the new enterprise and a complete description of the position's duties;[81]
- Evidence that the immigrant investor is a corporate officer or a member of the corporate board of directors;[82]
- For petitions filed before November 21, 2019, if the new enterprise is a partnership, either limited or general, evidence that the immigrant investor is engaged in either direct management or policymaking activities. The immigrant investor is sufficiently engaged in the management of the new commercial enterprise if the investor is a limited partner and the limited partnership agreement provides the investor with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act;[83] or
- For petitions filed on or after November 21, 2019, evidence that the petitioner is engaged in policymaking activities, including evidence that the petitioner is an equity holder in the new commercial enterprise and the organizational documents of the new commercial enterprise provide the petitioner with certain rights, powers, and duties normally granted to equity holders of the new commercial enterprise's type of entity in the jurisdiction in which the new commercial enterprise is organized.[84]

D. Creation of Jobs

The creation of jobs for U.S. workers is a critical element of EB-5. It is not enough that the immigrant investor invests funds into the U.S. economy. The investment of the required amount of capital must be in a new commercial enterprise that creates[85] at least 10 jobs for qualifying employees. It is important to recognize that while the investment must result in the creation of jobs for qualifying employees, it is the new commercial enterprise that creates the jobs.[86]

Example: Non-Regional Center

Ten non-regional center immigrant investors seek to establish a hotel as their new commercial enterprise. The establishment of the new hotel requires capital to pay financing costs to unrelated third parties, purchase the land, develop the plans, obtain the licenses, build the structure, maintain the grounds, staff the hotel, as well as many other types of expenses involved in the development and operation of a new hotel.

The non-regional center immigrant investor's capital can be used to pay part or all of these expenses. Each non-regional center immigrant investor's investment of capital helps the new commercial enterprise (the new hotel) create 10 jobs. The 10 immigrants' investments must result in the new hotel's creation of 100 jobs (10 jobs for each investor's capital investment) for qualifying employees.[87]

1. Bridge Financing

A developer or principal of a new commercial enterprise, either directly or through a separate job-creating entity, may use interim, temporary, or bridge financing, in the form of either debt or equity, prior to receipt of immigrant investor capital. If the project starts

based on the interim or bridge financing prior to receiving immigrant investor capital and subsequently replaces that financing with immigrant investor capital, the new commercial enterprise may still receive credit for the job creation under the regulations.

Generally, the replacement of temporary or bridge financing with immigrant investor capital should have been contemplated prior to acquiring the original temporary financing. However, even if the immigrant investor financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing that would be subsequently replaced by more permanent long-term financing, the infusion of immigrant investor financing could still result in the creation of, and credit for, new jobs.

For example, if traditional financing originally contemplated to replace the temporary financing is no longer available to the commercial enterprise, a developer is not precluded from using immigrant investor capital as an alternative source. Immigrant investor capital may replace temporary financing even if this arrangement was not contemplated prior to obtaining the bridge or temporary financing.

The full amount of the immigrant's investment must be made available to the business or businesses most closely responsible for creating the jobs upon which eligibility is based. In the regional center context if the new commercial enterprise is not the job-creating entity, then the full amount of the capital must be invested first in the new commercial enterprise and then made available to the job-creating entity or entities.[88]

2. Multiple Job-Creating Entities

If invested in a single new commercial enterprise and where the offering and organizational documents provide, an investor's full investment may be distributed to more than one job-creating entity in a portfolio investment strategy. The record must demonstrate that the new commercial enterprise will create the requisite jobs through the portfolio of projects. In addition, each investor must demonstrate that the full amount of money is made available to the business(es) most closely responsible for creating the employment upon which the petition is based, which may be one or multiple job-creating entities in a portfolio.

3. Full-Time Positions for Qualifying Employees

The investment into a new commercial enterprise must create full-time positions for not fewer than 10 qualifying employees.[89] An employee is defined as a person who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Regional Center Program, an employee also means a person who provides services or labor in a job that has been created indirectly through investment in the new commercial enterprise.[90]

Qualifying Employee

For the purpose of the job creation requirement, the employee must be a qualifying employee. A qualifying employee is a U.S. citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized for employment in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the immigrant investor, the immigrant investor's spouse, sons, daughters, or any nonimmigrant.[91]

Full-Time Employment

For the purpose of the job creation requirement, the position must be a full-time employment position.[92] Full-time employment is defined as employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.[93] In the case of the Regional Center Program, full-time employment also means employment of a qualifying employee in a position that has been created indirectly that requires a minimum of 35 working hours per week.

