



## FREQUENTLY ASKED QUESTIONS IIUSA Lawsuit Challenging USCIS APA Violations

### 1. Why did IIUSA file this suit?

Because USCIS broke the law. The agency cannot unilaterally issue regulations that disrupt an entire industry overnight.

- In October 2023, through a binding new rule issued via a website post and effective immediately, USCIS effectively repealed an existing regulation and upended more than 30 years of industry practice regarding the length of time each EB-5 investor's capital must remain at risk, known as the "sustainment period."
- The Administrative Procedure Act (APA) requires a policy change of this magnitude to be promulgated via formal notice-and-comment rulemaking—whereby stakeholders are afforded the opportunity to furnish the agency with views on a proposed rule, and the agency must demonstrate that it has given due consideration to stakeholder views. The APA notice period gives the regulated companies in an industry time to thoroughly understand a new rule before it is implemented, facilitating a smooth transition.
- USCIS ignored the APA's requirements. Instead, the agency simply changed the sustainment period policy, effective immediately upon its online announcement. This is the kind of textbook regulatory overreach that the APA forbids.

### 2. Does IIUSA want USCIS to revert to the old sustainment rule, under which EB-5 investor capital was required to remain invested throughout the conditional residency period?

No. The relevant provision of the EB-5 Reform and Integrity Act of 2022 (the "Integrity Act") requires a sustainment period of "not less than two years." USCIS has the authority to interpret this language 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 its October 2023 rule. IIUSA hopes this lawsuit will prompt USCIS to exercise its rulemaking authority to arrive at a balanced sustainment.

- IIUSA is keenly aware that the previous requirement that each EB-5 investor's capital remain invested throughout the period of conditional residency was far from ideal. Under that rule, the sustainment period was tied to visa availability and processing times, factors outside the control of EB-5 investors and regional centers.

For many investors, this resulted in a sustainment requirement that was years longer than initially anticipated, requiring multiple redeployments of capital. IIUSA believes



that outcome is just as inconsistent with Congressional intent as USCIS's ill-considered two-year sustainment policy. The key is to arrive at the *right* policy, with due consideration of all relevant factors, that strikes a balance between the two extremes.

- Accordingly, IIUSA urges USCIS to follow the standard APA notice-and-comment rulemaking procedure to do two things: (i) formally repeal the existing regulation that requires sustainment throughout conditional residency, and (ii) adopt a five-year hold period as the sustainment requirement. To that end, in addition to filing the lawsuit, IIUSA has also formally [petitioned USCIS for rulemaking](#). For more information on why IIUSA thinks five years strikes the right balance, read on.

### **3. Why does IIUSA support a five-year hold period for EB-5 investors?**

IIUSA regional center members are responsible for stewarding, on behalf of thousands of individual investors, the vast majority of the billions of dollars of EB-5 capital invested annually. At the same time, and as importantly, regional centers are also responsible for stewarding the EB-5 program itself. Accordingly, IIUSA is always focused on the program's long-term health and viability. With that in mind, IIUSA advocates a five-year hold period because we believe it is a reasonable, balanced requirement that is consistent with the Integrity Act and the overall purpose of the EB-5 program: maximizing American job creation. More specifically, IIUSA supports a five-year sustainment period because:

- [A five-year sustainment requirement is better for America](#). In general, longer-term, larger-scale projects create more American jobs than shorter-term, smaller-scale projects. Of course, it is possible to meet the minimum job creation requirements with a two-year project, and there is nothing wrong with such projects. But from a policy perspective, the purpose of the EB-5 program is not to create the *minimum required* number of jobs. Rather, Congress intended to encourage the creation of the *maximum possible* number of jobs. USCIS's sudden, drastic reduction in the sustainment period cuts against this congressional intent. It shortchanges America, because the U.S. economy loses the benefit of the EB-5 capital after just a brief hold, while the investor receives not only the unique, prized benefit of permanent residency in the United States, but also the benefit of the many other provisions of the Integrity Act that enhance investor protections along the way. As the leading EB-5 industry association, IIUSA considers itself responsible for advocating for the right balance between these extremely valuable benefits and the commitment required of each EB-5 investor to receive them. USCIS's hastily promulgated two-year sustainment requirement simply misses the mark; even if the minimum job creation requirements are met, two years is just not long enough in light of the benefits conferred on EB-5 investors. In contrast, IIUSA's proposed five-year requirement



requires a robust commitment from each investor, while still providing a reasonable, standardized, transparent investment duration.

