## EB-5 Consular Processing Versus Adjustment of Status Concurrent Filing

# Understanding the Risk of a Visa Fraud Finding

**Joseph "Joey" Barnett**
Partner | WR Immigration

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The recent changes in EB-5 processing options that has created new opportunities for EB-5 investors bring to light immigration risks that can disrupt an immigrant's future in the United States. In particular, entering on a nonimmigrant visa such a visitor's visa, or even a student visa, with an intent to file an adjustment of status could lead to inadmissibility determinations under INA 212(a)(6)(C)(i) based on fraud or material misrepresentation finding. This article seeks to provide EB-5 stakeholders with insight on this complicated and opaque issue that is often overlooked by EB-5 promoters and is manifestly fact-dependent on each immigrant investor's circumstances.

## CONCURRENT FILING OPTION

One of the biggest game-changing provisions[1] in the EB-5 Reform and Integrity Act of 2022 is the ability of an EB-5 immigrant investor to file a Form I-485 Application for Adjustment of Status before the initial EB-5 petition (Form I-526) is approved, provided a visa is "available". For new investors, this means a Form I-485 can be filed concurrently (at the same time) as the Form I-526. For existing investors, this means a Form I-485 can be filed before the pending Form I-526 is approved.

Included with a Form I-485 adjustment application are applications for work authorization (Form I-765) and for advance parole (Form I-131) that allow the applicant to travel internationally during the time the Form I-485 is pending. The ability to remain in the U.S., and lawfully work upon receipt of the EAD card, and have children attend public school, during the time in which the EB-5 petition is pending, is appealing.

In contrast, for those outside the United States, the path to a green card is through consular processing and admission on an immigrant visa, which can only occur after U.S. Citizenship and Immigration Services (USCIS) approves the initial EB-5 petition. Although EB-5 processing times are improving, the prospect of waiting outside the U.S. for an unknown amount of time after making such a substantial investment is a burden for some.

Prospective investors are inquiring on options to fast-track their lawful presence in the United States. Questions come up from visitors, students, temporary workers, as well as those on E treaty investor/trader visa, and O-1 extraordinary ability workers, as well as TN visas for Canadians and Mexicans, and others. All of these visas must meet the nonimmigrant intent requirement[2]. Note, certain categories of nonimmigrant cannot apply to adjust under the concurrent filing rules including, visa waiver entrants, crewmen, J-1 visa holders that are subject to the two-year home residence rule, and others. H and L visas allow dual intent so there is no issue when H or L nonimmigrants file concurrent adjustment applications immediately after entry.

Nonimmigrant intent generally means having a residence abroad that he or she has no intention of abandoning and allows the individual to legally enter and stay in the United States for only a limited period. Taking action that is inconsistent with that stated intent shortly after one's initial entry, including the filing of an adjustment of status application, can cause dire immigration consequences.

## OCTOBER 2023 VISA BULLETIN MOVEMENT OF CHART B APPLICATION FILING DATES

For existing investors, the same issue – entering on a nonimmigrant visa with an intent to file an adjustment of status has recently arisen as a large batch of EB-5 visas are available with the new fiscal year (starting October 1, 2023). In the October 2023 Visa Bulletin[3], the U.S. Department of State significantly advanced the Application Filing Dates in Chart B. USCIS has subsequently indicated[4] it will use Chart B in October 2023 (and generally allows for use in the initial months of each fiscal year) for purposes of "visa availability" so Form I-485s can be submitted.

| Oct 2023 Chart B Date | Sept 2023 Chart B Date | Change in Wait Time |
|---|---|---|
| 1 - Jan - 17 | 1 - Jan - 16 | - 1 year |
| 1 - Apr - 22 | 8 - Dec - 19 | - 2 year, 5 months |

The October 2023 Visa Bulletin has thus increased the number of immigrant investors who are potentially eligible to file a Form I-485, opening the door for possible immigration risks for EB-5 investors outside the United State who wish to take advantage of Chart B's movement. Yet, entering on a temporary visa to do so can be problematic due to issue of immigrant intent. Certain visa categories such as B-visitor visas, F-student visas, TN visas, and many others (in fact, the only nonimmigrant visas that allow for "dual intent" are L intracompany transferee visas and H specialty occupation visas) must have a temporary intent to visit that is primarily consistent with their visa category. A student must enter with the primary purpose of studying, and the visitor must have legitimate tourist intent as their primary purpose.

[1] See 8 U.S.C. § 1255(n)("If the approval of a petition for classification under section 1153(b)(5) of this title would make a visa immediately available to the alien beneficiary, the alien beneficiary's application for adjustment of status under this section shall be considered to be properly filed whether the application is submitted concurrently with, or subsequent to, the visa petition.").

[2] According to the INA, aliens shall be presumed to be an immigrant until they establish "to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission" that they are entitled to a nonimmigrant status under §1101(a)(15)." See 8 U.S.C. § 1184(b).

