

# USCIS Policy Manual

Current as of **June 14, 2017**

## Volume 6 - Immigrants

### Part G - Investors

#### Chapter 1 - Purpose and Background

##### A. Purpose

The Immigration and Nationality Act (INA) makes visas available to qualified foreign nationals who will contribute to the economic growth of the United States by investing in U.S. businesses and creating jobs for U.S. workers.<sup>[1]</sup> Congress created this employment-based fifth preference immigrant visa category (EB-5) to benefit the U.S. economy by providing an incentive for foreign capital investment that creates or preserves U.S. jobs.

The INA authorizes approximately 10,000 visas each fiscal year for immigrant investors (along with their spouses and unmarried children under the age of 21) who have invested or are actively in the process of investing in a new commercial enterprise and satisfy the applicable job creation requirements. Three thousand of the visas are set aside for immigrants, and their eligible family members, who invest in a new commercial enterprise within a USCIS-designated regional center. Regional centers are organized in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.<sup>[2]</sup>

The INA established a threshold investment amount of \$1,000,000 U.S. dollars per investor. To encourage investment in new enterprises located in areas that would most benefit from employment creation, the INA also sets aside at least 3,000 of the approximately 10,000 EB-5 visas annually for qualified immigrants who invest in new commercial enterprises that will create employment in targeted employment areas (TEA), which includes rural areas and areas with high unemployment. The minimum amount for investing in a TEA is currently set at \$500,000 U.S. dollars per investor.<sup>[3]</sup>

Upon adjustment of status or admission to the United States, immigrant investors and their derivative family members receive conditional permanent resident status for a 2-year period. Ultimately, if the applicable requirements have been satisfied, USCIS removes the conditions and the immigrants become lawful permanent residents (LPR) of the United States without conditions.

##### B. Background

###### 1. EB-5 Category Beginnings

In 1990, Congress created the EB-5 immigrant visa category.<sup>[4]</sup> The legislation envisioned LPR status, initially for a 2-year conditional period, for foreign nationals who established,<sup>[5]</sup> invested (or were actively in the process of investing) in, and engaged in the management of job-creating or job-preserving for-profit enterprises.<sup>[6]</sup> Congress placed no restriction on the type of the business if the foreign national invested the required capital and directly created at least 10 jobs for U.S. workers.

## 2. Creation of the Regional Center Program

In 1992, Congress expanded the allowable measure of job creation for the EB-5 category by launching the Immigrant Investor Pilot Program (referred to in this guidance as the Regional Center Program).<sup>[7]</sup> Congress designed this program to determine the viability of pooling investments in designated regional centers.<sup>[8]</sup> Currently, the jurisdiction of a regional center is based on the regional center proposal submitted to and approved by USCIS.

The Regional Center Program is different from the direct job creation (stand-alone) model because it allows for the use of reasonable economic or statistical methodologies to demonstrate job creation. Reasonable methodologies are used, for example, to credit indirect (including induced) jobs to immigrant investors. Indirect jobs are jobs held outside the enterprise that receives immigrant investor capital.

## 3. Program Extensions

Congress initially approved the Regional Center Program as a trial pilot program, set to expire after 5 years. Congress has extended the program several times.<sup>[9]</sup>

<b>Evolution of EB-5 Program</b>	
<b>Act</b>	<b>Statutory Provisions</b>
<b>Sections 121(a)-(b) of the Immigration Act of 1990<sup>[10]</sup></b>	<ul style="list-style-type: none"> <li>• Congress creates the employment-based fifth preference immigrant visa category (EB-5).</li> <li>• EB-5 provides a path to permanent resident status, initially on a 2-year conditional basis, to qualified foreign nationals who contribute to U.S. economic growth by investing in domestic businesses and creating employment.</li> <li>• Intends for immigrant investors to establish, invest in, and engage in the management of job-creating commercial enterprises.</li> </ul>
<b>Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993<sup>[11]</sup></b>	<ul style="list-style-type: none"> <li>• Congress creates an Immigrant Investor Pilot Program (Regional Center Program) to have a number of the available EB-5 visas set aside each fiscal year for foreign nationals (and eligible family members) who invest in a commercial enterprise associated with a designated Regional Center.</li> <li>• Regional centers designated for the promotion of economic growth.</li> <li>• The Regional Center Program allows foreign investors to claim credit for direct and indirect job creation.<sup>[12]</sup></li> </ul>

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<p><b>Sections 11035-37 of the 21st Century Department of Justice Appropriations Authorization Act</b> <a href="#">[13]</a></p>	<ul style="list-style-type: none"> <li>• Includes a specific reference to limited partnerships as commercial enterprises and eliminates the requirement that immigrant investors prove they have established a commercial enterprise themselves. Investors need only show they have invested or are actively in the process of investing in a commercial enterprise, among other requirements.</li> <li>• Defines full-time employment as employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.</li> <li>• Allows regional center proposals to be based on general but economically and statistically sound predictions submitted with the proposal concerning the kinds of enterprises that will receive capital from immigrant investors, the jobs that will be created directly or indirectly as a result of the investments, and other positive economic effects of the investments.</li> </ul>
<p><b>Section 1 of <a href="#">Pub. L. 112-176</a></b> <a href="#">[14]</a></p>	<ul style="list-style-type: none"> <li>• Eliminates the word pilot from the name of the Regional Center Program.</li> </ul>

### C. Legal Authorities

- [INA 203\(b\)\(5\)](#); [8 CFR 204.6](#) – Employment Creation Immigrants
- [INA 216A](#); [8 CFR 216.6](#) – Conditional Permanent Resident Status for Certain Alien Entrepreneurs, Spouses, and Children
- [8 CFR 216.3](#) – Termination of Conditional Permanent Resident Status
- Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993 [\[15\]](#)

### Footnotes

1. See [INA 203\(b\)\(5\)](#).
2. See Section 610(a) of the Judiciary Appropriations Act of 1993, [Pub. L. 102-395](#), 106 Stat. 1828, 1874 (October 6, 1992) as amended by Section 11037 of the 21st Century Department of Justice Appropriations Authorization Act, [Pub. L. 107-273](#), 116 Stat. 1758, 1847 (November 2, 2002).
3. See [INA 203\(b\)\(5\)\(B\)-\(C\)](#). See [8 CFR 204.6\(e\)-\(f\)](#).

4. See Section 121(a) of the Immigration Act of 1990 (IMMACT90), [Pub. L. 101-649](#), 104 Stat. 4978, 4987 (November 29, 1990).
5. In 2002, Congress eliminated the requirement that an immigrant investor establish the new commercial enterprise. See Section 11036 of the 21st Century Department of Justice Appropriations Authorization Act, [Pub. L. 107-273](#), 116 Stat. 1758, 1846 (November 2, 2002).
6. See Sections 121(a)-(b)(1) of IMMACT90, [Pub. L. 101-649](#), 104 Stat. 4978, 4987 (November 29, 1990).
7. See Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, [Pub. L. 102-395](#), 106 Stat. 1828, 1874 (October 6, 1992).
8. See S. Rep. 102-331 at 118 (July 23, 1992).
9. For information on the current expiration date, see the [USCIS website](#).
10. See [Pub. L. 101-649](#), 104 Stat. 4978, 4987 (November 29, 1990).
11. See [Pub. L. 102-395](#), 106 Stat. 1828, 1874 (October 6, 1992).
12. For a discussion on indirect jobs, see Chapter 2, Eligibility Requirements, Section D, Creation of Jobs [[6 USCIS-PM G.2\(D\)](#)].
13. See [Pub. L. 107-273](#), 116 Stat. 1758, 1846 (November 2, 2002).
14. See 126 Stat. 1325, 1325 (September 28, 2012).

