

# EB 5 and Maintaining Lawful Status

A comprehensive guide from EB5 Attorneys

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Thousands of EB 5 investors are already present in the United States on nonimmigrant visas when they file their I 526E petitions. Maintaining lawful status during what can be a multi year EB 5 processing period is one of the most technically demanding aspects of the case. A lapse in status can jeopardize your EB 5 petition, trigger bars to adjustment of status, and even result in removal proceedings. This guide covers the rules, risks, and strategies for staying in lawful status while your EB 5 case is pending.

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## Authorized Stay vs. Visa Validity: Understanding the Difference

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A common point of confusion is the difference between visa validity and authorized period of stay. Your visa (the stamp in your passport) allows you to present yourself at a U.S. port of entry and request admission. The visa can expire while you are inside the United States without affecting your status. Your authorized period of stay is determined by the I 94 Arrival/Departure Record issued by Customs and Border Protection (CBP) when you enter the country. The I 94 specifies either a date (such as a specific calendar date for H 1B holders) or "D/S" (duration of status, used for F 1 students and certain other categories). Your legal status in the United States is governed by the I 94, not the visa stamp. For example, an H 1B worker whose visa stamp expired in 2024 but whose I 94 shows an authorized stay through September 2027 is in valid H 1B status through September 2027. Conversely, a B 1/B 2 visitor whose visa stamp is valid through 2030 but whose I 94 authorized only a six month stay must depart or extend their status before that six month period ends. Understanding this distinction is fundamental because your ability to remain in the United States while your EB 5 case is pending depends entirely on maintaining valid authorized stay through your nonimmigrant status.

## How Different Visa Categories Interact with EB 5 Filing

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Your current nonimmigrant category determines the rules that apply to you during EB 5 processing. H 1B visa holders are in the strongest position because H 1B is a dual intent category under INA § 101(a)(15)(H). Filing an I 526E petition (which is an expression of immigrant intent) does not conflict with H 1B status. You can maintain H 1B, extend it, transfer to a new H 1B employer, and travel internationally without your EB 5 filing creating a problem. L 1 intracompany transferees also benefit from dual intent under INA § 101(a)(15)(L). Like H 1B holders, L 1 visa holders can file I 526E petitions without jeopardizing their nonimmigrant status. F 1 students face more complexity. F 1 status requires nonimmigrant intent, meaning USCIS expects you to depart when your studies are complete. Filing an I 526E signals immigrant intent, which can create issues if you need to extend F 1 status or apply for Optional Practical Training (OPT). Consult your attorney before filing if you are on F 1. B 1/B 2 visitors are similarly affected because B status requires nonimmigrant intent. If you are in the United States on B 1/B 2 status and file an I 526E, you may face scrutiny when seeking B status extensions. E 2 treaty investors present a nuanced case because, while E 2 does not formally provide dual intent, some USCIS offices and consulates are more flexible than others in evaluating immigrant intent in the E 2 context.

## Concurrent Filing: I 526E with I 485 Adjustment of Status

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If your EB 5 visa category priority date is current (meaning a visa number is available for your country and category), you may be eligible to file Form I 485 (Application to Register Permanent Residence or Adjust Status) concurrently with your I 526E petition. Concurrent filing under INA § 245 offers significant benefits. Once your I 485 is filed and pending, you can apply for an Employment Authorization Document (EAD) using Form I 765 and Advance Parole (AP) travel permission using Form I 131. The EAD allows you to work for any employer, freeing you from the restrictions of your nonimmigrant work visa. Advance Parole allows you to travel internationally and return to the United States without abandoning your pending adjustment application. For investors on H 1B or L 1 status, the concurrent filing strategy creates a valuable backup. Even if you choose to continue working under your H 1B rather than using the EAD, having the pending I 485 and associated documents provides flexibility. If your H 1B employer terminates your employment, you can immediately switch to EAD based work authorization rather than scrambling to maintain status. The filing fee for I 485 is \$1,440 as of April 2026 (USCIS Fee Schedule, 8 CFR 106.2). The I 765 and I 131 applications are filed concurrently with the I 485 at no additional fee. Your attorney should evaluate whether concurrent filing is available and advisable in your specific situation based on your priority date, country of chargeability, and current visa bulletin.

