EB5 ATTORNEYS

How EB 5 Changes Affect Pending Cases

A comprehensive guide from EB5 Attorneys

The EB 5 program has undergone multiple legislative and regulatory changes since its creation in 1990, and each change raises the same question for investors with pending petitions: does this affect my case? The transition from I 526 to I 526E under the EB 5 Reform and Integrity Act of 2022, shifting minimum investment amounts, new TEA designation criteria, and evolving USCIS processing policies have all affected pending cases in different ways. This guide explains the principles that govern how changes apply to existing petitions and what you can do to protect your investment.

Contents

Legislative vs. Regulatory Changes: Why the Distinction Matters

Changes to the EB 5 program come from two primary sources: Congress (legislative changes) and USCIS/DHS (regulatory changes). The distinction matters because legislative changes and regulatory changes operate under different legal frameworks regarding their effect on pending cases. Legislative changes are enacted through statutes, such as the EB 5 Reform and Integrity Act of 2022, which amended INA § 203(b)(5). When Congress changes the law, the statute itself usually specifies whether and how the changes apply to pending cases, through transition provisions, effective dates, and grandfathering clauses. If the statute is silent on pending cases, courts apply principles of statutory construction to determine Congressional intent. Regulatory changes are promulgated by agencies through the Administrative Procedure Act (APA) rulemaking process. USCIS publishes proposed rules, accepts public comments, and issues final rules that appear in the Code of Federal Regulations (8 CFR). Regulatory changes typically specify an effective date and may include transition provisions for pending cases. USCIS also issues policy guidance through the Policy Manual, policy memoranda, and operational directives, which can change how existing regulations are interpreted without formal rulemaking. These guidance changes are often the most unpredictable because they can take effect immediately and may or may not include transition guidance for pending cases. Understanding which type of change you are dealing with is the first step in assessing its impact on your case.

Grandfathering Principles in EB 5 Law

Grandfathering refers to the principle that an investor who filed under one set of rules should not be penalized by subsequent changes. The legal foundation for grandfathering in immigration law comes from several sources. The Supreme Court has held in multiple cases that retroactive application of new laws raises due process concerns, particularly when the new law imposes new burdens on actions already completed. In the EB 5 context, the most significant grandfathering provision appears in the RIA itself. Section 104 of the RIA, codified at INA § 203(b)(5)(N), establishes that petitions filed under the pre RIA rules (the old I 526 form) before March 15, 2022 are generally adjudicated under the law in effect when they were filed. This means that investors who filed I 526 petitions before the RIA took effect are not subject to the new minimum investment amounts ($1,050,000 general / $800,000 TEA), the new TEA designation criteria, or the new regional center compliance requirements that apply to I 526E petitions. However, grandfathering is not absolute. Certain RIA provisions apply to all investors regardless of when they filed, particularly those related to program integrity and investor protection. For example, the requirements for regional centers to comply with fund administration rules and annual reporting apply to all active regional centers, which indirectly affects investors in those centers even if their petitions were filed pre RIA. Your attorney must analyze the specific grandfathering provisions that apply to your filing date and the changes in question.

The Transition from I 526 to I 526E Under the RIA

One of the most significant changes under the RIA was the replacement of Form I 526 (Immigrant Petition by Alien Investor) with Form I 526E (Immigrant Petition by Regional Center Investor). The I 526E applies specifically to regional center investments, while direct investments use a separate process. Investors who filed I 526 petitions before March 15, 2022 (the RIA effective date) did not need to refile on the I 526E form. Their petitions continue to be adjudicated under the pre RIA framework, including the investment amounts and TEA definitions in effect when they filed. USCIS issued specific guidance confirming that pending I 526 petitions would not be converted to I 526E petitions and would not be subject to the new filing fees or evidentiary requirements introduced by the RIA. For investors who were contemplating filing but had not yet submitted their petitions before March 15, 2022, the RIA applied in full. These investors must use the I 526E form, pay the updated filing fee ($11,160 as of April 2026, per the USCIS Fee Schedule), meet the current minimum investment thresholds, and satisfy the new TEA designation criteria. The transition period created a distinct class of investors: those with pre RIA I 526 petitions pending alongside newer I 526E filers. These two groups are subject to different rules, and USCIS processes them under different policy frameworks. If you filed before March 15, 2022, confirm with your attorney that your petition is being adjudicated under the grandfathered rules.

