D&A CLIENT ADVISORY:

Current USCIS Policy on EB-5-Based Adjustment of Status for Students in F-1 and M-1 Status

A client advisory for F-1 and M-1 student-visa holders, addressing both the student investor and the investor's student child.

This advisory addresses EB-5 adjustment of status for individuals in F-1 or M-1 student status. It is written both for the student who is the EB-5 investor and for the EB-5 investor whose child holds student status. The EB-5 Reform and Integrity Act of 2022 permits many EB-5 investors to apply for permanent residence without departing the United States. Student status complicates that route, because it presents a question of immigrant intent that does not arise for holders of dual-intent classifications. A USCIS policy memorandum issued in May 2026 has increased the significance of that question. This advisory explains the applicable law, the options that remain available, and the areas in which caution is required.

The Two Circumstances Covered by this Advisory

A student may occupy either of two positions in an EB-5 matter, and the legal analysis differs between them. The relevant discussion below should be read according to the applicable situation.

The student as investor. The individual holds F-1 or M-1 status, is making the EB-5 investment, and is the petitioner on Form I-526E. The governing question is one of intent: whether the pursuit of permanent residence is consistent with the temporary, study-based purpose for which the individual was admitted.

The student as the investor's child. A parent is the EB-5 investor, and a son or daughter in F-1 or M-1 status is a derivative beneficiary on the parent's petition. The question of intent is of limited significance in this situation. The controlling issue is the child's age, and whether the Child Status Protection Act preserves the child's eligibility until permanent residence is obtained.

The 2022 Statutory Change

The EB-5 process consists of two stages. The investor petition, Form I-526 or I-526E, establishes the qualifying investment. The application for adjustment of status, Form I-485, confers permanent residence without the need for consular processing abroad.

Prior to 2022, the investor petition was required to be approved before the I-485 could be filed. The EB-5 Reform and Integrity Act, enacted March 15, 2022, removed that requirement. Where a green card visa is immediately available, the I-485 may be filed **concurrently** with the investor petition, or at any time thereafter. This filing route is established by statute, at Section 245(n) of the Immigration and Nationality Act, 8 U.S.C. § 1255(n).

The function and limits of Section 245(n)
Section 245(n) determines **when** an EB-5 adjustment application is properly filed. It determines nothing further. It does not guarantee approval, and it does not address the question of immigrant intent presented by student status. For a student, Section 245(n) is the point at which the analysis begins; it is not its conclusion.

USCIS Policy Memorandum PM-602-0199 (May 2026)

USCIS issued Policy Memorandum PM-602-0199 on May 21, 2026. Its limits should be noted first. A policy memorandum is not legislation. It cannot repeal a statute, abolish adjustment of status, or prohibit the filing of an I-485 within the United States. Section 245 of the Immigration and Nationality Act continues to authorize in-country applications for permanent residence, and the EB-5 concurrent filing rule remains in effect.

The operative effect of the memorandum is nonetheless substantial. It directs USCIS officers to treat adjustment of status as an extraordinary, discretionary benefit rather than a routine step, and it reflects an Administration position that adjustment of status should not be treated as a routine substitute for the ordinary consular visa process. Officers are directed to weigh conduct inconsistent with the temporary purpose of a person's admission as an adverse factor. Where the record contains adverse factors, the memorandum directs officers to require strong countervailing positive factors, described in the memorandum as "unusual or even outstanding equities."

The significance of the memorandum for students
An applicant in H-1B or L-1 status who pursues permanent residence engages in no conduct inconsistent with the status held, and the memorandum's central objection therefore does not apply. The position of an F-1 or M-1 student is different. Those classifications are **not** dual-intent categories. They require a present intent to depart upon completion of the authorized course of study. USCIS guidance recognizes that a student may hold a prospective immigration opportunity, and may even be the beneficiary of an immigrant petition, while continuing to qualify for student classification. The filing of an I-485, however, constitutes a substantially stronger assertion of present immigrant intent, and under a memorandum directing heightened discretionary scrutiny, it warrants careful preparation. The memorandum does not preclude adjustment of status for students. It requires that a student's application be prepared as a documented legal submission rather than a routine filing.

The Student as Investor

Section 245(n) establishes only that the adjustment application is properly filed. It does not determine whether the application will be approved. The determinative question is one the provision does not address: whether the applicant held the nonimmigrant intent required of a

student at the time of admission, or had instead formed an intent to immigrate. That question is adjudicated under the discretionary and admissibility components of the Section 245 review, which Section 245(n) leaves undisturbed. The timing of the filing is not dispositive; the applicant's intent at entry is.

