



**DRAFT FOR COMMENT ONLY**

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**Draft PM-602-0121**

## Policy Memorandum

**SUBJECT:** Guidance on the Job Creation Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829

### **Purpose**

This policy memorandum (PM) builds upon prior policy guidance for adjudicating EB-5 applications and petitions regarding the job creation requirement, and the requirement to sustain the investment during the conditional residence period.

### **Scope**

This PM is applicable to all U.S. Citizenship and Immigration Services (USCIS) employees. Prior guidance, to the extent that it does not conflict with this PM, remains valid unless and until rescinded.

### **Authorities**

- Immigration and Nationality Act (INA) sections 203(b)(5) and 216A
- Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 102-395, § 610, 106 Stat 1828, 1874 (1992)
- 8 C.F.R. §§ 103.2, 204.6 and 216.6

## **I. Background**

On August 23, 2014, the Department of State (DOS) announced that all visas for the EB-5 Program became unavailable for individuals born in mainland China for the remainder of fiscal year (FY) 2014. For the first time in the history of the EB-5 Program, the demand for visas exceeded availability. In anticipation of visa unavailability in FY 2015, USCIS provides clarification regarding two eligibility grounds that may be affected by visa retrogression: (1) job creation and (2) sustainment of the investment.

## II. Job Creation

The EB-5 Program is based on the requirement that the immigrant investor's capital investment in a new commercial enterprise must result in the creation of at least ten full-time jobs for U.S. workers. INA § 203(b)(5)(A)(ii). In order to show that a new commercial enterprise will create at least ten full-time positions for qualifying employees, an immigrant investor must submit the following evidence with his or her Form I-526:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) 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 ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(j)(4)(i).

Further, within 90 days prior to the two-year anniversary of the date on which the immigrant investor obtained conditional lawful permanent resident status, the immigrant investor must file a Form I-829 to remove the conditions. To demonstrate that the job creation requirement has been met, the Form I-829 petition to remove conditions must include in accordance with 8 C.F.R. § 216.6(a)(4)(iv)

[e]vidence that the commercial enterprise created or can be expected to create, within a reasonable time, ten full-time jobs for qualifying employees. In the case of a troubled business, the immigrant 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. At least ten jobs must be preserved or created per immigrant investor. The evidence may include, but is not limited to, payroll records, relevant tax documents, and Forms I-9.<sup>1</sup>

### A. Form I-526 Adjudications

Currently, USCIS policy provides that the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to begin six months after the adjudication of the Form I-526.<sup>2</sup> This policy was created to best approximate the two-year period of conditional residence, based on USCIS' determination that the average processing times for EB-5 petitioners filing for immigrant

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<sup>1</sup> USCIS Memorandum, "EB-5 Adjudications Policy," PM-602-0083 (May 30, 2013) at 22 [hereinafter 2013 Memo].

<sup>2</sup> 2013 Memo, *supra* note 1, at 19.

visas via consular processing, and EB-5 petitioners filing for adjustment of status, is approximately six months.<sup>3</sup> With visa retrogression, the average processing time for consular processing or adjustment of status is expected to vary significantly for a large percentage of EB-5 petitioners. However, at this time, USCIS cannot predict when and to what extent visa retrogression will occur, or whether visa retrogression will have any significant adverse effect on the ability of EB-5 petitioners to demonstrate continued eligibility. Given this uncertainty, USCIS is not prepared to change the current policy regarding the commencement of the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B).

### **B. Form I-829 Adjudications**

After the immigrant investor files a Form I-829 petition, USCIS reviews the petition to determine whether or not the petitioner created, or can be expected to create within a reasonable period of time, at least ten full-time jobs to qualifying employees. 8 C.F.R. § 216.6(c)(1)(iv). In the case of a “troubled business” as defined in 8 C.F.R. § 204.6(e), the petitioner must have maintained the number of existing employees at no less than the pre-investment level for the previous two years. 8 C.F.R. § 204.6(j)(4)(ii).

In making the determination as to whether or not the petitioner has created the requisite number of jobs, USCIS will not require that the jobs still be in existence at the time of the Form I-829 adjudication in order to be credited to the petitioner. Rather, the job creation requirement is met if the petitioner can show that at least ten 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.

Consistent with prior policy, direct jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as full-time jobs for EB-5 purposes; however, jobs that are expected to last for at least two years generally are not considered intermittent, temporary, seasonal, or transient in nature. In addition, because employment in some industries, such as construction or tourism, can be intermittent, temporary, seasonal or transient, USCIS will continue to instruct officers not to exclude jobs simply because they fall into such industries. Rather, 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 five-week periods over the course of the project, such positions would be deemed intermittent and not meet the definition of full-time employment.<sup>4</sup>

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<sup>3</sup> USCIS Memorandum from Donald Neufeld, “EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (AFM Update AD 09-04)”, HQDOMO 70/6.1.8 AD09-04 (June 17, 2009) at 3-4 [hereinafter June 2009 Neufeld Memo].

<sup>4</sup> June 2009 Neufeld Memo, *supra* note 2, at 5-6.