15. See [Pub. L. 102-395](#), 106 Stat. 1828, 1874 (October 6, 1992), as amended.

## Chapter 2 - Eligibility Requirements

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. <sup>[1]</sup>

#### 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. <sup>[2]</sup> 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 <sup>[3]</sup> 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. <sup>[4]</sup> 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.<sup>[5]</sup>

### *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<sup>[6]</sup> to the extent provided for by the jurisdiction in which the asset is located.<sup>[7]</sup> 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.<sup>[8]</sup>

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.<sup>[9]</sup>

### *Using Loan Proceeds as Capital*

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

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.<sup>[11]</sup>

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 and Debt Arrangements*

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 or guaranteed to the investor.

An arrangement under which funds have been contributed in exchange for an equity interest subject to a redemption agreement which provides that the investor may demand a return of some portion of his or her investment funds, including after obtaining conditional permanent resident status, is an impermissible debt arrangement, no different from the risk any business creditor incurs. Such funds do not constitute a qualifying contribution of capital [\[16\]](#) and, because the redemption provides for a guaranteed return to the immigrant investor, the funds are similarly not at risk. [\[17\]](#)

### *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. [\[18\]](#) Without some evidence of business activity, no assurance exists that the funds will be used to carry out the business of the commercial enterprise. [\[19\]](#)

### *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. [\[20\]](#) 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. [\[21\]](#)

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.<sup>[22]</sup> 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.<sup>[23]</sup> However, even a deposit into a business account over which petitioner exercises sole control, without more, may not satisfy the at-risk requirement.<sup>[24]</sup>

#### *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 Entrepreneur ([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<sup>[25]</sup> 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,<sup>[26]</sup> 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.

#### *At-Risk Requirement Before the Job Creation Requirement is Satisfied*

The full amount of capital must be used to undertake business activity that results in the creation of jobs.<sup>[27]</sup> Before the job creation requirement is met, the following at-risk requirements apply:

- 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; and
- 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.<sup>[28]</sup>

#### *At-Risk Requirement After the Job Creation Requirement is Satisfied*

Once the job creation requirement has been met, the capital is properly at risk if it is used in a manner related to engagement in commerce (in other words, the exchange of goods or services) consistent with the scope of the new commercial enterprise's ongoing business.<sup>[29]</sup> After the job creation requirement is met, the following at-risk requirements apply:

- 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; and
- Business activity must actually be undertaken.<sup>[30]</sup>

For example, if the scope of a new commercial enterprise was to loan pooled investments to a job-creating entity for the construction of a residential building, the new commercial enterprise, upon repayment of a loan that resulted in the required job creation, may further deploy the repaid capital into one or more similar loans to other entities. Similarly, the new commercial enterprise may also further deploy the repaid capital into certain new issue municipal bonds, such as for infrastructure spending, as long as investments into such bonds are within the scope of the new commercial enterprise in existence at the time the petitioner filed the Immigrant Petition by Alien Entrepreneur ([Form I-526](#)).

Officers must determine whether further deployment has taken place, or will take place, within a commercially reasonable time and within the scope of the new commercial enterprise's ongoing business.<sup>[31]</sup>

### 3. Required Amount of Investment

The immigrant investor must invest at least \$1,000,000 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 \$500,000 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.<sup>[32]</sup>

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,<sup>[33]</sup> 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, 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.<sup>[34]</sup> 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. [\[35\]](#) Any assets acquired directly or indirectly by unlawful means, such as criminal activity, are not considered capital. [\[36\]](#) 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. [\[37\]](#)

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. [\[38\]](#)

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, [\[39\]](#) 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.<sup>[40]</sup> A rural area is any area not within either a metropolitan statistical area or the outer boundary of a city or town having a population of 20,000 or more.<sup>[41]</sup> A high unemployment area is an area that has experienced unemployment of at least 150 percent of the national average rate.<sup>[42]</sup>

Congress provided for a reduced investment amount in a targeted employment area 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 targeted employment area.

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.<sup>[43]</sup>

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 targeted employment area for the lower capital investment amount to apply.<sup>[44]</sup>

The immigrant investor may seek to have an area designated as a targeted employment area. To do so, the immigrant investor must demonstrate that the targeted employment area meets the statutory and regulatory criteria by submitting:

- Evidence that the area is outside of a metropolitan statistical area and outside of a city or town having a population of 20,000 or more;
- Unemployment data for the relevant metropolitan statistical area or county; or
- 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. [\[45\]](#)

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:

<b>Targeted Employment Area (TEA) Analysis</b>	
<b>If the Investment of Capital...</b>	<b>Then...</b>
<b>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, prior to the filing of the Immigrant Petition by Alien Entrepreneur (<a href="#">Form I-526</a>).</b>	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.
<b>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 <a href="#">Form I-526</a> petition filing.</b>	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 <a href="#">Form I-526</a> 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 Entrepreneur 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*

A state government may designate a geographic or political subdivision within its boundaries as a targeted employment area based on high unemployment. Before the state may make such a designation, an official of the state must notify USCIS of the agency, board, or other appropriate state governmental body that will be delegated the authority to certify that the geographic or political subdivision is a high unemployment area. [\[46\]](#) The state may then send a letter from the authorized body of the state certifying that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. [\[47\]](#)

Consistent with the regulations, USCIS defers to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the targeted employment area. However, for all TEA designations, USCIS must still ensure compliance with the statutory requirement that the proposed area designated by the state has an unemployment rate of at least 150 percent above the national average. To do this, USCIS reviews state determinations of the unemployment rate and assess the method or methods by which the state authority obtained the unemployment statistics.

Acceptable data sources for calculating unemployment include 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 is no 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. [\[48\]](#)

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. [\[49\]](#)

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. [\[50\]](#)

## **C. New Commercial Enterprise**

A new commercial enterprise is any commercial enterprise established after November 29, 1990. [\[51\]](#) 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. [\[52\]](#) 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. [\[53\]](#)

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. [\[54\]](#)

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. [\[55\]](#) Cosmetic changes to the décor, a new marketing strategy, or a simple change in ownership do not qualify as restructuring. [\[56\]](#)

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. [\[57\]](#)

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. [\[58\]](#)

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. [\[59\]](#)

## 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. [\[60\]](#)

## 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. [\[61\]](#)

## 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. [\[62\]](#)

## 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. It is not enough that the immigrant investor maintain a purely passive role concerning his or her investment. [\[63\]](#)

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;
- Evidence that the immigrant investor is a corporate officer or a member of the corporate board of directors; or
- 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. [\[64\]](#)

## 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 [\[65\]](#) 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. [\[66\]](#)

### *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. [\[67\]](#)

### 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. [\[68\]](#)

## **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. [\[69\]](#) 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. [\[70\]](#)

### *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 a foreign national 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. [\[71\]](#)

### *Full-Time Employment*

For the purpose of the job creation requirement, the position must be a full-time employment position. [\[72\]](#) 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. [\[73\]](#) 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. [\[74\]](#)

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. [\[75\]](#) 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 Entrepreneur ([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. [\[76\]](#)

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. [\[77\]](#)

### *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. [\[78\]](#)

### *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. [\[79\]](#) 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. [\[80\]](#)

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.