Two or more qualifying employees can fill a full-time employment position in a job sharing arrangement. Job sharing is permissible so long as the 35 working hours per week requirement is met. However, the definition of full-time employment does not include combinations of part-time positions, even if those positions when combined meet the hourly requirement per week.[94]

A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. To demonstrate that a full-time position is shared by more than one employee, the following evidence, among others, may be relevant:

- A written job-sharing agreement;
- A weekly schedule that identifies the positions subject to a job sharing arrangement and the hours to be worked by each employee under the job sharing arrangement; and

- Evidence of the sharing of the responsibilities or benefits of a permanent, full-time position between the employees subject to the job sharing arrangement.

Jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as permanent full-time jobs. However, jobs that are expected to last at least 2 years are generally not considered intermittent, temporary, seasonal, or transient in nature.

4. Measuring Job Creation

The immigrant investor seeking to enter the United States through the EB-5 Program must invest the required amount of capital in a new commercial enterprise that will create full-time positions for at least 10 qualifying employees. There are three methods of measuring job creation depending on the new commercial enterprise and where it is located.

Troubled Business

The U.S. economy benefits when the immigrant investor's capital helps preserve the troubled business's existing jobs. If the immigrant investor is investing in a new commercial enterprise that is a troubled business, he or she must show that the number of existing employees in the troubled business is being, or will be, maintained at no less than the pre-investment level for a period of at least 2 years.[95] This applies in the regional center context as well.

The troubled business regulatory provision does not decrease the number of jobs required. An immigrant investor who invests in a troubled business must still demonstrate that 10 jobs have been preserved, created, or some combination of the two. For example, an investment in a troubled business that creates four qualifying jobs and preserves all six pre-investment jobs would satisfy the job creation requirement.

The regulatory definition of a troubled business is a business that has:

- Been in existence for at least 2 years;
- Has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the 12-month or 24-month period prior to the priority date on the Immigrant Petition by Alien Investor (Form I-526); and
- Had a loss for the same period at least equal to 20 percent of the troubled business's net worth prior to the loss.[96]

For purposes of determining whether or not the troubled business has been in existence for 2 years, successors-in-interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.[97]

New Commercial Enterprise Not Located Within a Regional Center

For a new commercial enterprise not located within a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted. This means that the new commercial enterprise (or its wholly owned subsidiaries) must itself be the employer of the qualifying employees.[98]

New Commercial Enterprise Located Within a Regional Center

Full-time positions can be created either directly or indirectly by a new commercial enterprise located within a designated regional center.[99] The general EB-5 program requirements still apply to investors investing in new commercial enterprises in the regional center context except that they may rely on indirect job creation. Employees filling indirect jobs do not work directly for the new commercial enterprise. Immigrant investors must use reasonable methodologies to establish the number of indirect jobs created.[100]

Direct jobs are those jobs that establish an employer-employee relationship between the new commercial enterprise and the persons it employs. Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. For example, indirect jobs can include, but are not limited to, those held by employees of the job-creating entity (when the job-creating entity is not the new commercial enterprise) as well as employees of producers of materials, equipment, or services used by the new commercial enterprise or job-creating entity.

In addition, a sub-set of indirect jobs, known as induced jobs, are created when the new direct and indirect employees spend their earnings on consumer goods and services. Indirect jobs can qualify and be counted as jobs attributable to a new commercial enterprise associated with a regional center, based on reasonable methodologies, even if the jobs are located outside of the geographic boundaries of a regional center.

Due to the nature of accepted job creation modeling practices, USCIS relies upon reasonable economic models to determine that it is more likely than not that the indirect jobs are created. USCIS may request additional evidence that the indirect jobs created, or to be created, are full time. USCIS may also request additional evidence to verify that the direct jobs (those held at the new commercial enterprise) will be or are full-time and permanent, which may include a review of W-2 forms or similar evidence.

Multiple Investors

When there are multiple investors in a new commercial enterprise, the total number of full-time positions created for qualifying employees will be allocated only to those immigrant investors who have used the establishment of the new commercial enterprise as the basis for their immigrant petition. An allocation does not need to be made among persons not seeking classification through the employment based fifth preference category. Also, jobs need not be allocated to non-natural persons, such as corporations investing in a new commercial enterprise.[101] Full-time positions will be allocated to immigrant investors based on the date their petition to remove conditions was filed, unless otherwise stated in the relevant documents.[102]

In general, multiple immigrant investors may not claim credit for the same job. An immigrant investor may not seek credit for the same specifically identified job position that has already been allocated to another immigrant investor in a previously approved case.

