

### EB-5 Investment in “New” and “Existing” Businesses 10/10/2011

If the EB-5 investment funds this type of business...	... then it is subject to these job creation requirements...	... and must provide this documentation to USCIS.
<b>1. Businesses established any time SINCE 11/29/1990</b> (the official cut-off date for a “new” business)		
1.1 A brand new business/project with no employees yet.	<ul style="list-style-type: none"> <li>• Create 10+ new jobs/investor post-investment</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Provide business plan that predicts job creation</li> <li>• <b>At I-829:</b> Document actual job creation</li> </ul>
1.2 A business with current employees that funds an expansion using EB-5 investment.	<ul style="list-style-type: none"> <li>• Preserve all pre-investment jobs.</li> <li>• Create 10+ new jobs/investor post-investment</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Document the pre-investment level of employment. Provide business plan that predicts additional job creation.</li> <li>• <b>At I-829:</b> Document actual created and preserved jobs.</li> </ul>
1.3 A business with current employees that qualifies as a “troubled business.”	<ul style="list-style-type: none"> <li>• Preserve all pre-investment jobs.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Show financial statements verifying that the business qualifies as a “troubled business.” (“has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur’s Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business’s net worth prior to such loss.”)</li> <li>• <b>At I-526:</b> Document the pre-investment level of employment. Provide a business plan predicting job preservation.</li> <li>• <b>At I-829:</b> Document actual job preservation.</li> </ul>
1.4 A new business that acquires another existing “new” business (established after 11/29/1990) that is operational at the time of acquisition		<ul style="list-style-type: none"> <li>• This scenario is treated like 1.2 above</li> </ul>
1.5 A new business that will acquire the assets of a closed/defunct business		<ul style="list-style-type: none"> <li>• This is a grey area. It should be treated like 1.1 above. But heavily document that the existing business was closed and defunct at the time of acquisition, and that this is just an asset-acquisition scenario, or it may be treated like 1.2 or like 2.1 or 2.2 below.</li> </ul>
1.6 A business that already created jobs as a result of investment from an investor who now wants to apply for an EB-5 visa.	<ul style="list-style-type: none"> <li>• Create 10+ new jobs/investor post-investment</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Document the 10+ jobs already created by the investment now seeking qualification as an EB-5 investment.</li> <li>• <b>At I-829:</b> Demonstrate that investment was sustained throughout the conditional period. (also document that jobs were sustained?)</li> </ul>

2. Businesses established any time BEFORE 11/29/1990		
2.1 A business that is purchased and completely reorganized using EB-5 investment.	<ul style="list-style-type: none"> <li>• Create 10+ new jobs/investor post-investment</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Show that the business has been/will be restructured and reorganized such that a new commercial enterprise results. (Simple change of ownership and/or cosmetic changes are not sufficient.)</li> <li>• <b>At I-829:</b> Document actual job creation</li> </ul>
2.2 A business with current employees that funds an expansion using EB-5 investment.	<ul style="list-style-type: none"> <li>• Create 10+ new jobs/investor or increase the pre-investment level of employment or net worth by at least 40% per investor, whichever is greater.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Document the pre-investment net worth and employment. Provide a business plan for expansion that has/will result in “substantial change” in the net worth or number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.</li> <li>• <b>At I-829:</b> Document actual job creation and net worth expansion.</li> </ul>
2.3 A business with current employees that qualifies as a “troubled business.”	<ul style="list-style-type: none"> <li>• Preserve all pre-investment jobs.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At I-526:</b> Show financial statements verifying that the business qualifies as a “troubled business.” (“has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur’s Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business’s net worth prior to such loss.”)</li> <li>• <b>At I-526:</b> Document the pre-investment level of employment. Provide a business plan predicting job preservation.</li> <li>• <b>At I-526:</b> Show that the business qualifies as “new” by virtue of restructuring/reorganization or expansion as described in 2.1 and 2.2 above.</li> <li>• <b>At I-829:</b> Document actual job preservation.</li> </ul>

**Note:** for both Regional Center and stand-alone EB-5, the business that needs to line up with the regulations is the entity most closely associated with job creation.

**The Regulations**

**8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of:**

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results;  
or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of

employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. § 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. § 204.6(j)(4)(ii).

**8 C.F.R. § 204.6(e) states that:**

*New*

means established after November 29, 1990.