## **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. [\[81\]](#)

The 2-year period [\[82\]](#) 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.

In the case of a troubled business, a comprehensive business plan must accompany the other required evidentiary documents. [\[83\]](#)

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.<sup>[84]</sup> 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.

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.<sup>[85]</sup> 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.<sup>[86]</sup>

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.

## 6. Tenant Occupancy Methodology

The tenant occupancy methodology can satisfy the EB-5 program requirement of presenting a reasonable methodology that is supported by economically or statistically valid forecasting tools. Information must be presented in verifiable detail that is sufficient to establish that the tenant jobs are likely to result from the new commercial enterprise.

Tenant occupancy models must demonstrate that the claimed jobs result directly or indirectly from the economic activity of the new commercial enterprise. Jobs that are merely re-located rather than created are not sufficient.

Whether a new commercial enterprise has caused the creation of indirect tenant jobs is an adjudicatory decision made on a case-by-case basis and will generally require an evaluation of the verifiable detail provided and the overall reasonableness of the methodology presented.

A tenant occupancy model should project the number of newly created jobs that would not have been created but for the economic activity of the new commercial enterprise.

To claim credit for tenant jobs, immigrant investors may present evidence backed by reasonable methods that map a specific amount of direct, imputed, or subsidized investment to such new jobs. Immigrant investors may

also utilize a facilitation-based approach to demonstrate that the economic benefits provided by a specific space project will remove a significant market-based constraint. One way applicants and petitioners can make this showing is to indicate how a specific real estate project will correct market imperfections and generate net new labor demand and income that will result in a specified prospective number of tenant jobs that will locate in that space.

For example, immigrant investors may provide a market analysis showing that new tenants in a specific industry will occupy the space, evidence of a lack of appropriate space for a specific industry in the geographic area, evidence of substantial cost savings to tenants that allowed them to occupy the space, or evidence of growing demand for space related to specific industries in the geographic area. In high unemployment areas in which new projects are not likely to significantly displace other income or labor, immigrant investors should generally indicate how a specific project will fill an existing investment void in that area to generate new demand for the tenant business.

Prospective tenant jobs or tenant activity demonstrated by reasonable methods and supported by verifiable evidence may be used as direct inputs into appropriate regional growth models. These inputs can project the number of indirect and induced jobs that result from the credited tenant jobs. Immigrant investors who utilize the facilitation-based approach do not need to demonstrate an equity or direct financial connection between their capital investment and the employees of prospective tenants.

Approved regional center applications based on the use of tenant occupancy projections should contain appropriate language regarding the assumptions underlying the approval in the approval notice. There may be a negative impact to the related immigrant petitions and petitions to remove conditions on residency if the claims made on the regional center application do not occur.<sup>[87]</sup>

For example, an application for regional center designation filed with an exemplar immigrant petition may be approved where no specific tenant has been identified to occupy a commercial space.<sup>[88]</sup> The regional center applicant may reasonably project that a restaurant will eventually lease the premises.<sup>[89]</sup>

If after approval of the application for regional center designation the space is leased to a different type of tenant (for example, a different type of restaurant that yields different expected employment or a non-restaurant), or fails to achieve previously projected occupancy rates, this change alone will not necessarily constitute a material change that triggers the elimination of deference. It is not necessarily a material change if a shopping mall fails to lease 1 out of 50 retail spaces. By contrast, if the projection was for a single type of tenant to occupy the entire building space and no tenant materializes, that may constitute a material change.

While such modified tenancy arrangements may be permissible, they could nevertheless impact the project's estimated job creation numbers. Therefore, the application for regional center designation approval notice should caution that the approved job creation estimates are based on a restaurant occupying that space. If no tenant or a different type of tenant eventually occupies the space, the economic impact analysis and ultimate job creation numbers will be revisited in future adjudications that relate to that project.

## **E. Burden of Proof**

The petitioner or applicant must establish each element by a preponderance of the evidence.<sup>[90]</sup> 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.

## **Footnotes**

1.

- See [8 CFR 204.6\(e\)](#).
2. See [8 CFR 204.6\(e\)](#).
  3. See [Matter of Ho](#), 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](#), 22 I&N Dec. 201, 202 (Assoc. Comm. 1998).
  8. See [Matter of Hsiung](#), 22 I&N Dec. 201, 202-03 (Assoc. Comm. 1998).
  9. See [Matter of Izummi](#), 22 I&N Dec. 169, 193-94 (Assoc. Comm. 1998).
  10. See [8 CFR 204.6\(e\)](#).
  11. See [Matter of Izummi](#), 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](#), 22 I&N Dec. 169, 180-188 (Assoc. Comm. 1998).
15. See [Matter of Izummi](#), 22 I&N Dec. 169, 184 (Assoc. Comm. 1998).
16. See [Matter of Izummi](#), 22 I&N Dec. 169, 185 (Assoc. Comm. 1998).
17. See [Matter of Izummi](#), 22 I&N Dec. 169, 183-188 (Assoc. Comm. 1998).
18. See [Matter of Ho](#), 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998).
19. See [Matter of Ho](#), 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).
20. See [Matter of Izummi](#), 22 I&N 169, 179, 189 (Assoc. Comm. 1998).
21. A job-creating entity is most closely responsible for creating the employment upon which the petition is based. See [Matter of Izummi](#), 22 I&N Dec. 169, 179 (Assoc. Comm. 1998). In some circumstances, the new commercial enterprise may also be the job-creating entity.
22. See [Matter of Izummi](#), 22 I&N Dec. 169, 178-79 (Assoc. Comm. 1998).
23. See [8 CFR 204.6\(j\)\(2\)](#).