5. Evidence of Job Creation

To show that a new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees, an immigrant investor must submit the following evidence:

- Documentation consisting of photocopies of relevant tax records, Employment Eligibility Verification (Form I-9), or other similar documents for 10 qualifying employees, if such employees have already been hired; or
- A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than 10 qualifying employees will result within the next 2 years and the approximate dates employees will be hired.[103]

The 2-year period[104] is deemed to begin 6 months after adjudication of Form I-526. The business plan filed with the immigrant petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this 2-year period.

Troubled Business

In the case of a troubled business, a comprehensive business plan must accompany the other required evidentiary documents.[105]

Regional Center Investors

In the case of a new commercial enterprise within a regional center, the direct or indirect job creation may be demonstrated by the types of documents identified in this section along with reasonable methodologies.[106] If a regional center immigrant investor seeks to rely on jobs that will be created to satisfy the job creation requirement, a comprehensive business plan is required.

Additionally, if the regional center immigrant investor seeks to demonstrate job creation through the use of an economic input-output model, USCIS requires the investor to demonstrate that the methodology is reasonable. For example, if the inputs into the input-output model reflect jobs created directly at the new commercial enterprise or job-creating entity, USCIS requires the investor to demonstrate that the direct jobs input is reasonable. Relevant documentation may include Form I-9, tax or payroll records or if the jobs are not yet in existence, a comprehensive business plan demonstrating how many jobs will be created and when the jobs will be created.

If the inputs into the model reflect expenditures, USCIS requires the investor to demonstrate that the expenditures input is reasonable. Relevant documentation may include receipts and other financial records for expenditures that have occurred and a detailed projection of sales, costs, and income projections such as a pro-forma cash flow statement associated with the business plan for expenditures that will occur.

If the inputs into the model reflect revenues, USCIS requires the investor to demonstrate that the revenues input is reasonable. Relevant documentation may include tax or other financial records for revenues that have occurred or a detailed projection of sales, costs, and income projections such as a pro-forma income statement associated with the business plan for revenues that will occur.

In reviewing whether an economic methodology is reasonable, USCIS analyzes whether the multipliers and assumptions about the geographic impact of the project are reasonable. For example, when reviewing the geographic level of the multipliers used in an input-output model, the following factors, among others, may be considered:

- The area's demographic structure (for example, labor pool supply, work force rate, population growth, and population density);
- The area's contribution to supply chains of the project; and
- Connectivity with respect to socioeconomic variables in the area (for example, income level and purchasing power).

6. Rescission of Guidance on Tenant Occupancy Methodology

As of May 15, 2018, USCIS rescinded its prior guidance on tenant occupancy methodology. That update applies to all USCIS employees with respect to determinations of all Immigrant Petitions by Alien Investors (Form I-526), Petitions by Investors to Remove Conditions on Permanent Resident Status (Form I-829), and Applications for Regional Center Designation Under the Immigrant Investor Program (Form I-924) filed on or after that date. USCIS also gives deference to Form I-526 and Form I-829 petitions directly related to projects approved before May 15, 2018, absent material change, fraud or misrepresentation, or legal deficiency of the prior determination.[107]

Previously, on December 20, 2012, USCIS had issued policy guidance defining the criteria to be used in the adjudication of applications and petitions relying on tenant occupancy to establish indirect jobs.[108] In November 2016, USCIS published consolidated policy guidance on immigrant investors in this Policy Manual, including guidance on the tenant occupancy methodology. That guidance provided that investors could (1) map a specific amount of direct, imputed, or subsidized investment to new jobs, or (2) use a facilitation-based approach to demonstrate the project would remove a significant market-based constraint.

The first method requires mapping a specific amount of direct, imputed, or subsidized investment to new jobs such that there is an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. In practice, however, the construction of standard office or retail space alone does not lead to a sufficient connection for this type of mapping such that tenant jobs can be credited to the new commercial enterprise. The existence of numerous other factors, such as the identity of future tenants and demand for that type of business, makes it difficult to relate individual jobs to a specific space.

