EB-5 Concurrent Filing

SIMONE WILLIAMS, ESQ.
MANAGING PARTNER, WILLIAMS GLOBAL LAW

CHARLES KAUFMAN, ESQ.
SHAREHOLDER, LEXCUITY PC

Among its myriad of changes to the decades-old EB-5 immigration investor program, the EB-5 Integrity and Reform Act of 2022 (the "Reform Act") contains a noteworthy provision that allows applicants to concurrently file an EB-5 investor petition and an adjustment of status application. This ostensibly streamlined new process has sparked some controversy, as some legal and business professionals have debated whether it presents more risks than benefits for applicants. The rule change seems intended to serve the Reform Act's overall goal of simplifying the procedures to create more jobs by providing permanent residence to investors seeking to contribute wealth to the U.S. economy. While there are drawbacks to the option of concurrent filings, we find that on balance it can offer significant benefits to EB-5 applicants who are present in the U.S. on non-immigrant status and wish to obtain permanent U.S. residency.

The U.S. Citizenship and Immigration Services ("USCIS") administers the EB-5 immigrant investor program ("EB-5 Program"), allowing investors (along with their spouses, and their unmarried children under the age of 21) to file for a U.S. permanent residency (otherwise known as a "Green Card"). To file, persons must meet several requirements. According to USCIS, a filer must "make the necessary investment in a commercial enterprise in the United States[1]"; and must "plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers.[2] Underneath the umbrella of the EB-5 Immigrant Investor Program, first signed into law in 1990, the "Regional Center Program…sets aside EB-5 visas for participants who invest in commercial enterprises associated with regional centers approved by USCIS."[3].

On March 15, 2022, President Joe Biden signed the Reform Act as part of his all-encompassing $1.5 trillion "Consolidated Appropriations Act." Congress reauthorized the EB-5 Regional Center Program for five years, ending on September 30, 2027. Along with the reauthorizing the Program, the Reform Act made numerous changes intended to modernize the EB-5 Program and reduce the occurrence of fraud. Most interestingly, an amendment to Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) allows concurrent filing of initial EB-5 petitions and applications for adjustment of status ("AOS").

To be considered for permanent residency under the EB-5 program, an EB-5

1 EB-5 Immigrant Investor Program." USCIS, 2 Aug. 2022, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program.
2 Ibid
3 Ibid

Continued On Page 16

Continued From Page 15

investor must submit either Form I-526, the Immigrant Petition by Standalone Investor or Form I-526E, the Immigrant Petition by Regional Center Investor.[4] In the past, investors had to wait for USCIS to approve their I-526 applications before they filed with a different agency – the U.S. Department of State – to commence residency under the EB-5 Program. Applicants outside the U.S. are required to apply for an immigrant visa at a U.S. embassy or consulate, while applicants within the U.S. (who entered the U.S. lawfully) may be eligible to adjust their statuses from non-immigrant to immigrant by filing Form I-485 (Application to Register Permanent Residence or Adjust Status) without leaving the U.S. Only upon approval of the second application could an investor begin conditional U.S. residency as a first step to achieving permanent, unconditional U.S. residency after satisfying the job-creation requirements of the EB-5 Program.

Though concurrent filing is not new in other employment-based immigration categories, it is new to the EB-5 Program. Until now, EB-5 applicants present in the U.S. on non-immigrant visa (NIV) status have often been unable to make progress toward their immigration goals, including establishing U.S. professional or academic careers, while the long-awaited responses from USCIS and then the Department of State were pending. Although, USCIS will not approve an I-485 until the underlying basis (I-526 or I-526E) is approved; if an investor files the AOS before his/her NIV status expires, the investor can remain in the US after NIV expiration with the pending AOS. Furthermore, the investor can file for Work Authorization (Form I-765) and Employment Authorization (Form I-131) at the same time as I-485 for the interim benefits, and therefore work and travel while their I-526 or I-526E remain pending. This allows investors to remain in the United States lawfully and pursue their economic prospects while awaiting approval with some risks as noted below.