[3] See https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-october-2023.html

[4] See https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/adjustment-of-status-filing-charts-from-the-visa-bulletin

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## PRECONCEIVED INTENT

To understand the concept of preconceived intent or visa fraud, one must simply realize that if entering as a visitor, one must primarily be a visitor and not plan to file for a green card. The question is whether a visitor enters with a legitimate tourist intent, and thereafter becomes aware of this new concurrent filing option, are they then eligible to adjust if they change their mind after entry? It is important to be clear on the rules because entering on a nonimmigrant visa, with a plan to file an adjustment after entry, could lead to a lifetime bar. USCIS may look at the specific facts that occurred after entry when making such a determination, and certain actions like enrolling a child into school or severing ties with a home country, could be major red flags.

## INCONSISTENT CONDUCT AFTER ENTRY

Circumstances may arise after entry that could lead to a change of an individual's intent. The timing between the issuance of a nonimmigrant visa or entry and the individual's change of plans or intentions are crucial. The U.S. Department of State's Field Adjudicator Manual ("FAM")[5] is clear and is commonly known as the "90-day rule":

*"If an individual engages in conduct inconsistent with their nonimmigrant status within 90 days of visa application or admission to the United States . . . you may presume that the applicant made a willful misrepresentation (i.e., you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of their true intentions in seeking a visa or admission to the United States)."*

Although the FAM does not control how USCIS adjudicators will act, it can be relevant in these situations.

USCIS guidance is less clear, as the agency has removed references to the "30/60-day rule" in its Policy Manual. Under this old rule, there would be a presumption of misrepresentation if the status violation or conduct occurred within 30 days of entry. If the status violation or conduct occurred more than 30 days but less than 60 days after entry, no presumption of misrepresentation would apply but if the facts gave rise to a "reasonable belief" that the individual misrepresented his or her intent, he or she would be provided the opportunity to present evidence to the contrary. Violations that occur after 60 days would not be a basis for a finding of inadmissibility for willful misrepresentation[6]. Notably, even before its removal from the policy manual, USCIS said the 30/60-day rule is used for guidance only, is not governed by the statutes or the regulations, and is not a conclusive tool to ascertain misrepresentation. Yet, a USCIS officer may still find the alien obtained admission by misrepresentation, if, on the basis of all the facts and evidence in the record, a reasonable person could reasonably find that the alien had done so.

Now, the USCIS Policy Manual states:

*"If the officer finds that the evidence for and against a finding of fraud or willful misrepresentation is of equal weight, then the applicant is inadmissible due to failure to meet the burden of proof. As long as there is a reasonable evidentiary basis to conclude that a person is inadmissible for fraud or willful misrepresentation, and the applicant has not overcome that reasonable basis with evidence, the officer should find the applicant inadmissible."*

This guidance potentially opens the door for scrutiny of one's actions and intent even beyond any specific period of time. For this reason immigrant investors need to be diligent in documenting their intent, and cautious when making investment and immigration decisions. On the other hand, if an applicant entered the US on a visitor's visa to accompany their child attending college and only learned of the ability to file an adjustment under the new law only one week after entry, then presumably there is no visa fraud, despite entering as a visitor. It is advisable for issuers to note this immigration risk in offering documents and to ensure immigrant investors are properly counselled regarding their immigration plan. As noted above, while the 90-day rule is just a guideline for DOS, there is authority for USCIS to revoke the approval of a green if they determine it was erroneously issued due to fraud or misrepresentation, and the issue could be raised again during a naturalization process.

## CONSEQUENCES

Immigrant investors must understand the severe consequences of preconceived intent and inconsistent conduct violations. If found inadmissibility under INA 212(a)(6)(C)(i), the Form I-485 adjustment of status will be denied, and removal (deportation) proceedings initiated unless the applicant is eligible for and granted a waiver. A finding of fraud or misrepresentation will also lead to a permanent bar to obtaining a visa and entering the U.S. There is a discretionary waiver of inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national[7]. Unfortunately it is rare for most EB-5 adjustment applicants to even have the required "anchor" relative. Applicants must understand that only H or L visa bearers are dual intent visas, and all other nonimmigrants must be knowledgeable and aware of the rules and risks in filing for an adjustment of status.

An INA 212(a)(6)(C)(i) finding results in a lifetime bar to entering the U.S. While there are nonimmigrant waivers, and in some instances immigrant waivers if one has a close U.S. citizen or permanent resident relative, these waivers are extremely hard to obtain and often take years to process.

## CONCLUSION

EB-5 applicants must fully understand the options of consular processing versus adjustment of status and the benefits and risks of either option. It is critical for all EB-5 applicants to have a carefully planned short-term and long-term immigration strategy to achieve EB-5 success. It's vital for EB-5 stakeholders to understand these rules to help investors navigate the complex U.S. immigration system.

[5] https://fam.state.gov/fam/09FAM/09FAM030209.html
[6] See Memorandum from Lori Scialabba, Associate Director for Refugee, Asylum, & International Operations Directorate, et al., USCIS HQ 70/21.1 AD, available at https://www.hsdl.org/?view&did=21566 (last accessed September 28, 2023).
[7] See 8 U.S.C. § 1182(i).