24. See [Matter of Ho](#), 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).
25. 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 [Form I-829](#), Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, 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.
26. See [Form I-829](#), Petition by Entrepreneur to Remove Conditions on Permanent Resident Status.
27. See [Matter of Ho](#), 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). See [Matter of Izummi](#), 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998).
28. See [Matter of Ho](#), 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). See [Matter of Izummi](#), 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998).
29. See [8 CFR 204.6\(e\)](#) for the definition of commercial enterprise.
30. See [Matter of Ho](#), 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). See [Matter of Izummi](#), 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998).
31. See [8 CFR 103.2\(b\)\(1\)](#) (A petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication).
32. See [INA 203\(b\)\(5\)\(C\)](#). See [8 CFR 204.6\(e\)-\(f\)](#).
33. 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](#), 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

34. See [8 CFR 204.6\(e\)](#).
  
35. See [8 CFR 204.6\(j\)\(3\)](#). See *Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm. 1998).
  
36. See [8 CFR 204.6\(e\)](#).
  
37. See [8 CFR 204.6\(e\)](#) and [8 CFR 204.6\(j\)\(3\)](#).
  
38. See [8 CFR 204.6\(j\)\(3\)](#).
  
39. As required under [8 CFR 204.6\(j\)\(3\)\(ii\)](#).
  
40. See [INA 203\(b\)\(5\)\(B\)\(ii\)](#).
  
41. See [INA 203\(b\)\(5\)\(B\)\(iii\)](#). See [8 CFR 204.6\(e\)](#).
  
42. See [INA 203\(b\)\(5\)\(B\)\(ii\)](#). See [8 CFR 204.6\(e\)](#).
  
43. See *Matter of Izummi*, 22 I&N Dec. 169, 174 (Assoc. Comm. 1998).
  
44. See [8 CFR 204.6\(j\)\(6\)](#). See *Matter of Izummi*, 22 I&N Dec. 169, 171-73 (Assoc. Comm. 1998).
  
45. See [8 CFR 204.6\(j\)\(6\)](#).

46. See [8 CFR 204.6\(i\)](#).
47. See [8 CFR 204.6\(j\)\(6\)\(ii\)\(B\)](#).
48. See [Matter of Ho](#), 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).
49. See [Matter of Ho](#), 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).
50. See [Matter of Ho](#), 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).
51. See [8 CFR 204.6\(e\)](#).
52. See [8 CFR 204.6\(e\)](#).
53. See [8 CFR 204.6\(e\)](#).
54. See [8 CFR 204.6\(e\)](#).
55. See [8 CFR 204.6\(h\)\(2\)](#).
56. See [Matter of Soffici](#), 22 I&N Dec. 158 (Assoc. Comm. 1998).
57. See [8 CFR 204.6\(h\)\(3\)](#).

58. See [8 CFR 204.6\(h\)\(3\)](#).
59. See [8 CFR 204.6\(h\)\(3\)](#).
60. See [8 CFR 204.6\(g\)](#).
61. See [8 CFR 204.6\(j\)-\(j\)\(1\)](#).
62. See [8 CFR 204.6\(j\)\(2\)\(i\)-\(v\)](#).
63. See [8 CFR 204.6\(j\)\(5\)](#).
64. See [8 CFR 204.6\(j\)\(5\)\(i\)-\(iii\)](#).
65. Job maintenance is also permitted under certain circumstances. See Subsection 4, Measuring Job Creation [[6 USCIS-PM G.2\(D\)\(4\)](#)].
66. See [8 CFR 204.6\(j\)\(4\)\(i\)](#).
67. See [8 CFR 204.6\(j\)](#) (It is the new commercial enterprise that will create the 10 jobs).
68. See [Matter of Izummi](#), 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

69. See [8 CFR 204.6\(j\)](#).

70. See [8 CFR 204.6\(e\)](#).

71. See [8 CFR 204.6\(e\)](#).

72. See [INA 203\(b\)\(5\)\(A\)\(ii\)](#).

73. See [INA 203\(b\)\(5\)\(D\)](#). See [8 CFR 204.6\(e\)](#).

74. See [8 CFR 204.6\(e\)](#).

75. See [8 CFR 204.6\(j\)\(4\)\(ii\)](#).

76. See [8 CFR 204.6\(j\)\(4\)\(ii\)](#).

77. See [8 CFR 204.6\(e\)](#).

78. See [8 CFR 204.6\(e\)](#).

79. See [8 CFR 204.6\(j\)\(4\)\(iii\)](#).

80. See [8 CFR 204.6\(m\)\(1\)](#). See [8 CFR 204.6\(m\)\(7\)](#).

81. See [8 CFR 204.6\(j\)\(4\)\(i\)](#).
82. The 2-year period is described in [8 CFR 204.6\(j\)\(4\)\(i\)\(B\)](#).
83. See [8 CFR 204.6\(j\)\(4\)\(ii\)](#).
84. See [8 CFR 204.6\(j\)\(4\)\(iii\)](#).
85. See [8 CFR 204.6\(g\)\(2\)](#).
86. USCIS recognizes any reasonable agreement made among immigrant investors in regard to the identification and allocation of qualifying positions. See [8 CFR 204.6\(g\)\(2\)](#).
87. USCIS will still apply the principles outlined in this guidance to Regional Centers that currently have an approval notice that does not include this language, subject to application of established USCIS policy calling for deference to prior decisions.
88. The term exemplar refers to a sample [Form I-526](#), Immigrant Petition by Alien Entrepreneur, filed with a [Form I-924](#), Application For Regional Center Under the Immigrant Investor Program, for an actual project. For more information, see Chapter 3, Regional Center Designation, Reporting, Amendments, and Termination, Section B, Types of Regional Center Projects [[6 USCIS-PM G.3\(B\)](#)].
89. A specific tenant does not need to be identified in order for the business plan to meet program requirements. However, the type of industry of the prospective tenant should be identified (for example, a restaurant tenant or a clothing store tenant) to meet the legal requirements set forth in [Matter of Ho](#), 22 I&N Dec. 206 (Assoc. Comm. 1998), and [8 CFR 204.6\(j\)\(4\)\(i\)\(B\)](#).
90. See [Matter of Chawathe](#), 25 I&N Dec. 369, 375-376 (AAO 2010).

## Chapter 3 - Regional Center Designation, Reporting, Amendments, and Termination

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The goal of the Regional Center Program is to stimulate economic growth in a specified geographic area. The regional center model can offer an immigrant investor already defined investment opportunities, thereby reducing the immigrant investor's responsibility to identify acceptable investment vehicles. If the new commercial enterprise is located within the geographic area, and falls within the economic scope of the defined regional center, reasonable methodologies can be used to demonstrate indirect job creation.<sup>[1]</sup> A regional center can be associated with one or more new commercial enterprises.

A regional center seeking to participate in the Regional Center Program must submit a proposal using the Application For Regional Center Under the Immigrant Investor Program ([Form I-924](#)).

USCIS may designate a regional center based on a general proposal for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. The statute further provides that a regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones.

In addition, the establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from immigrant investors, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have on the area.<sup>[2]</sup>

The regulations state that the proposal must:

- Clearly describe how the regional center focuses on a geographical region of the United States and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;
- Provide in verifiable detail how jobs will be created directly or indirectly;
- Provide a detailed statement regarding the amounts and sources of capital which have been already committed to the regional center;
- Provide a description of the promotional efforts taken and planned by the sponsors of the regional center;
- Include a detailed prediction<sup>[3]</sup> how the regional center will have a positive impact on the regional or national economy based on factors such as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and
- Be supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, or multiplier tables.<sup>[4]</sup>

The level of verifiable detail required for a [Form I-924](#) to be approved and provided deference may vary depending on the nature of the application filing.<sup>[5]</sup>

## A. Regional Center Application Proposals

The regional center proposal must include a management and operational plan to administer, oversee, and manage the proposed regional center, including but not limited to how the regional center:

- Will be promoted to attract immigrant investors, including a description of the budget for promotional activities;

- Will identify, assess, and evaluate proposed immigrant investor projects and enterprises;
- Characterizes the structure of the investment capital it will sponsor; for example, whether the investment capital to be sought for job-creating companies will consist solely of immigrant investor capital or a combination of immigrant investor capital and domestic capital, and how the distribution of the investment capital will be structured (for example, loans to developers or venture capital); and
- Will oversee all investment activities affiliated with, through, or under the sponsorship of the proposed regional center.