The second method looks at whether the investment removes a significant market-based constraint, referred to in the 2012 guidance as the "facilitation based approach." In providing this approach as an option, USCIS explicitly allowed applicants and petitioners to avoid having to establish an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. As of May 15, 2018, however, USCIS determined that that allowance was ill-advised, because a direct financial connection between the EB-5 capital investment and the job creation is necessary to determine a sufficient nexus between the two. Reliance on a showing of constraint on supply or excess of demand by itself does not establish a causal link between specific space and a net new labor demand such that it would overcome the lack of a sufficient nexus.

Moreover, allowing applicants and petitioners to use prospective tenant jobs as direct inputs into regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs leads to a more attenuated and less verifiable connection to the investment. There is also no reasonable test to confirm that jobs claimed through either tenant-occupancy methodology are new rather than relocated jobs such that they should qualify as direct inputs in the first place.

In sum, tenant-occupancy methodologies described in the 2012 Operational Guidance and previously incorporated into the Policy Manual result in a connection or nexus between the investment and jobs that is too tenuous[109] and thus are no longer considered reasonable methodologies or valid forecasting tools under the regulations.[110]

E. Burden of Proof

The petitioner or applicant must establish each element by a preponderance of the evidence.[111] The petitioner or applicant does not need to remove all doubt. Even if an officer has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads to the conclusion that the claim is more likely than not (that is, probably true), the petitioner or applicant has satisfied the preponderance of evidence standard.

F. Priority Dates

Under certain circumstances, the petitioner may use the priority date of a previously approved Immigrant Petition by Alien Investor (Form I-526) for purposes of a subsequent Form I-526 filed on or after November 21, 2019, for which the petitioner qualifies.[112]

Footnotes

[^ 1] See 8 CFR 204.6(e).

[^ 2] See 8 CFR 204.6(e).

[^ 3] See *Matter of Ho (PDF)*, 22 I&N Dec. 206 (Assoc. Comm. 1998).

[^ 4] See INA 203(b)(5). See 8 CFR 204.6(e).

[^ 5] See 8 CFR 204.6(j)(3).

[^ 6] Perfecting a security interest relates to the additional steps required to make a security interest effective against third parties or to retain its effectiveness in the event of default by the grantor of the security interest.

[^ 7] See *Matter of Hsiung (PDF)*, 22 I&N Dec. 201, 202 (Assoc. Comm. 1998).

[^ 8] See *Matter of Hsiung (PDF)*, 22 I&N Dec. 201, 202-03 (Assoc. Comm. 1998).

[^ 9] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 193-94 (Assoc. Comm. 1998).

[^ 10] See 8 CFR 204.6(e).

[^ 11] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 195 (Assoc. Comm. 1998).

[^ 12] See 8 CFR 204.6(e).

[^ 13] See 8 CFR 204.6(j)(2).

[^ 14] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 180-188 (Assoc. Comm. 1998).

[^ 15] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 184 (Assoc. Comm. 1998).

[^ 16] The full definition of invest is provided at 8 CFR 204.6(e).

[^ 17] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 183-188 (Assoc. Comm. 1998).

[^ 18] EB-5 regulations contain two basic requirements in order to have a legitimate qualifying investment: (1) 8 CFR 204.6(e) defines "invest" to require a qualifying (that is, non-prohibited) contribution of capital; and (2) 8 CFR 204.6(j)(2) requires a qualifying use of such capital (placing such capital at risk for the purpose of generating a return). In order to satisfy the evidentiary requirement set forth at 8 CFR 204.6(j)(2), an investor must first properly contribute capital in accordance with the definition of invest at 8 CFR 204.6(e). If the contribution of capital fails to meet the definition of invest, it is not a qualifying investment, even if it is at risk for the purpose of generating a return.

[^ 19] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 186-187 (Assoc. Comm. 1998).

[^ 20] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). *Matter of Izummi (PDF)* addressed redemption agreements in general, and not only those where the investor holds the right to repayment. USCIS generally disfavors redemption provisions that indicate a preconceived intent to exit the investment as soon as possible, and notes that one district court has drawn the line at whether the investor holds the right to repayment. See *Chang v. USCIS*, 289 F.Supp.3d 177 (D.D.C. Feb. 7, 2018).

[^ 21] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169 (185-86) (Assoc. Comm. 1998).

[^ 22] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). See *Chang v. USCIS*, 289 F.Supp.3d 177 (D.D.C. Feb. 7, 2018).

[^ 23] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998).

[^ 24] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).

[^ 25] See *Matter of Izummi (PDF)*, 22 I&N 169, 179, 189 (Assoc. Comm. 1998).