## Risks of Status Gaps During EB 5 Processing

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A gap in lawful status can have serious consequences for your EB 5 case and your overall immigration situation. If you fall out of status (meaning your authorized stay expires and you have not filed a timely extension or change of status), you begin accumulating unlawful presence under INA § 212(a)(9)(B). After 180 days of unlawful presence, you trigger a three year bar to reentry if you depart the United States. After one year of unlawful presence, the bar increases to ten years. These bars can be waived in limited circumstances, but they create significant complications. Beyond the unlawful presence bars, a status gap can affect your eligibility for adjustment of status under INA § 245. Generally, you must have been inspected and admitted or paroled into the United States and must be maintaining lawful status to be eligible for adjustment. Certain exceptions exist under INA § 245(c) and (k), but they have specific requirements and limitations. If you have a brief status gap (for example, your H 1B extension was filed late and there was a gap of a few days), your attorney must analyze whether that gap disqualifies you from adjustment of status or whether an exception applies. The consequences of a status gap vary depending on the length of the gap, the reason for the gap, and your specific immigration category. Prevention is far easier than cure. Your attorney should maintain a calendar of all status expiration dates and extension deadlines to ensure that your authorized stay never lapses while your EB 5 case is pending.

## Travel During EB 5 Processing: Rules and Risks

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International travel while your EB 5 case is pending requires careful planning. The rules depend on whether you have filed only an I 526E, or whether you have also filed an I 485 adjustment of status application. If you have filed only an I 526E (no pending I 485), your travel is governed by your nonimmigrant status. H 1B and L 1 holders can generally travel and reenter on their valid visas. However, each reentry requires presenting yourself to CBP, and officers may ask about your pending immigrant petition. Have copies of your I 526E receipt notice and any relevant correspondence available when you travel. If you have a pending I 485 adjustment of status application, departing the United States without Advance Parole (Form I 131 approved) will result in abandonment of your I 485 application under 8 CFR 245.2(a)(4)(ii). The exception is for H 1B and L 1 holders who can travel on their valid H or L status without abandoning their pending I 485, provided they are returning to resume the same H or L employment. This exception does not apply to other visa categories. Your attorney should advise you on the specific travel rules that apply to your situation and prepare you with the documents you should carry when traveling. Some attorneys recommend minimizing international travel while the I 485 is pending, particularly around the time an interview or decision is expected.

## What Happens If Your Nonimmigrant Status Expires Before I 526E Approval

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If your nonimmigrant status expires and your I 526E has not yet been approved, your options depend on what steps you have already taken. If you filed I 485 concurrently with I 526E and the I 485 is still pending, you may remain in the United States under the "period of authorized stay" afforded by the pending adjustment application. You can work using your EAD and travel using Advance Parole. Your nonimmigrant status expiration does not affect the pending I 485. If you did not file an I 485 (either because you were not eligible for concurrent filing or because you chose consular processing), the expiration of your nonimmigrant status means you must either extend or change your status, or depart the United States. Filing a timely extension or change of status application before your current status expires gives you continued authorized stay while the extension is pending, under INA § 212(a)(9)(B)(iv). Some investors switch from their current nonimmigrant category to another, such as changing from H 1B to B 1 status after the H 1B maximum period, to maintain lawful presence while the I 526E is pending. This strategy has specific requirements and limitations that your attorney must evaluate. The worst outcome is remaining in the United States after your status expires without a pending extension or I 485 application. This constitutes unlawful presence and can trigger the reentry bars described above.

## Employment Authorization During the EB 5 Process

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Your right to work in the United States during EB 5 processing depends on your current status and whether you have filed an I 485 adjustment application. If you are on H 1B status, you are authorized to work for your H 1B employer (and only that employer, unless a transfer or amendment is approved). If you are on L 1 status, you are authorized to work for your L 1 petitioning organization. Your I 526E filing does not, by itself, provide any work authorization. If you have filed an I 485, you can apply for an EAD (Form I 765, category (c)(9)). The EAD typically takes 3 to 6 months to process, though processing times vary. Once you receive the EAD, you can work for any employer without restriction. However, be cautious about using the EAD if you are currently on H 1B status. Using the EAD (rather than H 1B employment authorization) may be treated as abandonment of your H 1B status. If your I 485 is subsequently denied, you would not be able to revert to H 1B because it was abandoned. This is a strategic decision your attorney should discuss with you. Many H 1B holders choose to maintain H 1B status and keep the EAD as a backup, using it only if they lose H 1B employment or want to change employers. Your attorney should explain the specific consequences of EAD use given your current status and help you make an informed decision.