### *Geographic Scope*

An officer reviews the proposed geographic boundaries of a new regional center to determine if they are acceptable. USCIS deems geographic boundaries acceptable if the regional center applicant can establish by a preponderance of the evidence that the proposed economic activity will promote economic growth in the proposed area. The question is fact-specific and the law does not require any particular form of evidentiary showing, such as a county-by-county analysis. The reasonableness of proposed regional center geographic boundaries may be demonstrated through evidence that the proposed area is contributing significantly to the supply chain, as well as the labor pool, of the proposed projects.

## **B. Types of Regional Center Projects**

An actual project refers to a specific project proposal that is supported by a [Matter of Ho](#) compliant business plan.<sup>[6]</sup>

A hypothetical project refers to a project proposal that is not supported by a [Matter of Ho](#) compliant business plan.

The term exemplar refers to a sample Immigrant Petition by Alien Entrepreneur ([Form I-526](#)), filed with an Application For Regional Center Under the Immigrant Investor Program ([Form I-924](#)) for an actual project. This type of regional center proposal contains copies of the commercial enterprise's organizational and transactional documents, which USCIS reviews to determine if they are in compliance with established eligibility requirements.

### **1. Hypothetical Projects**

If the [Form I-924](#) projects are hypothetical projects, general proposals and general predictions may be sufficient to determine that the proposed regional center will more likely than not promote economic growth, improved regional productivity, job creation, and increased domestic capital investment. A regional center applicant seeking review of a hypothetical project should clarify in the [Form I-924](#) submission that the project is hypothetical. General proposals and predictions may include a description of the project parameters, such as:

- Proposed project activities, industries, locations, and timelines;
- A general market analysis of the proposed job creating activities and explanation regarding how the proposed project activities are likely to promote economic growth and create jobs; and
- A description, along with supporting evidence, of the regional center principals' relevant experience and expertise.

While hypothetical project submissions are sufficient for regional center designation, previous determinations based on hypothetical projects will not receive deference. Actual projects will receive a de novo officer review during subsequent filings (for example, through the adjudication of an amended [Form I-924](#) application, including the actual project details or the first [Form I-526](#) immigrant investor petition).

Organizational and transactional supporting documents are not required for a hypothetical project. If a regional center applicant desires a compliance review of organizational and transactional documents, the application must include an actual project with a [Matter of Ho](#) compliant business plan and an exemplar immigrant investor petition.

## 2. Actual Projects

Applications for regional center designation based on actual projects may require more details than a hypothetical project to demonstrate that the proposal contains verifiable details and is supported by economically or statistically sound forecasting tools. A regional center applicant seeking review of an actual project should clarify in the [Form I-924](#) submission that the project is actual.

Actual projects require a [Matter of Ho](#) compliant comprehensive business plan that provides verifiable detail on how jobs will be created. Absent fraud, willful misrepresentation, or a legal deficiency,<sup>171</sup> USCIS defers to prior determinations based on actual projects when evaluating subsequent filings under the project involving the same material facts and issues.

Organizational and transactional documents for the new commercial enterprise are not required. If a regional center applicant desires review of organizational and transactional documents for program compliance, the regional center application must be accompanied by an exemplar [Form I-526](#) immigrant investor petition.

If regional center applicants opt not to file a [Form I-924](#) amendment, the investor should identify his or her [Form I-526](#) immigrant investor petition as an actual project being presented for the first time. Additionally, the immigrant petition should contain an affirmative statement signed by a regional center principal confirming that the regional center is aware of the specific project being presented for the first time as part of the immigrant investor petition.

In cases where the regional center application is filed based on actual projects that do not contain sufficient verifiable detail, USCIS may approve the projects as hypothetical projects if they contain the requisite general proposals and predictions. The projects approved as hypotheticals, however, do not receive deference in subsequent filings.

In cases where some projects are approvable as actual projects, and others are not approvable or only approvable as hypothetical projects, the approval notice should identify which projects have been approved as actual projects and will be accorded deference. The approval notice should also identify projects that have been approved as hypothetical projects but will not be accorded deference.

## 3. Exemplar Filings

Regional center applications, based on actual projects, including a [Form I-526](#) immigrant investor exemplar petition, require more details than a hypothetical or actual project submitted without an exemplar. A regional center applicant seeking review of an exemplar should state that the project is an actual project with a [Form I-526](#) exemplar.

Exemplar filings require a [Matter of Ho](#) compliant comprehensive business plan that provides verifiable detail on how jobs will be created, as well as organizational and transactional documents for the new commercial enterprise.

Absent fraud, willful misrepresentation, or a legal deficiency, officer determinations based on exemplar filings are accorded deference in subsequent filings under the project with the same material facts and issues.

While an amended [Form I-924](#) is not required to perfect a hypothetical project once the actual project details are available, some applicants may choose to file an amended [Form I-924](#) application with a [Form I-526](#) exemplar

to obtain a favorable determination. These exemplar filings are accorded deference in subsequent related filings, absent material change, fraud, willful misrepresentation, or a legally deficient determination.

### C. Regional Center Annual Reporting

Designated regional centers must file a Supplement to Form I-924 ([Form I-924A](#)) annually that demonstrates continued eligibility for designation as a regional center in the EB-5 Program.<sup>[8]</sup> The regional center must file the form within 90 days of the end of the fiscal year (between October 1 and December 29). The [Form I-924A](#) instructions specifically list required information that must be submitted.<sup>[9]</sup>

If the regional center fails to file the required annual report, USCIS issues a Notice of Intent to Terminate (NOIT) to the regional center for failing to provide the required information. This may ultimately result in the termination of the regional center's designation if the regional center fails to respond or does not file a response which adequately demonstrates continued eligibility.

### D. Regional Center Amendments

Because businesses' strategies constantly evolve, with new opportunities identified and existing plans improved, a regional center may amend a previously approved designation. The [Form I-924](#) instructions provide information regarding the submission of regional center amendment requests.<sup>[10]</sup>

To improve processing efficiencies and predictability in subsequent filings, many regional centers may seek to amend the [Form I-924](#) approval to reflect changes in economic analysis and job creation estimates. Such amendments, however, are not required in order for individual investors to proceed with filing the immigrant petitions or petitions to remove conditions on residence based on the additional jobs created, or to be created, in additional industries.

Formal amendments to an approved regional center's designation are not required when a regional center changes its industries of focus, business plans, or economic methodologies; however, a regional center may find it advantageous to seek USCIS approval of such changes before they are adjudicated in individual immigrant investor petitions.

