



# THE USCIS GUIDANCE ON SUSTAINMENT: INVESTORS BEWARE

*November 14, 2023*

I am moved to publish this blog as a lawyer who has represented large numbers of EB-5 investors for over 30 years. During those 30 years, I have seen my investor clients fall victim to promises or assurances that sound too good to be true – – and, in fact, turn out to be too good to be true. A prime example is investors who have been led to believe that they will get green cards in a year or 18 months after making their EB-5 investments only to learn that the waiting time is, in fact, far longer. There are many other examples.

The latest trap that I am concerned about for my investor clients is the idea that they only have to invest for 2 years and will get their money back in 2 years. This is what the [October 11, 2023, USCIS guidance](#) appears to state for post-[RIA](#) investors. Investors beware – – this is another trap for the unwary.

Here is why I am concerned for my investor clients:

USCIS chose to change the sustainment period by guidance memo rather than by regulation. While it is very clear that USCIS intended its guidance to be its final word on the subject without promulgating a regulation, it chose not to repeal the existing regulation that stated – – and still states – – that the investment must be sustained at risk during the two years of conditional residence at a minimum. When USCIS published its revised and updated EB-5 Policy Manual on October 26, 2023, 15 days after its guidance memo on the sustainment period, it continued to include the requirement that the investment must be sustained at risk during the 2 years of conditional residence.

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That leaves my investor clients in a real conundrum. Do they follow the regulation, which is the law? Do they follow the USICS Policy Manual, which is USCIS' official statement of its policy? Or do they follow the guidance memo, which is not the law and which is not contained in the USCIS Policy Manual, but which is USCIS' statement of the policy that it intends to follow?

Even assuming the guidance memo is USCIS' final word on the subject, 2 years does not mean 2 years.

First, what is the start date of the 2 years? The start date is not 2 years from the date of the investment. The start date, even under the language of the guidance memo, is 2 years from the date the NCE makes the investor's money available to the JCE for job creation. It is not clear whether the 2 years starts from the date the money gets to the JCE or the date the JCE uses the money for job creation, but it definitely does not start on the date of investment.

Investors need to be aware that, in a typical project, the money does not go from the NCE to the JCE the day it is invested. Rather, there is usually a delay until the NCE receives a certain quantum of money and until the JCE requests a drawdown of that money. That may be several weeks, or it may be several months after the investor invests in the NCE. The bottom line is that the start date of the 2 years is often unknown to the investor, but definitely later than the date of the investment.

Some projects have chosen to allow investors to invest on a staggered basis – a certain amount of investment at the time the I-526E petition is filed and the remainder of the investment in one or more installments at a later date. When does the 2 years start in this situation? Presumably, it starts 2 years from the date the last investment dollars go from the NCE to the JCE for use in job creation.

How about the end date of the 2 years? It is equally hard to determine, but usually not 2 years after the start date.

The 2 years does not end until all of the necessary jobs for that particular investor have been created. For regional center projects, job creation is based on "indirect and induced employment". At the I-526E stage, the project documents include an economic report projecting a certain number of indirect and induced jobs based on factors such as the

timeline of the project, hard and soft construction costs, location of the project, and others. Many or most successful EB-5 projects have construction timelines in excess of 2 years. The economic report does not project the number of jobs as of any particular day prior to the completion of the project.

In many cases, job creation may not commence until the full amount of EB-5 money is deployed, which means until all investors invest. What if there are construction delays, which happen rather frequently? Such delays would obviously delay the 2-year sustainment period. The bottom line is that it may be very difficult for investors to determine the number of jobs for which they get credit until the project is completed.

As a practical matter, is any regional center or project going to be willing and able to tie repayment to job creation with all of these open issues? Will projects and regional centers be prepared to repay each investor as each investor's job creation is satisfied?

Furthermore, the NCE cannot repay the investors until the JCE repays the NCE. At any given point in the life of a project, there may be insufficient funds to pay the outstanding development loans and the EB-5 investors. And even when there is sufficient money to pay back the investors, will NCEs check when each investor's money is used by the JCE for job creation and when each investor's allocated job creation has happened; and immediately return the funds to the investor? That may not be practical in the real world.

The practicality is that this illusory 2-year period is much more likely to be 3 or 4 years at a minimum by the time (a) the investment is made into the NCE, (b) the I-526E has been filed, (c) the NCE has made the money available to the JCE, (d) the JCE has used the money for job creation, (e) the necessary jobs have been created, (f) the JCE has the money available to repay the NCE and (g) the NCE repays the investors.

Another big concern is the quality of EB-5 projects that only need EB-5 money for 2 years. Most sizable EB-5 projects, and most top real estate developers, are not interested in 2-year money. Usually, 5 years is a minimum. I fear that investors will be lured to riskier projects – both financially riskier and riskier for EB-5 purposes – while chasing the illusory goal of getting their money back in 2 years.

Finally, investors need to be aware that, no matter what USCIS advises at any given point in time regarding the minimum time period for an investment, the return of the

investment is subject to the project's private placement memorandum. This is the document that will govern when and under what terms the investment money will be returned.

Investors should take note of the language contained in the Q&As published with the guidance memo on sustainment. Q&A number 5 asks the question of whether the investment capital can be returned without affecting the approvability of the I-526E petition if the 2-year investment period has been completed? The answer is disturbing. USCIS states: "Likely yes, as we generally will use the date that the requisite amount of qualifying investment is made to the new commercial enterprise and placed at risk under applicable requirements, including being made available to the job-creating entity, as appropriate." "Likely yes" in a guidance memo and USCIS stating that it "generally" will follow that rule is not the kind of language that I am comfortable advising my clients to rely upon.

I am also concerned with the potential impact of the return of the money to the EB-5 investor before the adjudication of the I-526E petition. In the past, since the money could not be returned at the I-526 stage, there was no RFE on an I-526 petition requesting whether the money had been returned or not. Will we now see regular RFEs on I-526Es asking that question? Will it be followed by a requirement that the investors prove that the necessary job creation occurred before they got their money back? Before this guidance memo, there was no requirement that all the jobs be created before the I-526E petition was approved.

None of the above is meant to advocate for a continuation of the existing, non-repealed regulation. There is no way that Congress intended the EB-5 program to be a program with multiple redeployments of investors' money and sustainment periods for some investors in excess of 15 to 20 years. That is just not fair.

However, the problem is that USCIS went about this the wrong way. It should have repealed its regulation and followed the requirements of the Administrative Procedure Act to engage in notice and comment rulemaking that would lead to the publication of a new regulation. It may be that that new regulation would have a sustainment period of a fixed number of years that would be more than 2 years but in line with the business realities of construction projects, such as 4 or 5 years. Arguably, this would be consistent with the language of the RIA which requires investors to "expect" that their investments "will remain invested for not less than 2 years" but does not specifically state a 2-year

sustainment period. 5 years would be “not less than 2 years”, would be consistent with construction realities, would be fair to investors, and would provide investors with a reliable indicator of when they should expect a return of their investment dollars.

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