It is crucial to be aware of the time to file according to the Visa Bulletin, and the dates as listed under Date of Filing (DFF) and Final Action Date (FAD). First, only investors who have current priority dates under the Visa Bulletin are eligible to file for AOS under this rule. Second, to note, is the application of the Child Status Protection Act (CSPA) as it applies to concurrent filings. The CSPA protects children who will be turning 21 by freezing the age of the child if the AOS is filed by a certain date. However, there is no age freezing under CSPA for children who file AOS applications under DFF as only the FAD protects the age of the child under the CSPA. According to the USCIS manual, the applicant's CSPA age calculation is dependent on visa availability according to the Final Action Dates chart. Applicants who file based on the Dates for Filing chart may not ultimately be eligible for CSPA if their calculated CSPA age based on the Final Action Dates chart is 21 or older. Therefore, since only the FAD can freeze the age of a derivative child this rule must be taken into consideration when investors are filing with derivative children who are close to turning 21 years of age.

This provision particularly affects investors in the U.S. on non-immigrant visas, such as E-2, F-1, H-1B, L-1. For students filing under F-1 status, this could be very advantageous by allowing them to stay in the U.S. a bit longer after graduation to explore and finalize investment opportunities. In other cases, this measure may give foreign workers who plan to file an EB-5 petition freedom from their current employers. Because the EB-5 visa does not require applicants to present a U.S. employer as a sponsor,[5] workers are free to pursue different roles, companies, fields, and even entrepreneurship more easily.

Concurrent application does not benefit investors outside the U.S. because they are not eligible for adjustment of status. Under current law, they must wait until receiving I-526 petition approval before applying for an immigrant visa at a U.S. embassy or consulate. Nevertheless, it has become increasingly common for aliens in the U.S. on non-immigrant status to seek permanent residency through the EB-5 program. Most of these individuals should be eligible to apply for an adjustment of status and potentially benefit from concurrent registration.

Filing the I-485 and I-526 forms concurrently minimizes total wait time. This new rule addresses one of the largest setbacks for potential investors in recent years—indefinitely delayed processing times. Prior to this new regulation, investors were required to complete their I-526 process before applying to adjust their status. Depending on the country of origin, the wait time for the prior process could exceed two years. Filing concurrently empowers the petitioner to plan and accept opportunities sooner than they otherwise would have been able to do.

Another advantage of concurrent filing lies in its ability to increase flexibility for prospective investors. Before this bill, foreign workers were bound to their employers because their status relied on specific work visa classifications. Career changes only became possible after finding either a new employer to sponsor them or a new status to rely on. A lack of flexibility limited the range of roles an individual could pivot professionally. Additionally, there was minimal opportunity to pursue the fields of technology and start-ups out of fear of accruing unlawful presence here in the U.S. With the ability to file concurrently, interested investors can start making decisions about their lives and career with a more seamless timeline under their feet.

Despite the positive changes, there are also some potential disadvantages and risks of concurrent filing. One of the main risks of concurrent filing is the issue of immigrant intent, for those who entered the U.S. on a temporary visa such as a B-visitor's visa or F-student visa. For instance, if entering as

Continued On Page 17

4 The USCIS introduced the two versions of the initial petition in response to the Reform Act's distinction of "pooled" investments, which must be made under regional sponsorship, and single or standalone investments that may be made in a project without regional center sponsorship.

5 "How EB-5 Concurrent Filing Will Let Investors Live, Work, and Study in the US." The Economic Times,https://economictimes.indiatimes.com/nri/migrate/how-eb-5-concurrent-filing-will-let-investors-live-work-and-study-in-the-us/articleshow/93406858.cms?from=mdr.

Continued From Page 16

a visitor, one must retain that status, and not plan to file for a green card.

As a general rule, USCIS will refuse to evaluate admissibility for the first 60 days after entry under one of the temporary visa programs. This is because agency policy is that relatively abrupt efforts to change immigration status and/or conduct inconsistent with non-immigrant status within 60 to 90 days may constitute misrepresentation or visa fraud, and create a permanent bar to immigration benefits. We therefore strongly advise that investors who entered the U.S. under the visitor or student visas programs have a clear plan to enter, visit and go home at the time of entry, clearly proving that their intention was a non-immigrant one.