### E. Termination of a Regional Center Designation

USCIS issues a NOIT if:

- USCIS determines that a regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment; or
- The regional center fails to submit required information to USCIS.<sup>[11]</sup>

The NOIT will provide the grounds for termination and provide at least 30 days from receipt of the NOIT for the regional center to respond to the allegations in the NOIT. The regional center may offer evidence to contest the allegations in the NOIT. If the regional center overcomes the allegations in the NOIT, USCIS issues a Notice of Reaffirmation that affirms the regional center's designation.

If the regional center fails to overcome the allegations in the NOIT, USCIS terminates the regional center's participation in the Regional Center Program. In this case, USCIS notifies the regional center of the termination, the reasons for termination, and the right to file a motion, appeal, or both. The regional center may appeal the decision to USCIS' Administrative Appeals Office within 30 days after service of notice (33 days, if the notice was mailed).<sup>[12]</sup>

## Footnotes

1. For a definition of indirect jobs, see Chapter 2, Eligibility Requirements, Section D, Creation of Jobs, Subsection 4, Measuring Job Creation [[6 USCIS-PM G.2\(D\)\(4\)](#)].
2. See Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, [Pub. L. No. 102-395](#), 106 Stat. 1828, 1874 (October 6, 1992), as amended.
3. An applicant can submit a general prediction which addresses the prospective impact of the capital investment projects sponsored by the regional center, regionally or nationally. See [Form I-924](#) instructions.
4. See [8 CFR 204.6\(m\)\(3\)](#).
5. For more information about the types of regional center projects, see Section B, Types of Regional Center Projects [[6 USCIS-PM G.3\(B\)](#)].
6. See Chapter 2, Eligibility Requirements, Section B, Comprehensive Business Plan [[6 USCIS-PM G.2\(B\)](#)].
7. Legal deficiency includes objective mistakes of law or fact made as part of the USCIS adjudication.
8. See [8 CFR 204.6\(m\)\(6\)](#).
9. See [Form I-924A](#) instructions.
10. See [Form I-924](#) instructions.
11. See [8 CFR 204.6\(m\)\(6\)](#).

12. See [8 CFR 103.3](#). See [8 CFR 204.6\(m\)\(6\)](#).

## Chapter 4 - Immigrant Petition by Alien Entrepreneur (Form I-526)

An immigrant investor must file an initial immigrant petition and supporting documentation to receive EB-5 immigrant classification.<sup>[1]</sup> The immigrant investor will be a conditional permanent resident upon adjustment of status or admission to the United States.<sup>[2]</sup>

The petitioner must establish he or she meets the following eligibility requirements when filing the Immigrant Petition by Alien Entrepreneur ([Form I-526](#)):

- The required amount of capital has been invested or is actively in the process of being invested in the new commercial enterprise;
- The investment capital was obtained by the investor through lawful means;
- The new commercial enterprise will create at least 10 full-time positions for qualifying employees; and
- The immigrant investor is or will be engaged in the management of the new commercial enterprise.

If the immigrant investor seeks to qualify based on a \$500,000 investment, instead of \$1,000,000, it is necessary to show the new commercial enterprise or job-creating entity, as applicable, is principally doing business in a TEA.

At the preliminary [Form I-526](#) filing stage, the immigrant investor must demonstrate his or her commitment to invest the capital, but does not need to establish the required capital already has been fully invested. The investment requirement is met if the immigrant investor demonstrates that he or she is actively in the process of investing the required capital. However, evidence of a mere intent to invest or of prospective investment arrangements entailing no present commitment will not suffice.<sup>[3]</sup>

At this preliminary stage, the immigrant investor does not need to establish the required jobs have already been created. The job creation requirement is met by the immigrant investor demonstrating it is more likely than not the required jobs will be created.<sup>[4]</sup>

### A. Petitions Associated with Regional Centers

Each regional center investor must demonstrate that he or she has invested, or is actively in the process of investing, lawfully obtained capital in a new commercial enterprise located within a designated regional center in the United States. The investor must also demonstrate that this investment will create at least 10 direct or indirect full-time jobs for qualifying employees.

The immigrant investor must provide a copy of the regional center's most recently issued approval letter. In addition, if the immigrant investor is relying on previously approved project-specific documentation (including the comprehensive business plan, economic analysis, and organizational and transactional documents) to satisfy his or her burden of proof, the immigrant investor must submit this documentation with his or her [Form I-526](#) petition. This is required even though the regional center previously submitted and USCIS reviewed the documentation with a regional center's Application for Regional Center Under the Immigrant Investor Program ([Form I-924](#)).

When USCIS has evaluated and approved certain aspects of an EB-5 investment, USCIS generally defers to that favorable determination at a subsequent stage in the EB-5 process. USCIS does not, however, defer to a previously favorable decision in later proceedings when, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation, or the previously favorable decision is determined to be legally deficient. [\[5\]](#)

## **B. Stand-Alone Petitions**

An immigrant investor not associated with a regional center must, together with the petition, demonstrate that he or she has invested, or is actively in the process of investing, lawfully obtained capital in a new commercial enterprise located within the United States that will create at least 10 direct full-time jobs for qualifying employees.

## **C. Material Change**

A petitioner must establish eligibility at the time of filing and a petition cannot be approved if, after filing, the immigrant investor becomes eligible under a new set of facts or circumstances. Changes that are considered material that occur after the filing of an immigrant investor petition will result in the investor's ineligibility if the investor has not obtained conditional permanent resident status. [\[6\]](#)

If material changes occur after the approval of the immigrant petition, but before the investor has obtained conditional permanent residence, such changes would constitute good and sufficient cause to issue a notice of intent to revoke and, if not overcome, would constitute good cause to revoke the approval of the petition. A change is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. [\[7\]](#)

Changes that occur in accordance with a business plan and other supporting documents as filed will generally not be considered material. For example, if at the time of filing the immigrant petition, no jobs have yet been created, but after approval of the immigrant petition and before the investor has obtained conditional permanent resident status, the investment in the new commercial enterprise results in the creation of 10 jobs in accordance with the investor's business plan as filed, such a change would not be considered material.

If the new commercial enterprise undertakes the commercial activities presented in the initially filed business plan and creates the required number of jobs, the new commercial enterprise may further deploy the capital into another activity. The activity must be within the scope of the new commercial enterprise and further deployment must be within a commercially reasonable period of time. Further deployment of this nature will not cause the petition to be denied or revoked under certain circumstances.

In all cases where further deployment is envisioned, officers review the evidence submitted with the petition to determine whether the petitioner has presented sufficient evidence to demonstrate continuing eligibility with the capital at risk requirement. The investor must show that the capital is, and will remain, at risk of loss and gain and is and will be used in a manner related to engagement in commerce within the scope of the new commercial enterprise's business. Further deployment of capital that occurs before the immigrant investor becomes a conditional permanent resident must be adequately described in the [Form I-526](#) record.

