



Search our Site

Español (https://web.archive.org/web/20181026003634/http://www.uscis.gov/es) | About USCIS (https://web.archive.org/web/20181026003634/http://www.uscis.gov/aboutus) | Contact Us (https://web.archive.org/web/20181026003634/http://www.uscis.gov/about-us/contact-us)

(https://web.archive.org/web/20181026003634/http://www.uscis.gov/)

September 26, 2018 – POLICY ALERT – Special Naturalization Provisions for Children (https://web.archive.org/web/20181026003634/http://www.uscis.gov/policymanual/Updates/20180926-SpecialNatZProvisions.pdf)

Volume 1 – <b>General Policies and Procedures</b> (PolicyManual-Volume1.html)
Volume 2 – <b>Nonimmigrants</b> (PolicyManual-Volume2.html)
Volume 3 – <b>Protection &amp; Parole</b>
Volume 4 – <b>Refugees</b>
Volume 5 – <b>Asylees</b>
Volume 6 – <b>Immigrants</b> (PolicyManual-Volume6.html)
Volume 7 – <b>Adjustment of Status</b> (PolicyManual-Volume7.html)
Volume 8 – <b>Admissibility</b> (PolicyManual-Volume8.html)
Volume 9 – <b>Waivers</b> (PolicyManual-Volume9.html)
Volume 10 – <b>Consent to Reapply</b>
Volume 11 – <b>Travel, Employment, &amp; Identity Documents</b>
Volume 12 – <b>Citizenship &amp; Naturalization</b> (PolicyManual-Volume12.html)

Volume 6 – Immigrants (PolicyManual-Volume6.html), Part G – Investors (PolicyManual-Volume6-PartG.html)

## Chapter 2 – Eligibility Requirements

← Chapter 1 (PolicyManual-Volume6-PartG-Chapter1.html)

Chapter 3 → (PolicyManual-Volume6-PartG-Chapter3.html)

Guidance Resources 10 Appendices 0 Updates 5

The immigrant investor category requires three main elements:

- An investment of capital;
- In a new commercial enterprise;
- Which creates jobs.

Each element is explained in this chapter in the context of both the stand-alone program and the Regional Center Program.

For the general requirements, the term immigrant investor in this Part of the Policy Manual refers to any EB-5 investor-petitioner, whether investing through the stand-alone program or the Regional Center Program. Where distinctions between the two programs exist, the term non-regional center immigrant investor refers to petitioners using the stand-alone program, and the term regional center immigrant investor refers to petitioners using the Regional Center Program.

## A. Investment of Capital

Congress created the immigrant investor category so the U.S. economy can benefit from an immigrant's contribution of capital. This benefit is greatest when capital is at risk and invested in a new commercial enterprise that, because of the investment, creates at least 10 full-time jobs for U.S. workers. The regulations that govern the category define the terms capital and investment with this economic benefit in mind. <sup>[1]</sup>

### 1. Capital

The word capital does not mean only cash. Instead, the broad definition of capital takes into account the many different ways in which a person can make a contribution of financial value to a business. Capital includes cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided the immigrant investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. <sup>[2]</sup> All capital must be valued at fair market value in U.S. dollars.

The immigrant investor must establish that he or she is the legal owner of the capital invested <sup>[3]</sup> and has obtained the capital through lawful means. Any assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital. <sup>[4]</sup> To establish that the capital was obtained through lawful means, the immigrant investor's petition must include (if applicable):

- Foreign business registration records;
- Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this list), and personal tax returns, including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within 5 years with any taxing jurisdiction in or outside the United States by or on behalf of the immigrant investor;
- Evidence identifying any other source(s) of capital; or
- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the immigrant investor from any court in or outside the United States within the past 15 years. <sup>[5]</sup>

#### *Promissory Notes*

Capital can include the immigrant investor's promise to pay (a promissory note), as long as the immigrant investor is personally and primarily liable for the promissory note debt and his or her assets adequately secure the note. Any security interest must be perfected <sup>[6]</sup> to the extent provided for by the jurisdiction in which the asset is located. <sup>[7]</sup> Further, the assets securing the promissory note:

- Cannot include assets of the company in which the immigrant is investing;
- Must be specifically identified as securing the promissory note; and
- Must be fully amenable to seizure by a U.S. noteholder. <sup>[8]</sup>