How Fee Changes Affect Pending Cases

USCIS adjusts its fee schedule periodically, and fee increases have been substantial in recent years. The general principle is that fee changes apply to petitions filed on or after the effective date of the new fee schedule. If you already filed and paid the fee that was in effect at the time of filing, you are not required to pay a supplemental fee when USCIS raises its rates. This principle applies to the I 526E filing fee, the I 485 adjustment of status fee, the I 829 petition to remove conditions fee, and all other USCIS fees. However, if your petition is denied and you need to refile, you will pay the fee in effect at the time of refiling, not the fee that applied to your original filing. Similarly, if you need to file a new petition (for example, because you are transferring to a new regional center project after your original center was terminated), the current fee applies. Fee changes can also affect the overall cost of the EB 5 process in indirect ways. The $1,000 per petition Integrity Fund fee applies to I 526E petitions filed after the RIA effective date. Administrative processing fees charged by regional centers and fund administrators may also increase over time, though these are not government fees and are not subject to the same regulatory framework. Your attorney should provide a complete cost breakdown at the start of your case, including government filing fees, attorney fees, and estimated administrative costs, and update you if any of these change during the course of your case.

TEA Designation Changes and Their Effect on Existing Investments

The definition of Targeted Employment Areas has changed multiple times throughout the EB 5 program's history. Before the RIA, states had significant latitude to designate TEAs by aggregating census tracts to meet the unemployment threshold. The RIA transferred TEA designation authority from states to DHS and imposed stricter geographic criteria. Under the current rules, a TEA is defined as either a rural area (outside a metropolitan statistical area and not within a city or town with a population of 20,000 or more, per INA § 203(b)(5)(D)(iv)) or a high unemployment area (with unemployment at least 150% of the national average, calculated using specific census tract methodology under INA § 203(b)(5)(D)(ii)). For investors who filed under the pre RIA TEA definitions, the grandfathering provisions generally protect them from being reclassified under the new criteria. If your project qualified as a TEA under the rules in effect when you filed, your reduced investment amount ($500,000 under the pre RIA rules, or $900,000 under the 2019 regulation) should be honored. However, if your petition is denied and you refile, the current TEA definitions and investment thresholds will apply to the new filing. The TEA changes are particularly significant because they affect which projects qualify for the reduced investment threshold and, under the RIA, which projects benefit from reserved visa numbers (rural and high unemployment TEA projects receive set aside visa allocations). Your attorney should verify your project's TEA qualification under the rules applicable to your filing date.

Policy Guidance Changes and How They Affect Adjudication

Beyond statutory and regulatory changes, USCIS frequently updates its Policy Manual and issues policy memoranda that affect how I 526E and I 829 petitions are adjudicated. These guidance changes can alter evidentiary standards, change how USCIS interprets existing regulations, and introduce new adjudication procedures. Unlike formal regulations, policy guidance does not go through the APA notice and comment process and can take effect with little advance warning. Recent examples include changes to source of funds evidentiary requirements, updated guidance on how USCIS evaluates economic methodology in regional center projects, and new procedures for I 829 adjudication including interview requirements. These policy changes apply to pending cases because USCIS adjudicators follow the most current guidance when reviewing petitions. This means an I 526E petition filed under one set of evidentiary expectations may be adjudicated under different expectations if USCIS updates its guidance while the petition is pending. This is one of the most frustrating aspects of EB 5 practice: an investor who prepared their petition to meet the standards in effect at the time of filing may receive an RFE asking for additional evidence under updated guidance. Your attorney should stay current with all USCIS policy updates and, if an RFE is issued based on new guidance, respond in a way that addresses the current standard while preserving arguments about the propriety of applying new guidance retroactively.

Historical Examples of Changes Affecting Pending Investors

The EB 5 program's history provides instructive examples of how changes have affected pending cases. In November 2019, USCIS raised the minimum investment amount from $500,000 (TEA) and $1,000,000 (non TEA) to $900,000 and $1,800,000 respectively through a final rule. Petitions filed before November 21, 2019 were adjudicated under the old amounts; petitions filed on or after that date required the higher amounts. In June 2021, a federal court in Behring Regional Center LLC v. Wolf vacated the 2019 rule, temporarily reverting the minimum amounts to $500,000 and $1,000,000. USCIS accepted petitions at the lower amounts during the period before the RIA superseded the issue. Then in March 2022, the RIA set new minimums at $800,000 (TEA) and $1,050,000 (non TEA), with an inflation adjustment mechanism. Each of these changes created transition issues for investors who were in the middle of their investment or petition preparation. The EB 5 program also lapsed entirely multiple times before the RIA made it permanent. During lapse periods, USCIS could not accept new regional center petitions, though direct petitions continued. Investors who had completed their investments but had not yet filed were stuck until the program was reauthorized. The RIA's permanent authorization of the regional center program eliminated this particular risk, but the history demonstrates why understanding program change dynamics is essential for any EB 5 investor.