If the organizational documents for a new commercial enterprise contain a liquidation provision, that does not otherwise constitute an impermissible debt arrangement, the documents may generally be amended to remove such a provision in order to allow the new commercial enterprise to continue to operate through the regional center immigrant investor's period of conditional permanent residence. Such an amendment would generally not be considered a material change because facts related to the immigrant investor's [Form I-526](#) eligibility would not change.

If, at the time of adjudication, the investor is asserting eligibility under a materially different set of facts that did not exist when he or she filed the immigrant petition, the investor must file a new [Form I-526](#) immigrant petition.

Further, the termination of a regional center associated with a regional center immigrant investor's [Form I-526](#) petition constitutes a material change to the petition.<sup>[8]</sup>

## Footnotes

1. See [8 CFR 204.6\(a\)](#). See [8 CFR 103.2\(b\)](#).
2. See [INA 216A\(a\)](#). For information regarding removal of the conditional basis of the investor's permanent resident status, see Chapter 5, Removal of Conditions [[6 USCIS-PM G.5](#)].
3. See [8 CFR 204.6\(j\)\(2\)](#). See *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998).
4. See [8 CFR 204.6\(j\)\(4\)](#). See [8 CFR 204.6\(m\)\(7\)](#).
5. Legally deficient includes objective mistakes of law or fact made as part of the USCIS adjudication.
6. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). See [8 CFR 103.2\(b\)\(1\)](#).
7. See *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).
8. See [8 CFR 204.6\(j\)](#). See [8 CFR 204.6\(m\)\(7\)](#).

## Chapter 5 - Removal of Conditions

To seek removal of the conditions on permanent resident status, the immigrant investor must file a Petition by Entrepreneur to Remove Conditions on Permanent Resident Status ([Form I-829](#)) within 90 days prior to the 2-year anniversary of the date conditional permanent resident status was granted (for example, adjustment of status application was approved or investor admitted into the United States on an immigrant visa).

The immigrant investor must submit the following evidence with his or her petition to remove conditions:

- Evidence that the immigrant investor invested, or was actively in the process of investing the required capital and sustained the investment throughout the period of the immigrant investor's residence in the United States; and
- Evidence that the new commercial enterprise created or can be expected to create, within a reasonable time, at least 10 full-time positions for qualifying employees.<sup>[1]</sup> In the case of a troubled business, the investor must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident.<sup>[2]</sup>

## A. Evidence of Investment and Sustainment

### 1. Investment

The petition must be accompanied by evidence that the immigrant investor invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence.<sup>[3]</sup>

### 2. Sustainment of the Investment

The immigrant investor must provide evidence that he or she sustained the investment throughout the period of his or her status as a conditional permanent resident of the United States.

USCIS considers the immigrant investor to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement and continuously maintained his or her capital investment over the sustainment period.<sup>[4]</sup> When filing a petition to remove conditions, the full amount of required capital does not need to have been invested, but the immigrant investor must provide evidence that he or she has substantially met the requirement. The evidence may include, but is not limited to:

- Bank statements;
- Invoices;
- Receipts;
- Contracts;
- Business licenses;
- Federal or state income tax returns; and
- Federal or state quarterly tax statements.<sup>[5]</sup>

## B. Evidence of Job Creation

The immigrant investor can meet the job creation requirement by showing that at least 10 full-time positions for qualifying employees have been created, or will be created within a reasonable time. The non-regional center investor must show that the new commercial enterprise directly created these full-time positions for qualifying employees. The regional center investor may show that these jobs were directly or indirectly created by the new commercial enterprise. The evidence to prove job creation may include, but is not limited to the following:

- For direct jobs created as a result of the immigrant investor's investment, evidence such as payroll records, relevant tax documents, and Employment Eligibility Verification ([Form I-9](#)) showing employment by the new commercial enterprise;
- For direct jobs maintained or created in a troubled business, evidence such as payroll records, relevant tax documents, and [Form I-9](#) showing employment at the time of investment and at the time of filing the petition to remove the conditions on residence; or
- For jobs created indirectly as a result of an investment in the regional center context, reasonable methodologies, including multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices.

If the regional center investor seeks to demonstrate job creation through the use of an economic input-output model, the investor must demonstrate that the methodology is reasonable. Further, the investor must submit relevant documents previously submitted with the Immigrant Petition by Alien Entrepreneur ([Form I-526](#)), including the comprehensive business plan and economic impact analysis, if he or she is relying on such documents to meet his or her burden of proof. This information is necessary to indicate whether there are material changes that would impact deference.

Where the inputs into the model reflect jobs created directly at the new commercial enterprise or job-creating entity, the investor must 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, the investor must 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, the investor must demonstrate 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 making the determination as to whether or not the immigrant investor has created the requisite number of jobs, USCIS does not require that the jobs still be in existence at the time of the petition to remove conditions adjudication in order to be credited to the investor. Instead, the job creation requirement is met if the investor can show that at least 10 full-time jobs for qualifying employees were created by the new commercial enterprise as a result of his or her investment and such jobs were considered to be permanent jobs when created. <sup>[6]</sup>

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. <sup>[7]</sup> For example, if the new commercial enterprise creates 25 jobs, yet there are three immigrant investors associated with the new commercial enterprise, and the record is silent on the issue of allocation, the first two immigrant investors to file the petition to remove conditions will each get to count 10 of the 25 jobs. The third immigrant investor to file the petition to remove conditions is allocated the remaining five jobs.

Direct 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 for at least 2 years generally are not considered intermittent,

temporary, seasonal, or transient in nature.

Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. The focus of the adjudication will continue to be on whether the position, as described in the petition, is continuous full-time employment.

For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if the same project called for electrical workers to provide services during a small number of 5-week periods over the course of the project, such positions would be deemed intermittent and not meet the definition of full-time employment.

### **1. Position Focused, Not Employee Focused**

The full-time employment criterion focuses on the position, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude the position from consideration as full-time employment. For example, the positions described in the preceding paragraph would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day-to-day or week-to-week as long as the need for the positions remain constant.

### **2. Within a Reasonable Time Standard**

A petitioner may demonstrate that jobs will be created within a reasonable period of time after adjudication of the [Form I-829](#) petition.<sup>[8]</sup> This permits a degree of flexibility to account for the realities and unpredictability of starting a business venture, but it is not an open-ended allowance. The business plan submitted with the [Form I-526](#) immigrant petition must establish a likelihood of job creation within the next 2 years,<sup>[9]</sup> demonstrating an expectation that EB-5 projects will generally create jobs within such a timeframe.

USCIS may determine, based upon a totality of the circumstances, that a lengthier timeframe is reasonable. USCIS has latitude under the law to request additional evidence concerning those circumstances. Because 2 years is the expected baseline period in which job creation will take place, jobs that will be created within a year of the 2-year anniversary of the immigrant investor's admission as a conditional permanent resident or adjustment to conditional permanent resident may generally be considered to be created within a reasonable period of time.

Jobs projected to be created more than 3 years after the immigrant investor's admission in, or adjustment to, conditional permanent resident status usually will not be considered to be created within a reasonable time unless extreme circumstances,<sup>[10]</sup> are presented.