The degree of risk is not uniform across the filing steps, and the distinction is material. The filing of Form I-526E establishes an immigrant-investor record. It does not, by itself, defeat F-1 or M-1 intent, and USCIS guidance accepts that a student may be the beneficiary of an immigrant petition while maintaining student status. The filing of Form I-485 presents the more significant concern, as it constitutes a direct application for permanent residence from within the United States. The two filings are related, but they are not equivalent expressions of intent.

No period of delay following entry confers protection. Protection derives instead from a genuine and documented sequence of events: that the applicant was admitted for the purpose of study, pursued that study, and reached the decision to invest through EB-5 and to seek permanent residence as a result of circumstances arising after admission. Where that sequence is accurate and supported by contemporaneous records, counsel is in a position to argue that the adjustment application reflects a later, bona fide change in circumstances rather than a preconceived intent to immigrate. Where the facts indicate that the EB-5 plan was already underway at or before entry, that difficulty is substantive, and no sequence of filing will cure it.

The timing of both admission and filing will be examined. A brief interval between admission on a student visa and the filing of the I-526E and I-485 invites inquiry into the applicant's intent at the time of entry. A substantial record of bona fide study preceding any EB-5 step supports the contrary conclusion. The firm will review the applicant's timeline before advising whether adjustment of status or consular processing is the appropriate course.

None of the foregoing renders F-1 or M-1 students ineligible for EB-5 adjustment of status. Adjustment is available where the statutory requirements are satisfied, including under Section 245(n) where a visa is immediately available. The difficulty is evidentiary and discretionary in nature: the applicant must be able to demonstrate a credible and well-documented progression from temporary study to a subsequent decision to immigrate.

The "90-Day" Misconception

A "90-day rule" is sometimes understood to mean that an individual may enter on a nonimmigrant visa, allow 90 days to elapse, and then file for permanent residence without risk. For a student considering EB-5, that understanding is incorrect and should not be relied upon.

No statute or regulation establishes a 90-day safe harbor. The 90-day guideline appears in the U.S. Department of State's Foreign Affairs Manual, and it instructs consular officers as to when conduct inconsistent with nonimmigrant status may support a presumption of misrepresentation of intent at the time of entry. The filing of an application for an immigration benefit within 90 days of admission may give rise to that presumption. The expiration of 90 days may avoid that particular consular presumption, but it has no further effect. It does not preclude an officer from

examining the facts and concluding that the applicant intended to immigrate at the time of entry. USCIS, moreover, is not bound by the 90-day guideline in adjudicating adjustment applications. It may consider the totality of the circumstances, including the applicant's intent at visa issuance, at admission, and at the time of each subsequent immigration step.

> **The 90-day mark does not constitute a safe harbor**
> Admission on an F-1 or M-1 visa, followed by the expiration of approximately 90 days and the filing of an adjustment application, has never constituted a sound strategy. Following the May 2026 memorandum, it presents a significant risk. The determinative consideration is not the number of days elapsed. It is whether the applicant was genuinely admitted for study and reached the EB-5 decision thereafter. A documented and consistent timeline affords protection; the passage of a fixed period does not.

M-1 Status

M-1 status, applicable to vocational and other non-academic students, is the more restrictive of the two student classifications and warrants separate treatment. M-1 students are subject to more restrictive limits on employment and on program length, and the law restricts an M-1 student's eligibility to change to certain other statuses, including a restriction intended to prevent the use of vocational study as a means of obtaining H-1B status. Adjustment of status is a distinct process from a change of nonimmigrant status. The restrictive design of the M-1 category nonetheless indicates that an officer may scrutinize with particular care whether an M-1 student's conduct remained consistent with the limited purpose of that classification. An applicant in M-1 status should regard the timing and intent analysis set out above as applying with corresponding force, and should review it with the firm before undertaking any EB-5 step.

The Form I-526E Processing Election

Form I-526E requires the petitioner to indicate the intended means of pursuing permanent residence. Part 6 of the form requires an election between two routes: immigrant visa processing at a consulate abroad, and adjustment of status within the United States. The election has the appearance of a routine entry. For a student investor, it warrants deliberate consideration.

An election of "adjustment of status" records, on a federal petition, a written statement of intent to complete the permanent residence process within the United States. For an applicant in a dual-intent classification, that statement is of no consequence. For an F-1 or M-1 student, it carries evidentiary weight, as it constitutes an express statement of an intent to remain and immigrate, which is the precise question an officer examines in the case of a non-dual-intent visa holder. The election is generally not irrevocable, and the selection of one route does not preclude the other. The election nonetheless affects the routing of the case and, for a student, bears upon the intent record.

