

Navigating USCIS' New Minimum EB-5 Investment Period

By **Samuel Silverman, Ronald Klasko and Kate Kalmykov** (November 28, 2023)

On Oct. 11, U.S. Citizenship and Immigration Services updated its policy on the minimum investment period for EB-5 visa applicants. This update seeks to clarify how USCIS interprets changes made by the EB-5 Reform and Integrity Act.

The RIA stated that an investment is expected to remain invested for not less than two years, but does not specify when the two years start.

The October guidance published on the USCIS website states that this two-year period begins when investor funds are deployed to the job-creating entity. As long as 10 jobs have been created by an EB-5 investor's investment, the investor can be repaid after two years and remain eligible for a U.S. green card.

This is a significant change to the at-risk requirement for EB-5 investors.

The new policy, however, is just that: a nonbinding policy. It does not carry the weight of a regulation promulgated by the immigration agency, which has been subject to notice and comment. As a result, EB-5 investors should be cautious about selecting projects that promise a shorter investment time frame.

In this article, we examine this new policy and explain why it may be temporary. We also provide practical guidance for EB-5 investors on how to mitigate the financial and immigration risks that come with this new policy.

Overview of the New Two-Year Minimum Investment Time Frame Policy

To qualify for a green card, an EB-5 investor's funds must be "at risk," which means the money must be invested in an EB-5 project and subject to gain or loss. Prior to the RIA, an EB-5 investor's funds had to remain at risk until the end of the investor's two-year conditional residence period, which might be long after the approval of their Form I-526 immigrant petition.

The RIA has new language regarding the investment period. Instead of having to keep their funds invested until the end of the conditional residence period, EB-5 investors must keep their funds invested for at least two years. But in the RIA, Congress did not define when this two-year period starts.

The latest guidance from USCIS seeks to clarify the situation. According to the new policy, this two-year minimum investment period begins once "the full 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."



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In other words, the clock starts ticking once the investment is made and becomes at risk. The period no longer begins when the conditional green card is granted.

The reduced minimum investment time frame does not apply to EB-5 investors who filed petitions for a conditional green card, Form I-526, before the RIA was signed into law in March 2022.

Risks Associated With a Two-Year EB-5 Investment Period

This shift in USCIS policy provides little certainty about when EB-5 investors can be repaid while remaining eligible for green cards. And relying on this new policy entails several risks.

The start date of the two-year investment period remains ambiguous.

While the policy update was meant to clarify the required investment time frame, its wording leaves room for uncertainty. As a result, determining the exact start and end dates of the two-year investment period can still be difficult.

The Oct. 11 USCIS update says: "We interpret the start date to be the date that the full 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."

At a basic level, this means that an EB-5 investor's funds must go from the new commercial enterprise, or NCE, to the job-creating entity for the two-year investment period to begin.

In most EB-5 offerings, the NCE is the regional center's investment fund. This entity receives the money from the EB-5 investor but does not create the jobs. The JCE is the project-development entity that uses the EB-5 investments to create jobs.

However, EB-5 funds generally do not go straight from the NCE to the JCE. In some cases, the JCE may not need the capital for months.

The exact language of the policy update that is of concern is "placed at risk" and "made available." This language suggests that, at a minimum, the two-year investment period begins when an EB-5 investor's funds are advanced to the JCE. But USCIS may decide that the JCE must actively be using an investor's funds for job creation in order for the investment to be considered "placed at risk."

Determining when the JCE has used all of a specific EB-5 investor's capital on job-creating activities can be difficult. EB-5 funds may be drawn in different amounts and at different times from the NCE into the JCE, based on the project's capital needs.

This means that, in practice, an EB-5 investor's two-year investment period may begin long after the investor transfers funds to a project's NCE. Furthermore, the exact date this period starts will be hard to determine with certainty without further guidance from USCIS.

Repayment cannot happen before the job creation requirement is met.

For an EB-5 investor to qualify for repayment of their EB-5 funds, both of the following two requirements must be met:

- The investment must have been "placed at risk" and "made available" to the JCE for at least two years; and
- The investment must have created at least 10 jobs.

Tracking the timing of job creation is complex. The process involves an evaluation of the project's drawdown schedule, its job creation benchmarks and the timing of when the JCE actually uses the funds for job creation.

Job creation typically depends on an EB-5 project's construction expenditures. Job creation is calculated differently depending on how long construction lasts. Projects with construction that lasts at least two years will benefit from much higher economic impact, while short projects will produce significantly fewer jobs.

Any delays in construction or in raising EB-5 funds are also likely to delay job creation. This is a risk factor for all EB-5 projects, but it will be especially pronounced in projects that plan to repay investors after only two years.

Depending on construction progress at the time an investor makes their investment, few jobs may have been created after two years. Fewer jobs entails less room for error.

If an EB-5 project repays an investor as soon as the two-year period ends, and if it turns out later that the project created an insufficient number of jobs, the investor will have no way of curing a job-creation problem. Because the investor has already been repaid, they are no longer a member of the NCE. Thus, the investor will not qualify for a removal of conditions on their permanent green card.

Calculating job creation accurately is essential. EB-5 projects that plan to repay investors after two years will have to be very careful to ensure that all 10 required jobs have been created for a specific investor before repaying that investor.

So, while shorter time frames may seem attractive, the added nuances of earlier repayment can often create an additional layer of immigration risk for EB-5 investors.

The two-year investment time frame may be overturned.

The new two-year investment policy was not created through the normal rulemaking process. Consequently, it is nonbinding and can be reversed sua sponte by the agency, which USCIS has a history of doing on this exact topic.