[^ 26] A job-creating entity is most closely responsible for creating the employment upon which the petition is based. See *Matter of Izummi (PDF)*, 22 I&NDec. 169, 179 (Assoc. Comm. 1998). In some circumstances, the new commercial enterprise may also be the job-creating entity.

[^ 27] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 178-79 (Assoc. Comm. 1998).

[^ 28] See 8 CFR 204.6(j)(2).

[^ 29] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).

[^ 30] When funds are held in escrow outside the United States, USCIS reviews currency exchange rates at the time of adjudicating the Form I-526 petition to determine if it is more likely than not that the petitioner will make the minimum qualifying capital investment. With the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829), USCIS reviews the evidence in the record, including currency exchange rates at the time of transfer, to determine that, when the funds were actually transferred to the United States, the petitioner actually made the minimum qualifying capital investment.

[^ 31] See Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829).

[^ 32] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998).

[^ 33] See 8 CFR 204.6(e).

[^ 34] Based on an internal review and analysis of typical EB-5 capital deployment structures, USCIS generally considers 12 months to be a reasonable amount of time to further deploy capital for most types of commercial enterprises but will consider evidence showing that a longer period was reasonable for a specific type of commercial enterprise or into a specific commercial activity under the totality of the circumstances.

[^ 35] The requirement to make the full amount of capital available to the business or businesses most closely responsible for creating the employment upon which the petition is based is generally satisfied through the initial deployment of capital resulting in the creation of the required number of jobs.

[^ 36] See 8 CFR 204.6(e) for the definition of commercial enterprise.

[^ 37] This clarification is meant to address potential confusion among stakeholders regarding prior language about the "scope" of the new commercial enterprise while remaining consistent with applicable eligibility requirements.

[^ 38] See 8 CFR 103.2(b)(1). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 175-6, 189 (Assoc. Comm. 1998). See Chapter 4, Immigrant Petition by Alien Investor (Form I-526), Section C, Material Change [6 USCIS-PM G.4(C)].

[^ 39] See INA 203(b)(5)(A), which refers to a single new commercial enterprise: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise."

[^ 40] See 8 CFR 204.6(j) which refers to a single regional center: "In the case of petitions submitted under the Immigrant Investor . . . Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital . . . within a regional center designated by the Service." See 8 CFR 204.6(m)(7) which refers to a single regional center: "An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor . . . Program must demonstrate that his or her qualifying investment is within a regional center."

[^ 41] See Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395 (PDF), 106 Stat. 1828, 1874 (October 6, 1992), as amended.

[^ 42] See INA 203(b)(5)(C). See 8 CFR 204.6(e)-(f).

[^ 43] See 84 FR 35750, 35808 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(f)).

[^ 44] The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. See Matter of Izummi (PDF), 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

[^ 45] See 8 CFR 204.6(e).

[^ 46] See 8 CFR 204.6(j)(3). See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210-11 (Assoc. Comm. 1998).

[^ 47] See 8 CFR 204.6(e).

[^ 48] See 8 CFR 204.6(e) and 8 CFR 204.6(j)(3).

[^ 49] See 8 CFR 204.6(j)(3).

[^ 50] As required under 8 CFR 204.6(j)(3)(ii).

[^ 51] See INA 203(b)(5)(B)(ii).

[^ 52] See INA 203(b)(5)(B)(iii). See 84 FR 35750, 35808 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(e)).

[^ 53] See INA 203(b)(5)(B)(ii). See 8 CFR 204.6(e).

[^ 54] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 174 (Assoc. Comm. 1998).

[^ 55] See 8 CFR 204.6(j)(6). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 171-73 (Assoc. Comm. 1998).

[^ 56] See 8 CFR 204.6(j)(6)(i).

[^ 57] See 8 CFR 204.6(j)(6)(ii)(B) (PDF) (in effect before November 21, 2019).

[^ 58] See 8 CFR 204.6(j)(6)(ii)(A) (PDF) (in effect before November 21, 2019).

[^ 59] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6)(ii)(A)).

[^ 60] USCIS makes designations as part of the petition adjudication and does not issue separate designation notices. See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6)(ii)(A)).

[^ 61] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(i)). See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6(ii)(B)).

[^ 62] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(i)).

[^ 63] See 8 CFR 204.6(i) (PDF) (in effect before November 21, 2019).

[^ 64] See 8 CFR 204.6(j)(6)(ii)(B) (PDF) (in effect before November 21, 2019).