Not all of the goals of capital investment and job creation need to be fully realized before the conditions on the immigrant investor's status have been removed. The investor must establish that it is more likely than not that the investor is in substantial compliance with the capital requirements and that the jobs will be created within a reasonable time.

## **C. Material Change**

USCIS recognizes the process of carrying out a business plan and creating jobs depends on a wide array of variables of which an investor may not have any control. In order to provide flexibility to meet the realities of the business world, USCIS permits an immigrant investor who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed.

An immigrant investor may proceed with the petition to remove conditions and present documentary evidence demonstrating that, notwithstanding the business plan contained in the initial [Form I-526](#) immigrant petition, the requirements for the removal of conditions have been satisfied. USCIS does not deny petitions to remove conditions based solely on the failure to adhere to the business plan contained in the [Form I-526](#) immigrant petition. An immigrant investor may pursue alternative business opportunities within an industry category not previously approved for the regional center.

Therefore, during the conditional residence period, an investment may be further deployed in a manner not contemplated in the initial [Form I-526](#), as long as the further deployment otherwise satisfies the requirement to sustain the capital at risk. In addition, further deployment may be an option during the conditional residence period in various circumstances. For example, further deployment may be possible in cases where the requisite jobs were created by the investment in accordance with the business plan, as well as in cases where the requisite jobs were not created in accordance with the original business plan, and even if further deployment had not been contemplated at the time of the [Form I-526](#) filing.

The initial [Form I-526](#) immigrant petition must be filed in good faith and with full intention to follow the plan outlined in that petition. If the immigrant investor does not demonstrate that he or she filed the immigrant petition in good faith, USCIS may conclude that the investment in the commercial enterprise was made as a means of evading the immigration laws. Under these circumstances, USCIS may terminate the immigrant investor's conditional status.<sup>[111]</sup>

While USCIS allows this flexibility in [Form I-829](#) filings, nothing in this policy relieves an immigrant investor from the requirements for removal of conditions.<sup>[12]</sup> Therefore, even in the event of a change in course, an immigrant investor must always be able to demonstrate that:

- The required funds were placed at risk throughout the period of the petitioner's conditional permanent residence in the United States;
- The required amount of capital was made available to the business or businesses most closely responsible for creating jobs (unless the job creation requirement has already been satisfied);
- This at-risk investment was sustained throughout the period of the petitioner's conditional permanent residence in the United States; and
- The investor created (or maintained, if applicable), or can be expected to create within a reasonable period of time, the requisite number of jobs.

Accordingly, if an immigrant investor fails to meet any of these requirements, he or she would not be eligible for removal of conditions.

Further, with respect to the impact of regional center termination, an immigrant investor's conditional permanent resident status, if already obtained, is not automatically terminated if he or she has invested in a new commercial enterprise associated with a regional center that USCIS terminates. The conditional permanent resident investor will continue to have the opportunity to demonstrate compliance with EB-5 program requirements, including through reliance on indirect job creation.

## Footnotes

1. See [8 CFR 216.6\(a\)\(4\)\(ii\)-\(iv\)](#).

2. See [8 CFR 216.6\(a\)\(4\)\(iv\)](#).
3. See [8 CFR 216.6\(a\)\(4\)\(ii\)](#).
4. See [8 CFR 216.6\(c\)\(1\)\(iii\)](#). The sustainment period is the investor's 2 years of conditional permanent resident status. USCIS reviews the investor's evidence to ensure sustainment of the investment for 2 years from the date the investor obtained conditional permanent residence. An investor does not need to maintain his or her investment beyond the sustainment period.
5. See [8 CFR 216.6\(a\)\(4\)\(iii\)](#).
6. See [Matter of Ho](#), 22 I&N Dec. 206, 212-13 (Assoc. Comm. 1998).
7. USCIS recognizes any reasonable agreement made among immigrant investors with regard to the identification and allocation of qualifying positions. See [8 CFR 204.6\(g\)\(2\)](#).
8. See [8 CFR 216.6\(a\)\(4\)\(iv\)](#).
9. See [8 CFR 204.6\(j\)\(4\)\(i\)\(B\)](#).
10. For example, force majeure.
11. See [INA 216A\(b\)\(1\)\(A\)](#).
12. See [INA 216A\(d\)\(1\)](#). See [8 CFR 216.6\(a\)\(4\)](#).

## Chapter 6 - Deference

There are distinct eligibility requirements at each stage of the EB-5 immigration process. Where USCIS has previously evaluated and approved certain aspects of an investment, USCIS generally defers to that favorable determination at a later stage in the process. This deference policy promotes predictability for immigrant investors, new commercial enterprises, and their employees. Deference also conserves scarce agency resources, which should not ordinarily be used to duplicate previous efforts.

As a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and such earlier determinations will be presumed to have been properly decided. When USCIS has previously concluded that an economic methodology is reasonable to project future job creation as applied to the facts of a particular project, USCIS defers to this determination for all related adjudications directly linked to the specific project for which the economic methodology was previously approved.

For example, if USCIS approves an Application For Regional Center Under the Immigrant Investor Program ([Form I-924](#)) or an Immigrant Petition by Alien Entrepreneur ([Form I-526](#)) presenting a *Matter of Ho* compliant business plan and a specific economic methodology, USCIS will defer to the earlier finding that the methodology was reasonable in subsequent adjudications of [Form I-526](#) presenting the same related facts and methodology. However, USCIS will still conduct a de novo review of each prospective immigrant investor's lawful source of funds and other individualized eligibility criteria.

Conversely, USCIS does not defer to a previously favorable decision in later proceedings when, for example, the underlying facts, upon which a favorable decision was made, have materially changed, there is evidence of fraud or misrepresentation, or the previously favorable decision is determined to be legally deficient. A change is material if it would have a natural tendency to influence, or is predictably capable of affecting, the decision. <sup>11</sup>

When a new filing involves a different project from a previous approval, or the same previously approved project with material changes to the project plan, USCIS does not defer to the previous adjudication.

Since prior determinations will be presumed to have been properly decided, a prior favorable determination will not be considered legally deficient for purposes of according deference unless the prior determination involved an objective mistake of fact or an objective mistake of law evidencing ineligibility for the benefit sought, but excluding those subjective evaluations related to evaluating eligibility. Unless there is reason to believe that a prior adjudication involved an objective mistake of fact or law, officers should not reexamine determinations made earlier in the EB-5 process. Absent a material change in facts, fraud, or willful misrepresentation, officers should not re-adjudicate prior agency determinations that are subjective, such as whether the business plan is comprehensive and credible or whether an economic methodology estimating job creation is reasonable.

### Footnotes

1. See *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

## Appendices

## Updates

## **POLICY ALERT – Job Creation and Capital At Risk Requirements for Investors**

June 14, 2017

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to provide further guidance regarding the job creation and capital at risk requirements for Form I-526, Immigrant Petition by Alien Entrepreneur, and Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status.

## **POLICY ALERT – Employment-Based Fifth Preference Immigrants: Investors**

November 30, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance regarding the eligibility requirements for regional centers and immigrant investors.