*Troubled business*

means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

*Commercial enterprise*

means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

*Employee*

means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

*Full-time employment*

means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. In the case of the Immigrant Investor Pilot Program, "full-time employment" also means employment of a qualifying employee in a position that has been created indirectly through revenues generated from increased exports resulting from the Pilot Program that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

**8 C.F.R. § 204.6 (g)** Makes the following provision for multiple investors:

- (1) General. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section [203\(b\)\(5\)](#) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.
- (2) Employment creation allocation. The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section [203\(b\)\(5\)](#) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Note that the regulation at 8 CFR 204.6(h) has been superseded by a subsequent statutory amendment (Section 11036 of Public Law 107-273), which eliminated the requirement that the investor had to establish the new commercial enterprise. Presently, an investor only has to invest in a new commercial enterprise.

#### **Adjudicator's Field Manual Chapter 22.4(4)(h)**

##### November 2, 2002 Amendments to EB-5

On November 2, 2002, the President signed into law certain amendments to the EB-5 program. Title I, subtitle B of Division C of the Twenty-First Century Department of Justice Appropriations Authorization Act (the "2002 DOJ Appropriations Act)," sections 11031-37 of Public Law 107-273.

On June 10, 2003, USCIS issued interim policy guidance regarding changes effected by the new law. Memorandum from William R. Yates, HQ40/6.1.3, entitled "Amendments Affecting Adjudication for Alien Entrepreneur (EB-5)" (the "Yates Memorandum"). The Yates Memorandum provides that:

· As before, the commercial enterprise must be "new," that is, have been created after November 29, 1990. [See 8 CFR 204.6\(e\)](#). Section 11036 of the law does, however, eliminate the previous requirement that an alien personally have "established," that is, have had a personal hand in, the creation of the new commercial enterprise. Under the 2002 DOJ Appropriations Act, the alien need only "sustain" his or her investment in a pre-existing commercial enterprise. This effectively allows multiple investments in the same commercial enterprise at any time, provided that the alien still creates ten new positions for qualifying U.S. workers jobs and meets all other EB-5 requirements are complied with. The law applies to both pending I-526 and I-829 petitions filed on that date or thereafter. This provision modifies [8 CFR 204.6\(h\)\(1\)](#), regarding the creation of an original business.

##### Note

The 2002 DOJ Appropriations Act does not change the requirement that the commercial enterprise create 10 new jobs. In order to determine whether the commercial enterprise actually has created ten new positions, adjudicators must first determine whether the petitioner personally created the commercial enterprise and, if the petitioner did not create the business, the number of jobs there were in the existing business at the time the petitioner acquired the business.

**Note Also**

The 2002 DOJ Appropriations Act supercedes, in part, 8 CFR 204.6(h)(3), which describes “the establishment of a new commercial enterprise,” due to the removal of the requirement that the alien entrepreneur establish the new commercial enterprise. Section 204.6(h)(3) of the Act continues, however, to be relevant in that it describes the circumstances under which a commercial enterprise in existence prior to November 29, 1990 will be considered “new” for purposes of the law. Enterprises that have been expanded or substantially reorganized, as described above, will continue to meet the definition of “new” regardless of when the commercial enterprise was actually created.

- As was the case by regulation before November 2, 2002, a new commercial enterprise may include a limited partnership.
- Full-time employment is defined as employment that requires at least 35 hours of service per week “at any time,” regardless of who fills the position. This provision does not change the requirement that, in order to be “full-time,” the job created may not be seasonal. If the enterprise employs individual workers on a temporary basis, it can meet the “full-time” requirement only if the job itself is permanent in nature and will be staffed year-round by qualified U.S. workers for the requisite 35 hours per week. For example, an enterprise which is staffed by qualifying workers on one-year contracts would qualify only if, upon expiration of a particular contract, the enterprise, without break, continues to employ the same or another U.S. worker in that same position.
- With the limited exception of certain persons eligible for a “second opportunity” to make a qualifying investment (discussed below) under the 2002 DOJ Appropriations Act, as before, a petitioner may invest capital, for purposes of EB-5, in only one commercial enterprise. A petitioner who filed a Form I-526 petition after August 31, 1998 therefore may not qualify for removal of conditions if he or she has invested in multiple commercial enterprises.