- Five years is consistent with precedent. Indeed, no other federal investment incentive program has a hold period of less than five years. For example, Qualified Small Business Stock must be held for five years, New Market Tax Credits require a 7-year hold, and Opportunity Zones require a 10-year investment. And in return for these multiyear commitments, investors in these programs receive only tax breaks. Mere money. In contrast, every EB-5 investor who meets program requirements is granted *the right to live and work in the United States of America for the rest of their natural lives*. This is a benefit that is measured not in dollars, but in opportunity. In passing the Integrity Act, Congress did not intend to cheapen this extraordinary benefit by dramatically *reducing* the commitment required of EB-5 investors to receive it – but that is the effect of USCIS’s misinterpretation of the law.
- The two-year sustainment policy risks undermining EB-5 program integrity. Congress designed the Integrity Act to promote just that: integrity. By dramatically shortening the required sustainment period, USCIS has done just the opposite by creating an incentive for project sponsors to promise short investment timeframes even when achieving such short durations is unrealistic. This increases the likelihood of a disconnect between investors’ expectations and the realities of project development timelines – a recipe for unhappy investors and litigation. Incentivizing this misalignment of interests between project sponsors and investors risks undermining the integrity of the entire EB-5 program, to the detriment of all EB-5 stakeholders.

#### **4. Isn’t the two-year sustainment period good for investors? Why would IIUSA want a longer sustainment period?**

IIUSA understands that EB-5 investors seek to mitigate financial risk as much as possible. Some perceive a shorter-duration investment as lower risk, in part because it makes redeployment less likely. It is important that investors evaluate the risk associated with the initial project to determine if the promised timeframe is realistic and if a return of capital is likely. A shorter-term project may or may not lower an investor’s risk, even when taking the possibility of redeployment into account. What is not up for debate is that, as noted above, the fundamental purpose of the EB-5 program is to create as many American jobs as possible, and a two-year requirement tends to cut in the other direction. IIUSA believes that, as a general matter, a five-year sustainment period strikes the right balance between providing investors with a reasonable and transparent investment horizon and achieving the policy goal of maximizing job creation.



**5. If IIUSA's lawsuit is successful, what will happen to investors who invested in a shorter-duration project based on the October 2023 USCIS sustainment period policy?**

At this early stage of the case, it is impossible to know whether the two-year sustainment period policy issued by USCIS in October 2023 will be set aside, and if so, how the judge and the USCIS will treat investors who filed Form I-526E in reliance on that rule. IIUSA believes such investors should not be punished for relying on official USCIS policy. However, the Integrity Act generally requires redeployment of capital if an investor's initial investment ends prior to the end of the sustainment period, so it is certainly possible that such investors could be required to redeploy their capital. As a general matter, it is important for every investor in any EB-5 project, especially those with shorter duration designed to take advantage of USCIS's October 2023 rule, to understand the redeployment policies of the regional center they've invested with.

**6. What is the lawsuit seeking to achieve?**

With this lawsuit, IIUSA seeks to:

- Hold USCIS accountable for illegal regulatory overreach. The agency must be required to follow the law.
- Protect the EB-5 program long-term by aligning the sustainment period with Congressional intent.

**7. When does IIUSA's proposed five-year clock start?**

In its [request for rulemaking](#), IIUSA recommends that the five-year hold period should begin on the later of the following:

- The date an investor's EB-5 capital is fully funded to the job creating enterprise; or
- The date the investor filed the I-526E petition.

**8. Who authorized this lawsuit?** IIUSA has been authorized to proceed with this lawsuit by a unanimous vote of the IIUSA Board of Directors.