The fair market value of a promissory note depends on its present value, not the value at any different time. In addition, to qualify as capital, nearly all of the money due under a promissory note must be payable within 2 years, without provisions for extensions. <sup>[9]</sup>

#### *Using Loan Proceeds as Capital*

Proceeds from a loan may qualify as investment capital provided the requirements placed on indebtedness are satisfied. <sup>[10]</sup>

When using loan proceeds as capital, an immigrant investor must demonstrate:

- The immigrant investor is personally and primarily liable for the debt;
- The indebtedness is secured by assets the immigrant investor owns; and

- The assets of the new commercial enterprise are not used to secure any of the indebtedness.

The immigrant investor must have primary responsibility, under the loan documents, for repaying the debt used to satisfy his or her minimum required investment amount.

The immigrant investor must also demonstrate that his or her own collateral secures the debt, and that the value of the collateral is sufficient to secure the amount of debt that satisfies the immigrant investor's minimum required investment amount. A loan secured by the immigrant investor's assets qualifies as capital only up to the fair market value of the immigrant investor's pledged assets.

## 2. Investment

The immigrant investor is required to invest his or her own capital. The petitioner must document the path of the funds to establish that the investment was made, or is actively in the process of being made, with the immigrant investor's own funds. <sup>[11]</sup>

To invest means to contribute capital. A loan from the immigrant investor to the new commercial enterprise does not count as a contribution of capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the immigrant investor and the new commercial enterprise is not a capital investment. <sup>[12]</sup>

To qualify as an investment, the immigrant investor must actually place his or her capital at risk. The mere intent to invest is not sufficient. <sup>[13]</sup>

Purchasing a share of a business from an existing shareholder, without more, will not qualify, since the payment goes to the former shareholder rather than to the new commercial enterprise.

### *Guaranteed Returns and Debt Arrangements*

If the immigrant investor is guaranteed a return, or a rate of return on all or a portion of his or her capital, then the amount of any guaranteed return is not at risk. <sup>[14]</sup> For the capital to be at risk there must be a risk of loss and a chance for gain.

Additionally, if the investor is guaranteed the right to eventual ownership or use of a particular asset in consideration of the investor's contribution of capital into the new commercial enterprise, the expected present value of the guaranteed ownership or use of such asset will count against the total amount of the investor's capital contribution in determining how much money was placed at risk. For example, if the immigrant investor is given a right of ownership or use of real estate, the present value of that real estate will not be counted as investment capital put at risk of loss. <sup>[15]</sup>

Nothing prevents an immigrant investor from receiving a return on his or her capital in the form of a distribution of profits from the new commercial enterprise. This distribution of profits may happen during the conditional residency period and may happen before creating the required jobs. However, the distribution cannot be a portion of the investor's minimum qualifying investment or guaranteed to the investor.

An arrangement under which funds have been contributed in exchange for an equity interest subject to a redemption agreement which provides that the investor may demand a return of some portion of his or her investment funds, including after obtaining conditional permanent resident status, is an impermissible debt arrangement, no different from the risk any business creditor incurs. Such funds do not constitute a qualifying contribution of capital <sup>[16]</sup> and, because the redemption provides for a guaranteed return to the immigrant investor, the funds are similarly not at risk. <sup>[17]</sup>

### *Business Activity*

An immigrant investor must provide evidence of the actual undertaking of business activity. Merely establishing and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant investor has placed his or her capital at risk. <sup>[18]</sup> Without some evidence of business activity, no assurance exists that the funds will be used to carry out the business of the commercial enterprise. <sup>[19]</sup>

### *Made Available*

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>[20]</sup> In the regional center context, the immigrant investor must establish that the capital was invested into the new commercial enterprise and that the full amount was subsequently made available to the job-creating entity or entities, if separate. <sup>[21]</sup>

In cases with a separate job-creating entity or entities, the payment of administrative fees, management fees, attorneys' fees, finders' fees, syndication fees, and other types of expenses or costs by the new commercial enterprise that erode the amount of capital made available to the job-creating entity do not count toward the minimum required investment amount. <sup>[22]</sup> The payment of these fees and expenses must be in addition to the minimum required capital investment amount.