That said, the State Department will, after the 90-day period, consider a "changed circumstances" explanation in which there were specific circumstances that led to changing their minds after entry, and filing for a green card to prevent an adverse finding. We recommend that all petitioners who decide to file for AOS concurrent filing due to "changed circumstances" do so after the 90-day period; and that such "changed circumstances" should be one of expediency or urgency.

Another big issue that may arise under this rule, is when investors do not maintain their underlying status and a problem later occurs with their petitions. If an investor is no longer maintaining NIV status after filing (because EAD is being used) and AOS is then denied, they need to leave the country immediately. We therefore strongly advise all investors to act conservatively, if possible, and maintain underlying NIV status despite the EAD.

Another disadvantage is the processing times of obtaining the Employment Authorization Documentation (EAD or "Form I-765")) and/or Travel Authorization document (Form I-131). An EAD or I-131 could take six months or more to be approved in some cases, which would restrict the investor's ability to work or travel while these applications are pending. However, processing times have begun to decrease since COVID-19 delays last year.

Lastly, prospective investors must be aware of the even more recent change in how USCIS accepts concurrent applications. As of September 1, 2022, USCIS stopped taking combined fee payments when a Form I-526 or I-526E was filed in conjunction with Form I-485, Form 131, the Application for Travel Document, or Form I-765, the Application for Employment Authorization.[6] They are now requiring that petitioners submit a separate fee payment for Forms I-526 or I-526E. This may be an effort to properly account for all of the forms as USCIS irons out its implementation process. Prospective investors should note that submitting combined payments for I-526 or I-526E with either Form I-485, I-131, or I-765 will result in a rejection.

Securities Law Considerations

U.S. regulators and courts have firmly established that an offering of investment opportunities to EB-5 Program participants is an offering of securities and must comply with securities laws and regulations, both federal and state. The Reform Act focuses on compliance with securities laws by adding new requirements for regional centers to certify that all EB-5 offerings sponsored by them comply with all applicable federal and state securities laws.

The Securities Act of 1933 (the "Securities Act") broadly requires every offering of securities (which would include EB-5 offerings) either to be registered with the SEC – a costly, time-consuming and

6 EB-5 Immigrant Investor Program." USCIS, 2 Aug. 2022, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program.

Continued On Page 18

Continued From Page 17

onerous process usually associated with IPOs – or else to be conducted under an available exemption from registration. Because most EB-5 offerings target persons outside the U.S., EB-5 issuers have typically relied on a broad exemption for offshore offerings under Regulation S under the Securities Act. However, Regulation S is not available for offerees or prospective investors who reside in or are physically located in the U.S., even those here on non-immigrant status. It is unavailable even if those investors leave the U.S. and submit their purchase agreement and purchase price while they are physically outside the U.S. Therefore, issuers offering or selling EB-5 investment opportunities to persons who reside in the U.S. on non-immigrant status or are located in the U.S., no matter where they are when they actually invest, must comply with another exemption from registration under the Securities Act.

For offers and sales of securities in the U.S. and to U.S. persons, the most useful exemptions from SEC registration are Rule 506(a) and Rule 506(b) of Regulation D. These exemptions allow an unlimited amount of capital to be raised. While they require careful compliance with specific requirements, they do not involve permits, approvals, or interaction with extensive agency procedures. SEC regulations expressly allow an issuer to conduct simultaneous offerings under Regulation S and Regulation D so long as each offering independently satisfies the requirements of its targeted exemption.

Both Rule 506(b) and Rule 506(c) restrict sales to "accredited investors."[7] An individual person (as are all EB-5 investors) is accredited if (1) he or she has more than $1 million in net assets (excluding principal residence), either individually or with the spouse, or (2) earned more than $200,000 in income in the previous two years, or $300,000 jointly with the spouse, and reasonably expects that same income in the current year.

U.S. residents seeking to invest under the EB-5 Program – who now may benefit from a concurrent application – are frequently college students or young persons who do not have personal wealth but may have wealthy parents or grandparents willing to provide funds for an EB-5 investment. In such cases, the young potential investor will not be accredited if he or she receives a loan of the $800,000 investment amount, or even a gift of that investment amount. Rather, the young investor must receive a gift that brings total net worth (including the value of the EB-5 investment) to at least $1 million.