Also in keeping with prior policy, generally, the full-time employment criterion focuses on the position, not the employee.<sup>5</sup> Accordingly, the fact that the position may be filled by more than one employee does not exclude it 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 position remains constant. This interpretation is consistent with 8 C.F.R. § 204.6(e), which, as part of the regulatory definition of full-time employment, includes job sharing arrangements.

With regard to jobs that have not yet been created at the time of the Form I-829 adjudication, the regulations allow Form I-829 petitioners to demonstrate that jobs will be created “within a reasonable period of time” at the time of filing the Form I-829 petition. 8 C.F.R. § 216.6(a)(4)(iv). In keeping with existing policy, USCIS will continue to consider three years from the investor’s admission as a conditional permanent resident or adjustment to conditional permanent resident to be a reasonable period of time.<sup>6</sup> Jobs projected to be created beyond that time horizon usually will not be considered to be created within a reasonable time, unless extreme circumstances, such as *force majeure*, are presented.<sup>7</sup>

### III. Sustainment

When filing the Form I-829, the petitioner must also include, in accordance with 8 C.F.R. § 216.6(a)(4)(ii)-(iii):

[e]vidence that the immigrant investor invested or was actively in the process of investing the required capital and sustained this action throughout the period of the immigrant investor’s residence in the United States. The immigrant investor can make this showing if he or she has, in good faith, substantially met the capital investment requirement and continuously maintained his or her capital investment over the two years of conditional residence. At this stage the immigrant investor need not have invested all of the required capital, but must have substantially met that requirement.<sup>8</sup>

The petitioner must show that he or she has continuously maintained his or her capital investment over the two years of conditional residence when filing the Form I-829 petition. INA § 216A(c)(1)(A). In addition, in order to qualify as an investment in the EB-5 Program, the immigrant investor must have actually placed his or her capital “at risk” for the purpose of generating a return. 8 C.F.R. § 204.6(j)(2). Therefore, the continuous maintenance or “sustainment” of the capital investment requires that the capital be “at risk” throughout the sustainment period and sustained in a single new commercial enterprise.

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<sup>5</sup> *Id.* at 6.

<sup>6</sup> 2013 Memo, *supra* note 1, at 22

<sup>7</sup> *Id.*

<sup>8</sup> 2013 Memo, *supra* note 1, at 21.

### **A. New Commercial Enterprise**

The statute requires investment into “a” new commercial enterprise. *See* INA 203(b)(5)(A). Consistent with prior policy guidance, the investment must be into a single new commercial enterprise.<sup>9</sup>

Similarly, to sustain it, the investment must remain in a single new commercial enterprise. While the new commercial enterprise may deploy funds to wholly-owned businesses or, in the regional center context, to job-creating entities, the funds must remain invested in the same new commercial enterprise throughout the conditional permanent residence period.

### **B. Capital “At Risk”**

As mentioned previously, the statute and regulations, when read together, require the invested capital to be “at risk” throughout the sustainment period. For the capital to be “at risk” there must be a risk of loss and a chance for gain. USCIS’ current policy allows for the investor’s money to be held in escrow at the Form I-526 petition stage until the investor has obtained conditional lawful permanent resident status if the immediate and irrevocable release of the escrowed funds is contingent only upon approval of the investor’s Form I-526 and subsequent visa issuance and admission to the United States as a conditional permanent resident or, in the case of adjustment of status, approval of the investor’s Form I-485.<sup>10</sup> However, the capital will not be considered “at risk” if it is merely being held in the new commercial enterprise’s bank account or an escrow account during the sustainment period. At the Form I-829 stage, USCIS will continue to require evidence verifying that the escrowed funds were released, and that the investment was sustained in the new commercial enterprise such that the capital was “at risk” throughout the sustainment period.

An investor may receive a return on his or her capital (i.e., a distribution of profits) during or after the conditional residence period, so long as prior to or during the two-year conditional residence period, and before the requisite jobs have been created, the return is not a portion of the investor’s principal investment and was not guaranteed to the investor. *Matter of Izummi*, 22 I&N Dec. 169, 180-188 (Assoc. Comm’r 1998). If, on the other hand, the investor shows that all of his or her invested funds were lost as a result of the investment, the investor may still meet the sustainment requirement for the Form I-829 adjudication. The investor must demonstrate that the full amount of capital was invested into the new commercial enterprise and establish the loss of funds as a direct result of the investment. For example, if the investor invested into a new commercial enterprise that in turn loaned the invested capital to a job-creating entity and the job-creating entity becomes insolvent and files for bankruptcy during the sustainment period, the investor can meet the sustainment requirement by documenting his or her investment into that new commercial enterprise and the loss of all or a portion of his or her investment through the treatment of the new commercial enterprise’s creditor claim as part of the job-creating entity’s bankruptcy process (e.g. extinguishment, partial repayment, etc.). Note, however, that to the

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<sup>9</sup> 2013 Policy Memo, *supra* note 1, at 6-7.