Protecting Your Case from Future Policy Shifts

While you cannot prevent legislative or regulatory changes, you can take steps to minimize their impact on your case. First, file promptly. Once your investment is complete and your documentation is ready, file the I 526E without unnecessary delay. Your priority date and the rules in effect at the time of filing provide the foundation for grandfathering protections. Every day of delay is a day during which new rules could take effect. Second, build the strongest possible petition at the outset. A petition that meets or exceeds current evidentiary standards is more likely to be approved without an RFE, reducing the window during which policy changes could affect your adjudication. Third, maintain flexibility in your immigration strategy. If you have the option to pursue concurrent filing (I 485) when your priority date becomes current, do so promptly. Pending adjustment applications provide their own set of protections and benefits. Fourth, stay informed. Subscribe to USCIS updates, follow AILA practice alerts, and ensure your attorney monitors all relevant policy developments. Early awareness of proposed changes gives you time to adjust your strategy. Fifth, preserve all documentation. Keep copies of the regulations, policy guidance, and fee schedules in effect when you filed. If USCIS attempts to apply new standards retroactively, your attorney can cite the rules that applied at your filing date in your response. Your attorney should maintain a regulatory file for your case that documents the legal framework under which your petition was prepared.

Frequently Asked Questions

1. If the minimum investment amount increases after I file my I 526E, do I need to invest more?

> No. The investment amount is determined by the rules in effect on the date your I 526E petition is filed with USCIS. If you filed when the minimum TEA investment was $800,000 and the amount later increases, your petition is evaluated under the $800,000 threshold. This grandfathering principle is established by the transition provisions of the RIA and general principles of administrative law. However, if your petition is denied and you must refile, the investment amount in effect at the time of refiling applies.

2. My I 526 petition was filed before the RIA in 2022. Am I subject to the new RIA requirements?

> Pre RIA I 526 petitions are generally grandfathered under Section 104 of the RIA, codified at INA § 203(b)(5)(N). Your petition should be adjudicated under the law in effect when it was filed, including the pre RIA investment amounts, TEA definitions, and adjudication standards. However, some RIA provisions (particularly those related to program integrity and regional center compliance) may indirectly affect your case if your regional center is subject to new compliance requirements.

3. Can USCIS apply new evidentiary standards to my already pending petition?

> USCIS adjudicators generally follow the most current Policy Manual guidance when reviewing petitions, which means updated evidentiary standards can be applied to pending cases. This is a point of significant frustration for petitioners and attorneys. If you receive an RFE based on guidance that did not exist when you filed, your attorney should respond with the requested evidence while also preserving arguments about the retroactive application of new standards. In some cases, this issue has been challenged in federal court.

4. What happens to my case if Congress changes the EB 5 program again?

> Future legislative changes would include their own transition provisions specifying how they apply to pending cases. Based on the historical pattern, Congress has generally provided some form of grandfathering for investors with pending petitions, though the specific protections vary by legislation. The RIA made the regional center program permanent (removing the sunset/reauthorization risk), but Congress retains the power to amend the statute at any time. Your attorney cannot predict future legislation but can structure your case to take advantage of existing grandfathering principles.

5. Does the filing fee I paid protect me from future fee increases?

> Yes, for the petition you already filed. USCIS does not require supplemental fees when the fee schedule changes after you have filed and paid. However, subsequent filings (I 485, I 829, or any refiled petitions) will require the fee in effect at the time of those filings. The I 526E filing fee as of April 2026 is $11,160 per the USCIS Fee Schedule at 8 CFR 106.2.

6. How do I know which rules apply to my specific petition?

> The rules that apply to your petition are generally those in effect on your filing date, subject to any specific transition provisions in subsequent legislation or regulations. Your attorney should maintain a record of the applicable statutes, regulations, and USCIS policy guidance as of your filing date. If you are unsure, ask your attorney to provide a written summary of the legal framework under which your petition was prepared and how recent changes do or do not apply.

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.

Source: https://eb5attorneys.com/guides/eb5-program-changes-pending-petitions