



CREATING JOBS THROUGH EB-5 INVESTMENT

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***IIUSA Files Federal Lawsuit to Protect Integrity of EB-5 Visa Program
Also Files Formal Request for Rulemaking on Required Sustainment Period***

WASHINGTON, DC – March 29 2024 – Invest in the USA (IIUSA) filed a lawsuit in the U.S. District Court for the District of Columbia against U.S. Citizenship and Immigration Services (USCIS) asserting the agency failed to comply with the federal Administrative Procedures Act when it announced on its website a critical new rule that has the force of law without any opportunity for public notice and comment. The new policy upended decades of industry practice by cutting the required period of time an EB-5 immigrant investor’s capital must be invested—commonly referred to as the “sustainment period”—to only two years.

Importantly, the purpose of this lawsuit is not to return to the previous sustainment policy that required many EB-5 investors to redeploy their capital for extended periods. As IIUSA makes clear in its complaint, USCIS has the authority to interpret the relevant language in the EB-5 Reform and Integrity Act of 2022 (“Integrity Act”) –“not less than two years”– in a range of reasonable ways that consider market realities, reliance interests, and other key factors. The agency is not limited to a binary choice between the previous status quo and the two-year guidance recently issued.

To emphasize this, in addition to filing the lawsuit, IIUSA has also petitioned USCIS for rulemaking under pursuant to 5 U.S.C. § 553(e) and 6 C.F.R. §§ 3.1 – 3.7. The purpose of this petition is twofold. First, IIUSA formally requests that USCIS repeal the existing sustainment period regulation at 8 C.F.R. § 216.6(c)(1)(iii), which currently requires each EB-5 investor’s capital to remain at risk through the end of the conditional residency period. While USCIS’s October 2023 rule was promulgated unlawfully and must be set aside, IIUSA does not wish to see the previous policy reinstated. Therefore, the second purpose of IIUSA’s petition for rulemaking is to urge the agency to exercise its discretion under the Integrity Act to issue a formal regulation, through proper notice-and-comment rulemaking, to establish a five-year sustainment period. IIUSA believes five years is objectively reasonable, consistent with precedent, and responsive to key reliance interests shared by all EB-5 investors and stakeholders: the urgent need for a sensible, transparent sustainment period.

IIUSA filed this lawsuit and the request for rulemaking to protect investors and uphold the integrity that industry leaders worked with Congress for more than a decade to achieve. USCIS cannot unilaterally issue regulations that are effective overnight. This is textbook regulatory overreach that is highly damaging to market participants. Their policy must take this into account. A formal notice-and-comment rulemaking is the only legal way forward.

IIUSA further asserts a two-year holding period undermines EB-5 economic development projects and contradicts Congressional intent by short-changing the investment's ability to create jobs. Strengthening EB-5 projects and safeguarding investor interests were basic tenets of the Integrity Act.

Our members know the EB-5 program is an economic development and job creation program. No other federal economic development program has a holding period for investments of less than five years, because investment initiatives require time to take root and strengthen economies. For example, the New Markets Tax Credit program requires a seven-year hold period. Investors in Opportunity Zones and Qualified Small Business Stock must hold their positions for ten years and five years, respectively. From a policy perspective, longer-term, larger-scale projects create more American jobs—the goal of the EB-5 program and the explicit Congressional intent of the Integrity Act.

Executive Director Aaron Grau said, *“IIUSA worked assiduously with Congress to craft the Integrity Act to rejuvenate the EB-5 program, as well as to include meaningful integrity measures intended to protect immigrant investors. USCIS’s ill-considered adoption of a two-year holding period misrepresents Congressional intent. We have seen what happens when there is an incentive to game the system, which the Integrity Act is specifically designed to prevent. This new interpretation flies in the face of that Congressional intent.”*

For more information about the EB-5 Regional Center Program and IIUSA’s advocacy, visit www.iiusa.org.

IIUSA is the national membership-based not-for-profit trade association for the EB-5 Regional Center Program. Our members account for a vast majority of capital formation and job creation resulting EB-5 investments.

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