7 While Rule 506(b) ostensibly allows up to 35 unaccredited investors, it applies onerous disclosure requirements when unaccredited investors are included. As a result, compliant Rule 506(b) offerings that include unaccredited investors are extremely rare.

The SEC has recently amended Regulation D to create additional categories of accredited investor for individuals, which may be helpful in some situations involving the wealthy family supporting the application of a less wealthy family member. Specifically, if the family has investments with value exceeding $5 million it may be able to qualify as a "family office," and a family member making the investment may qualify as a "family client" if the investment is directed by a person capable of judging its merits and risk. Before relying on this category of accreditation, the issuer should carefully confirm that the definitions of "family office" and "family client" in the Investment Advisers Act of 1940 are satisfied.

The recent amendment to Regulation D also extends accredited investor status to a person holding a professional certification, designation, or credential that the SEC determines to confer accredited investor status. As of the date of this article, the SEC has designated holders in good standing of the FINRA Series 7, Series 65, and Series 82 licenses as accredited in this category. While perhaps of limited applicability, this new category could benefit investors who are professional participants in the financial services industry.

As for the choice between the exemptions under Rule 506(b) or Rule 506(c), the selection will depend on the manner of the offering:

- Rule 506(b) allows investors to self-certify that they are accredited, but requires the offering to avoid any "general solicitation" – any advertising, any promotion through seminars open to the public, etc. Generally, prospective investors under Rule 506(b) must have a pre-existing relationship with the issuer (or else be introduced by a broker-dealer or similar promoter, who must be registered if U.S.), and must have self-confirmed their accredited status before the offering can be communicated to them.

Continued On Page 19

Continued From Page 18

- By contrast, Rule 506(c) offerings permit public advertising and general solicitation (including internet advertising) to strangers with no pre-existing relationship, and allow offers to be made to persons who may not be accredited, so long as every actual purchaser is *verified* as accredited. Verification of accredited investor status will require a review of personal financial information, but it may permissibly be outsourced to a confidential third-party accreditation agent at relatively low cost.

Further, before electing to conduct an offering under Rule 506(b), issuers should consider that common marketing methods in EB-5 could risk violating the prohibition on general solicitation. In particular, if a simultaneous offshore offering under Regulation S conducts seminars, or advertises in publications, through broadcasting, or on the internet, great care must be taken that these activities are exclusively directed outside the U.S. and no U.S.-located person invests after being exposed to these marketing methods.

By contrast, while Rule 506(c) requires the extra step of investor verification, it avoids any worry about "blowing the exemption" through inadvertent exposure to general public solicitation in the offshore marketing. For example, many EB-5 issuers have received an inquiry from a U.S. resident who was unintentionally reached through offshore marketing and wishes to invest. This potential investor, even if accredited, must be refused if the issuer is relying on Rule 506(b)—but (if accredited) could be accepted under Rule 506(c).

Both Rule 506(b) and Rule 506(c) require the issuer to file a report on Form D with the SEC within 15 days after the first sale through the offering. This report is relatively simple and brief, but navigating the SEC's electronic reporting system is difficult. While offerings under these Reg D exemptions are generally also exempt from state securities laws (often called "blue sky laws"), most U.S. states require (a) a filing of the SEC Form D with authorities of the state where the securities are sold (and, in some cases, the state where the issuer is domiciled), and (b) payment of a fee (usually $500 or less, but sometimes as much as $1,000), usually within 15 days of the first sale in the state. It is relatively easy to satisfy these state requirements by uploading the Form D to the Electronic Filing Depository ("EFD") maintained by the North American Securities Administrators Association ("NASAA"), but the applicable requirements cannot be ignored.

Conclusion

While the option to file concurrently is new to the EB-5 community, its effects are promising. Immigrant investors, EB-5 project sponsors and the professionals who advise them must be mindful of the potential pitfalls and extra compliance measures that go hand-in-hand with the benefits of concurrent applications for investors in the U.S. If successful at streamlining the EB-5 investment process and attracting new investors, these new measures will be beneficial to immigrant investors and EB-5 project sponsors.