Will EB-5 investors applying for US green cards be exempt from new USCIS consular processing memo?

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June 4, 2026 16:27 IST

The key point in the USCIS debate is that the new directive might not be strictly enforced in situations where foreigners contribute economically to the US.

The EB-5 visa program allows foreigners to invest and create jobs in the US economy and, in turn, become eligible for lawful permanent status, also called the green card. Many EB-5 investors apply for the green card through the "adjustment of status" procedure, which allows them to change their immigration status without leaving the US.

However, this path has now become less straightforward. President Trump's administration has made notable changes to the green card application process. A May 22 USCIS memo emphasizes the necessity for consular processing for most green card applicants in the adjustment of status process, meaning many will now need to leave the US to apply at consulates in their home countries.

"In principle, all Green Card applicants, including EB-5 investors, are impacted by the new Memo on Adjustment of Status," says Nicholas Mastroianni III, President, U.S.

Immigration Fund.

How the EB-5 process works

Form I-526 (Immigrant Petition by Standalone Investor) is used by a standalone EB-5 investor to petition USCIS for immigrant status, while Form I-526E is used when routing investments through a Regional Center. Thereafter, Form I-485 (Application to Register Permanent Residence or Adjust Status) is used to apply for the green card.

“The EB-5 Reform and Integrity Act of 2022 was the first legislation to grant EB-5 investors the right to file an Adjustment of Status concurrently with their I-526/I-526E visa petition, even before petition approval, if the applicant’s visa number is available and the EB-5 petition is filed concurrently, pending, or approved,” says Ignacio Donoso, Managing Partner, Donoso & Partners.

What if your I-485 is already filed or approved? “If I-485 is already approved, you are most likely not impacted by this memo. But, if your I-485 is pending with an approved EAD and Advance Parole, you should be able to continue renewing your EAD and Advance Parole as usual. The memo does not affect work authorization unless the underlying I-485 is denied. That said, please avoid non-essential international travel for now,” says Shilpa Menon, Managing Director, Commercial of LCR Capital Partners.

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Another key element emerging from the new USCIS directive is that adjustment of status remains a viable option for many foreigners. USCIS has directed its officers to apply it “as a matter of discretion and administrative grace” and only as “an extraordinary relief.”

“EB-5 investors should understand that this directive does not eliminate adjustment of status as an option. It simply reinforces that USCIS officers may review the applicant’s facts and circumstances more carefully before granting adjustment of status,” says Abhinav Lohia, Chief Revenue Officer, Golden Gate Global.

“The key takeaway is that investors should not assume that adjustment of status is automatically available in every case. The strategy should be evaluated based on the applicant’s immigration history, visa category, timing of entry, intent at the time of entry, current status in the United States, and overall facts,” adds Lohia.

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The most important thing emerging in the USCIS debate is that the new directive may not be applied strictly in cases where foreigners provide economic benefit to the US. A USCIS spokesperson said, “While we work to operationalize this, people who present applications that provide an economic benefit or otherwise are in the national interest will likely be able to continue on their current path while others may be asked to apply abroad depending on individualized circumstances.”

This is where EB-5 investors stand apart. EB-5 investors are required to invest between $800,000 and $1,050,000 in US businesses and projects, ensuring at least 10 full-time American jobs are created per investor. The entire process entails extensive scrutiny of the source of funds and the background of the investor.

“EB-5 applicants are making a qualifying investment into the United States and creating American jobs. In my opinion, these factors may weigh favorably when an officer evaluates the overall circumstances of the case,” adds Lohia.

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