It is also subject to challenge through litigation. Past USCIS policy changes have been successfully overturned through litigation.

One recent example is Behring Regional Center LLC v. Mayorkas, in which a June 2022 ruling from the U.S. District Court for the Northern District of California went against prior USCIS' decisions to deauthorize all EB-5 regional centers. The policy was overturned, and USCIS modified its guidance accordingly.

Should USCIS reverse its updated policy regarding investment time frames, any investors

who were repaid prior to holding their green cards for two years may be subsequently denied.

EB-5 projects with two-year repayment terms may not have safety features.

Historically, many of the safest projects in the EB-5 market have been large real estate developments that do not rely on EB-5 funding and that have been underwritten by major banks. With a senior loan, developer equity and traditional sources of funding, EB-5 capital makes up only a small portion of these projects' capital structures.

Even if these projects raise less EB-5 capital than projected, they will continue to be built because they have already secured all the necessary funding. As a result, they are likely to continue creating jobs as planned, reach completion and repay their investors.

In many cases, construction is already well underway in these projects. By the time EB-5 funding is deployed in the JCE, some or all of the required EB-5 jobs may even have been created already.

These real estate projects are typically larger and require EB-5 funding to remain invested for a four- or five-year period. But because of how they are structured, they tend to increase an EB-5 investor's chances of both creating the 10 necessary jobs and getting a timely repayment.

Comparably, new projects that plan to repay EB-5 investors after two years, based on USCIS's new policy guidance, may feature capital structures that are higher risk.

These projects may not have secured funding from traditional sources and therefore may need EB-5 capital to begin construction. If a project is dependent on EB-5 funds, it may not reach completion unless it raises all of the planned EB-5 capital. Then, if the project is not completed, the EB-5 investors may not be repaid at all.

These may even be predevelopment projects, meaning that construction has not yet begun. No construction progress would mean little to no job creation, meaning projects in predevelopment are often riskier than those with construction well underway.

Because job creation must occur before EB-5 investors can be repaid, it is unclear whether EB-5 investors in projects like these could be repaid earlier without jeopardizing their chances of getting their green cards. The added risks are high with uncertain benefits.

Before selecting an EB-5 project that offers repayment after two years, EB-5 investors should ask whether the possibility of being repaid sooner is worth risking their green card.

Other Considerations for Two-Year EB-5 Investment Projects

Besides the added risks that may be involved with projects that offer repayment after two years, EB-5 investors should be aware of the other implications of this policy change.

Repayment will ultimately depend on a project's offering documents.

The new policy does not require that every EB-5 investor be repaid after exactly two years. And even if a project markets itself as offering repayment after two years, not every EB-5 investor may qualify. The terms of a project's documents and offering memorandum ultimately determine when an EB-5 investor can have their funds returned.

For example, a project's offering documents may state that the EB-5 loan term is five years. If this is the case, the project is unlikely to be able or willing to pay back investors after only two years.

Additionally, even if an EB-5 project offers a two-year loan term, the offering documents may include optional extensions of the loan that may be exercised without investor consent.

EB-5 investors should read an EB-5 project's offering documents carefully before investing. Even though USCIS policy currently allows for repayment after two years, the offering documents are what ultimately dictate the conditions and time frame for the return of capital.

Repayment after exactly two years is unlikely.

Raising EB-5 funds takes time. For many EB-5 projects, the NCE raises funds for one to two years. Then the JCE may not use any EB-5 capital until a minimum amount has been raised. This could mean that an EB-5 investment is not "placed at risk" until a year or more after being wired to the NCE.

Another concern is that, realistically, a project that is not completed is unlikely to be able to repay an investor in the middle of development. Before investing in an EB-5 project that plans to repay EB-5 investors after two years, an EB-5 investor should ask where the repayment funds will come from if the project is ongoing.

Key Takeaways for EB-5 Investors

- The at-risk period for EB-5 funds is now two years, starting from the time the funds are placed at risk. What USCIS means by "placed at risk" remains unclear, but it is clear that the funds must be made available to the JCE for job creation.
- Although this appears to be USCIS' final pronouncement on the subject, USCIS may reverse this new policy — at any time — as it is nonbinding. Also, the policy may be overturned through the promulgation of regulations or litigation. If this happens, the required investment period would revert to the two-year conditional residency sustainment period — EB-5 investors must receive and hold the green card for two-years prior to being eligible for a repayment of investment funds.
- Because this policy, even though issued as a final pronouncement, may be reversed, investors should be cautious and keep this possibility in mind when considering an EB-5 project that has a much shorter repayment target than the average five-year term that most EB-5 projects have.
- Generally, EB-5 projects that promise a two-year investment period are likely to pose both higher immigration and financial risk to investors.

Conclusion

In a fast-changing regulatory environment, EB-5 investors should keep up to date with the latest policy changes, keeping in mind that even final USCIS policies can be overturned through litigation or by the agency itself.

The impact of the updated minimum investment time frame on the EB-5 market is presently unknown, and uncertainty always means risk.

The best practice for EB-5 investors will always be to choose the safest projects — those that are fully capitalized, that are not dependent on EB-5 funding to be completed and that have advanced construction with significant job creation already in place at the time of investment.

Instead of selecting a project based on uncertain hopes for faster repayment, an EB-5 investor should closely examine a project's financial strength and job creation. These are the two main factors that determine whether EB-5 investors will successfully get I-829 approval — their petition proving they have met all USCIS requirements — and a permanent green card, as well as a return of their EB-5 funds.

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