## Strategic Planning: Coordinating Status Maintenance with EB 5 Timeline

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Effective status maintenance during EB 5 processing requires proactive planning that starts before you file the I 526E. Your attorney should create a timeline that maps your nonimmigrant status expiration dates, extension deadlines, I 526E estimated processing time, visa bulletin projections for your category and country, and the window for concurrent I 485 filing if applicable. For H 1B holders approaching the six year maximum, the intersection of H 1B time limits and EB 5 processing creates particular urgency. The six year H 1B limit can be extended under the American Competitiveness in the Twenty First Century Act (AC21) if you have a pending or approved employment based immigrant petition or labor certification that was filed at least 365 days before the H 1B maximum. The I 526E qualifies as an immigrant petition for AC21 purposes, so a timely EB 5 filing can provide the basis for H 1B extensions beyond six years. For investors on categories without dual intent (F 1, B 1/B 2, certain E categories), the timing of the I 526E filing relative to status renewals requires additional analysis. Filing too early can complicate status renewals; filing too late can leave you without adequate processing time before your status options run out. Your attorney should model several scenarios and recommend the timing that best balances immigration risk with your EB 5 goals.

## Frequently Asked Questions

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### 1. Can I file an I 526E petition while on a tourist visa (B 1/B 2)?

You can file an I 526E from within the United States on B 1/B 2 status, but doing so declares immigrant intent, which may conflict with the nonimmigrant intent required for B status. If you need to extend your B 1/B 2 status or reenter on a B visa after travel, the pending I 526E could be an issue. Many attorneys recommend filing the I 526E from abroad or waiting until you have secured a dual intent status such as H 1B before filing. Discuss the specific risks with your attorney based on your situation.

### 2. Does filing I 485 adjustment of status give me work authorization immediately?

No. Filing the I 485 allows you to apply for an EAD (Form I 765), but the EAD must be approved before you can use it for work authorization. Processing times for EADs vary, typically between 3 and 6 months as of April 2026. Until the EAD is approved and in hand, your work authorization is governed by your nonimmigrant status. USCIS regulations at 8 CFR 274a.13 govern the EAD application process.

### 3. If I use my EAD instead of my H 1B work authorization, can I go back to H 1B status later?

This is a contested area of immigration law. Some practitioners argue that using an EAD while an H 1B is valid constitutes abandonment of H 1B status, meaning you could not revert to H 1B if the I 485 is denied. Others argue that the H 1B status is maintained as long as you continue working for the H 1B employer under the approved petition. Given the legal uncertainty, many attorneys advise H 1B holders to continue working under H 1B authorization and reserve the EAD as a backup. Discuss this with your attorney before making any changes.

### 4. What is Advance Parole and do I need it to travel during EB 5 processing?

Advance Parole (AP) is a travel document issued by USCIS on Form I 512L that allows you to reenter the United States after international travel without abandoning your pending I 485 application. If you have a pending I 485 and do not hold H 1B or L 1 status (which provide their own travel exceptions), you need approved AP before departing. If you leave without it, your I 485 is deemed abandoned under 8 CFR 245.2(a)(4)(ii). AP is applied for using Form I 131, which can be filed concurrently with the I 485.

## **5. How long can I stay in the United States with a pending I 485?**

A pending I 485 provides a period of authorized stay, meaning you may remain in the United States while USCIS adjudicates the application. There is no specific time limit on this authorized stay; it continues as long as the I 485 remains pending. However, if the I 485 is denied, your authorized stay based on the pending application ends, and you must have another valid status or depart. Some I 485 applications pend for years due to visa backlogs or processing delays.

## **6. Can my EB 5 attorney also handle my H 1B extensions and status issues?**

Many EB 5 attorneys also handle nonimmigrant visa matters, including H 1B extensions, L 1 extensions, and changes of status. Having one attorney manage both your nonimmigrant status and your EB 5 case is often advantageous because it ensures coordination between the two. If your EB 5 attorney does not handle nonimmigrant matters, they should coordinate with whoever does to ensure no deadlines are missed and no filings conflict.

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**Disclaimer:** This guide is provided for general informational purposes only and does not constitute legal advice. Every immigration case is unique. Consult a qualified immigration attorney for advice specific to your circumstances.

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