[^ 65] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 66] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 67] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 68] See 8 CFR 204.6(e).

[^ 69] See 8 CFR 204.6(e).

[^ 70] See 8 CFR 204.6(e).

[^ 71] See 8 CFR 204.6(e).

[^ 72] See 8 CFR 204.6(h)(2).

[^ 73] See *Matter of Soffici (PDF)*, 22 I&N Dec. 158 (Assoc. Comm. 1998).

[^ 74] See 8 CFR 204.6(h)(3).

[^ 75] See 8 CFR 204.6(h)(3).

[^ 76] See 8 CFR 204.6(h)(3).

[^ 77] See 8 CFR 204.6(g).

[^ 78] See 8 CFR 204.6(j)-(j)(1).

[^ 79] See 8 CFR 204.6(j)(2)(i)-(v).

[^ 80] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(5)).

[^ 81] See 8 CFR 204.6(j)(5)(i).

[^ 82] See 8 CFR 204.6(j)(5)(i).

[^ 83] See 8 CFR 204.6(j)(5)(iii) (PDF) (as in effect before November 21, 2019). As explained in the EB-5 Immigrant Investor Program Modernization Notice of Proposed Rulemaking (NPRM), 82 FR 4738 (PDF) (Jan. 13, 2017), clarifications were necessary to conform this clause—as well as other parts of 8 CFR 204.6(j)(5)—with amendments made by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (PDF) (November 2, 2002) to INA 203(b)(5). In particular, the amendment made by Public Law 107-273 to INA 203(b)(5) expressly permitting limited partnerships as new commercial enterprises was not intended to restrict investor choice with respect to the type of entity used in investment structuring, but was intended to permit flexibility in the administration of the EB-5 program with respect to the use of different entity types (including the longstanding use of limited liability companies with structures analogous to limited partnerships). Accordingly, 8 CFR 204.6(j)(5) was revised to clarify and conform existing regulations with the statutory requirements of INA 203(b)(5), as amended by Public 107-273.

[^ 84] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(5)(iii)).

[^ 85] Job maintenance is also permitted under certain circumstances. See Subsection 4, Measuring Job Creation [6 USCIS-PM G.2(D)(4)].

[^ 86] See 8 CFR 204.6(j)(4)(i).

[^ 87] See 8 CFR 204.6(j) (It is the new commercial enterprise that will create the 10 jobs).

[^ 88] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

[^ 89] See 8 CFR 204.6(j).

[^ 90] See 8 CFR 204.6(e).

[^ 91] See 8 CFR 204.6(e).

[^ 92] See INA 203(b)(5)(A)(ii).

[^ 93] See INA 203(b)(5)(D). See 8 CFR 204.6(e).

[^ 94] See 8 CFR 204.6(e).

[^ 95] See 8 CFR 204.6(j)(4)(ii).

[^ 96] See 8 CFR 204.6(j)(4)(ii).

[^ 97] See 8 CFR 204.6(e).

[^ 98] See 8 CFR 204.6(e).

[^ 99] See 8 CFR 204.6(j)(4)(iii).

[^ 100] See 8 CFR 204.6(m)(1). See 8 CFR 204.6(m)(7).

[^ 101] See 8 CFR 204.6(g)(2).

[^ 102] USCIS recognizes any reasonable agreement made among immigrant investors in regard to the identification and allocation of qualifying positions. See 8 CFR 204.6(g)(2).

[^ 103] See 8 CFR 204.6(j)(4)(i).

[^ 104] The 2-year period is described in 8 CFR 204.6(j)(4)(i)(B).

[^ 105] See 8 CFR 204.6(j)(4)(ii).

[^ 106] See 8 CFR 204.6(j)(4)(iii).

[^ 107] See Chapter 6, Deference [6 USCIS-PM G.6].

[^ 108] See Operational Guidance for EB-5 Cases Involving Tenant-Occupancy, GM-602-0001, issued December 20, 2012.

[^ 109] See, for example, *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179 (Assoc. Comm. 1998) (holding that the full amount of the money must be made available to the business(es) most closely responsible for creating the employment on which the petition is based).

[^ 110] See 8 CFR 204.6(j)(4)(iii) and (m)(3).

[^ 111] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 375-376 (AAO 2010).

[^ 112] See 84 FR 35750, 35808 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(d)). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)]. For general information on limited visa availability, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 2, Numerically Limited Visa Availability [7 USCIS-PM A.6(C)(2)].

Current as of November 18, 2020

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