

# USCIS Finalizes EB-5 Sustainment and Redeployment of Capital Issues and Consequences of Regional Center Termination

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On June 14 USCIS issued a revised Volume 6 of its Policy Manual which concerns EB-5 investors. The goal was to finalize policy first drafted in a 2015 memo concerning "sustainment of the investment, a crucial topic in this era when the period Chinese investors wait for a visa number exceeds the duration of the initial capital deployment. The agency also addressed the important issue of consequences of regional center termination on sponsored investors.

USCIS published an alert cryptically summarizing the changes and without publishing any document showing what the actual changes are. Luckily, I had made a Word version of the prior Volume 6, and I made a new one and ran a comparison to detect the changes. Further below I quote the changes, but immediately below I summarize them and provide some commentary. NCE means new commercial enterprise, and JCE means job creating enterprise.

## Period of Sustainment Defined

*Summary:* The period of conditional residence is clarified to begin with the date of CPR admission (the "resident since" date on the green card) and end exactly two years later (the "expires" date on the green card, which is also the final due date for the I-829). This seems to mean that nothing needs to stay in place past the date the I-829 was due, so there could be complete redemption to the EB-5 investor during the excessive period of time while the I-829 is pending.

*Implications:* That's a big deal in itself, and good.

## Liquidation and Re-deployment before CPR Admission

*Summary:* Once the jobs have been created (ostensibly that means once enough jobs have been created to cover the requirements of the EB-5 investors, and not every last operational job that was predicted in the business plan), the requirement to keep the capital at risk *in the original JCE(s)* ends, even before the investor is admitted as a conditional resident, as long as the capital is re-deployed at risk (with chance for loss and gain) "within a commercially reasonable period of time" and "consistent with the scope of the NCE's ongoing business" as set forth in the I-526 record. As examples, USCIS mentions loans into more residential construction projects or "new

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issue municipal bonds, such as for infrastructure spending." These two examples implicitly involve more job creation, but it is not stated whether more job creation-- or what type or how much -- is actually required, and USCIS does not state whether the new activity must be in the same regional center area or targeted employment area as the original project(s).

*Implications:*

*Good:* The general notion that the JCE interest can be liquidated to the NCE once jobs are created, without regard to whether the I-526 petition has been approved or a visa number has become available or the investor has been admitted as a conditional resident, is excellent.

*Bad:* The parameters for re-deployment of capital by the NCE remain terribly unclear. It is not clear whether an NCE that had reserved a broad latitude for reinvestment can take full advantage and what are the limits. For instance, would purchase of shares in a mutual fund of publicly traded stocks qualify? And if the NCE had failed to provide for re-deployment or wants to add a type of re-deployment not previously specified, would adding or changing a re-deployment provision constitute a material change? The draft 2015 memo explicitly had said not, but the Policy Manual's footnote referencing eligibility at the time of filing ominously suggests otherwise. Finally, the requirement to have adequately described the re-deployment in the I-526 record is hopelessly unclear.

### **Liquidation and Redeployment after CPR Admission**

*Summary:* Once the investor has been admitted as a conditional resident, liquidation from JCE to NCE and redeployment are allowed even if no such redeployment was contemplated in the I-526 papers and beyond the scope of anything in such papers and even if not all the required jobs had yet been created.

*Implications:* This is essentially consistent with prior policy. But it won't help the China-born investor in a project that got repaid before a visa number became available and whose NCE did not happen to reserve the right to redeploy returned capital.

### **Consequences of Regional Center Termination**

*Summary:* Termination of a regional center before an investor's admission as a conditional resident constitutes a material change requiring denial or revocation of the I-526, but for an investor who already obtained conditional residence it does not have an effect on I-829, even for claiming indirect job creation.

*Implications:* For investors who were admitted as conditional residents before their sponsoring regional center was terminated, this is a godsend and a sensibly generous interpretation of the existing regulation which was frighteningly unclear. But for those who were waiting on a visa number and or otherwise not yet admitted, it is a sickening shame that they will lose their place in the visa number queue (and probably have a child "age out" of eligibility) purely because their regional center messed up, even in matters having nothing to do with the investor's project. This should be challenged as arbitrary and capricious in lawsuits against USCIS brought by denied

investors. And Congress needs to pass proposed legislation that would provide better treatment for innocent investors who become victims of fraud and regional center termination.

## **Conclusion**

At least USCIS has finalized some policy, and in many respects it is favorable and merciful to investors and developers. But it penalizes investors in NCEs that did not have good counsel to provide explicitly for redeployment in the event of liquidation of the JCE interest, and it is frighteningly unclear on topics where parties need to be able to plan with confidence. And it is cruel to the investor whose regional center gets terminated before admission to conditional residence.

## **The Actual Changes in the Policy Manual**

*Footnotes are in blue font.*

Chapter 2.A.2 (Eligibility, Investment of Capital), adds:

### *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> 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 \(Assoc. Comm. 1998\)](#). 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> 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 \(Assoc. Comm. 1998\)](#).

### *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> See [8 CFR 204.6\(e\) for the definition of commercial enterprise](#). 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> 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 \(Assoc. Comm. 1998\)](#).

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> See [8 CFR 103.2\(b\)\(1\) \(A petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication\)](#).

Chapter 4.C. (I-526, Material Change), adds:

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.

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. See 8 CFR 204.6(j). See 8 CFR 204.6(m)(7).

Chapter 5.A.2 (I-829, Evidence of Investment and Sustainment) changes "the 2 years of conditional residence" (as the period to sustain the investment) to "sustainment period" and added a corresponding footnote for that term:

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.

Chapter 5.C. (I-829, Material Change)

1. *Adds:*

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.

2. *Adds the parenthetical at the end of the second of four items to be shown to get I-829 approval in the event of a "change in course":*

- 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);

3. *Adds:*

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.