<sup>10</sup> 2013 Policy Memo, *supra* note 1, at 6.

extent that all or some portion of the new commercial enterprise's claim against the job-creating entity is repaid to the new commercial enterprise during the sustainment period, the new commercial enterprise must continue to deploy such repaid capital in an "at risk" activity for the remainder of the sustainment period.

#### **IV. Material Change**

USCIS continues to recognize that the process of carrying out a business plan and creating jobs depends on a wide array of variables over which an investor may not have any control. However, under existing authorities, changes may impact a petitioner's eligibility depending on when the change is made relative to the investor's status in the United States. In the event of visa retrogression, when the period between the approval of the Form I-526 petition and the investor's subsequent admission to the United States or adjustment of status as a conditional permanent resident may be much longer than the previously-approximated six-month period, the possibility of change may pose a greater challenge to petitioners seeking to remain eligible until conditional permanent residence status is obtained, and ultimately to remove conditions on permanent residence. To assist petitioners in navigating such challenges, USCIS provides the guidance below to further clarify when changes may impact eligibility at different stages of the process.

##### **A. Investors Who Have Not Obtained Conditional Lawful Permanent Resident Status**

Changes that are considered material that occur after the filing of a Form I-526 petition will result in the petitioner's ineligibility if the petitioner has not obtained conditional permanent resident status. *See, e.g., Matter of Izummi*, 22 I&N Dec. at 176 ("If counsel had wished to test the validity of the newest plan, which is materially different from the original plan, he should have withdrawn the instant petition and advised the petitioner to file a new Form I-526."); *see also* 8 C.F.R. § 103.2(b)(1). If material changes occur after the approval of the Form I-526 but before the petitioner 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 petition. A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision.<sup>11</sup>

Consistent with USCIS' current interpretation of existing authorities and policy, changes that occur in accordance with a petitioner's business plan as filed will generally not be considered material. For example, if at the time of filing the Form I-526 petition, no jobs have yet been created, but after approval of the Form I-526 and before the petitioner has obtained conditional permanent resident status, the petitioner's investment in the new commercial enterprise results in the creation of ten jobs in accordance with the petitioner's business plan as filed, such a change would not be considered to be material.

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<sup>11</sup> 2013 Policy Memo, *supra* note 1, at 23 (citing to *Kungys v. United States*, 485 U.S. 759, 770-72 (1988) (defining materiality in the context of denaturalization)).

In the non-regional center context, if a petitioner files a Form I-526 petition demonstrating prospective job creation resulting from commercial activities contemplated in a comprehensive business plan and, subsequent to filing, the new commercial enterprise deviates from or otherwise changes such commercial activities, the petition might not be approved. However, if the new commercial enterprise undertakes the commercial activities presented in the initially filed business plan and the requisite number of jobs were created, the new commercial enterprise may redeploy the capital into another “at-risk” activity by expanding to a new location or a new industry without causing the petition to be denied or revoked.

Similarly, in the regional center context, if a petitioner files a Form I-526 petition purporting to utilize the proceeds of the investment through a job-creating entity undertaking a particular project, but subsequent to filing, it is determined that the proceeds of the investment will be directed to the same or a different job-creating entity undertaking an entirely different project, the petition cannot be approved.<sup>12</sup> However, if the investment was directed to a job-creating entity undertaking the project presented in the initial filing, the requisite number of jobs were created according to the plan presented with the Form I-526, and the loan made to the job-creating entity was repaid to the new commercial enterprise, the new commercial enterprise may redeploy such repaid capital in another “at risk” activity without causing the petition to be denied or revoked. In that instance, the redeployment of investment funds would not be considered a material change because the facts related to the petitioner’s eligibility, based upon which the petition was filed, did not change or deviate from the business plan.

In addition, if the organizational documents for a new commercial enterprise contain a liquidation provision based on repayment of a loan from a job-creating entity, the documents may be amended to remove such a provision in order to allow the new commercial enterprise to continue to operate through the petitioner’s period of conditional permanent residence. Such an amendment would not be considered a material change because facts related to the petitioner’s Form I-526 eligibility would not change.

Nothing in this section alters USCIS’ current practice, under existing authorities, of considering material changes during the Form I-526 adjudication period to be impermissible. If, at the time of adjudication, the petitioner is asserting eligibility under a materially different set of facts that did not exist and/or was not planned upon when the petition was filed, he or she must file a new Form I-526 petition.

#### **B. Investors Who Have Obtained Conditional Lawful Permanent Resident Status**

USCIS will continue to permit an investor who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed, provided that the Form I-526 was filed in good faith and with full intention to follow the plan outlined in that petition. If the investor does not demonstrate that he or she filed the Form I-526 in good faith, USCIS may conclude that the investment in the commercial enterprise was made as a means of

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<sup>12</sup> See 2013 Policy Memo at 24.

evading the immigration laws. Under these circumstances, USCIS may terminate the investor's conditional status. INA § 216A(b)(1)(A).

### **Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### **Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Immigrant Investor Program, Field Operations Directorate.

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