This is not a recommendation that a student invariably elect consular processing. A student who is present in the United States, eligible to file, and in a sound status posture may have legitimate reason to elect adjustment. The point is narrower: the Part 6 election should be made deliberately, in consultation with the firm, after consideration of the applicant's status, timeline, and travel plans. It should not be treated as a formality.

The Student as the Investor's Child

Where the parent is the EB-5 investor and the student is a derivative child, the concern regarding intent is significantly reduced. The child is not the party electing to immigrate through investment; the child is a beneficiary on the parent's petition. An officer is unlikely to treat a child's F-1 or M-1 study as conduct inconsistent with student status by reason only of a parent's EB-5 investment. The child should nonetheless maintain status properly. The central objection of the memorandum does not apply to the child as it applies to a student investor.

The controlling consideration for a child is age. An EB-5 derivative child must be unmarried and under 21 years of age. A child who reaches 21 may "age out" and lose derivative eligibility. The Child Status Protection Act may provide relief, by permitting the child's age to be calculated in a manner that subtracts the period during which the EB-5 petition was pending, which may preserve the eligibility of an older minor. CSPA protection is not automatic. It depends upon visa availability, upon the calculation itself, and upon the child's satisfaction of the statutory "sought to acquire" requirement, which must generally be met within one year of a visa becoming available.

The filing of the I-485 may constitute one means by which a child satisfies the "sought to acquire" requirement, which is among the reasons adjustment of status may be material for a family with a child approaching 21. The filing of the I-485 does not, however, resolve the CSPA question of itself. The child's CSPA age must be calculated using the correct visa-availability date, the period the petition was pending, and current USCIS CSPA policy, which applies the Final Action Dates chart for purposes of CSPA age calculation where that policy applies. A child in F-1 or M-1 status who is approaching 21 should have that calculation performed in advance of any filing, rather than after a difficulty has arisen.

> **Families with a child approaching 21**
> The CSPA calculation is fact-specific and time-sensitive. The relevant inputs include the child's date of birth, the period during which the I-526E was or will be pending, the visa-availability date for the applicable EB-5 category, and current USCIS CSPA policy, which applies the Final Action Dates chart for CSPA age calculation. A family with a child in the later teenage years should request that the firm perform the calculation before determining whether to rely upon adjustment of status.

Considerations While an Application Is Pending

Upon the filing of an I-485, the applicant may generally apply for employment authorization and for advance parole, the latter of which authorizes international travel. For a student, this carries both an advantage and several attendant risks.

Travel. Departure from the United States without advance parole, or without another applicable exception, may be treated as abandonment of the I-485. Travel is also the point at which intent may be examined. An application to renew an F-1 or M-1 visa abroad while a record of immigrant intent exists may give rise to considerable difficulty. An applicant should not depart the United States while an I-485 is pending without first consulting the firm.

Authorized stay and lawful status. A pending I-485 permits the applicant to remain in a period of authorized stay. Authorized stay is not equivalent to lawful F-1 or M-1 status. Should the I-485 be denied and no other status underlie it, the applicant may be out of status immediately. The proper maintenance of F-1 or M-1 status during the pendency of the I-485, through continued enrollment and compliance with the applicable employment rules, is therefore important: it provides a fallback, and a record of maintained status constitutes a positive factor.

Employment. A pending I-485 does not, of itself, authorize employment. An applicant may be employed only with proper authorization, such as authorized F-1 employment or an adjustment-based employment authorization document once issued. Unauthorized employment may give rise to both eligibility and discretionary concerns. Section 245(k), extended to EB-5 investors by the 2022 Act, may preserve adjustment eligibility notwithstanding certain limited violations of status, periods of unauthorized employment, or failures to maintain status, generally not exceeding an aggregate of 180 days since the most recent lawful admission. Section 245(k) is not a general remedy. It does not waive separate grounds of inadmissibility. Whether it applies to a given set of facts depends upon the specific immigration history, which the firm will review.

Matters That Remain Subject to USCIS Review

Section 245(n) determines when a student may file; it does not determine whether the application will be granted. USCIS reviews each adjustment application in full. Four matters remain squarely within that review:

- **Visa availability.** Whether a green card visa is in fact available as of the filing date, as determined by the monthly Visa Bulletin, the applicable EB-5 category, and the chart designated by USCIS for that month. The firm confirms this prior to any filing.
- **Admissibility.** Whether any matter in the applicant's history, including certain immigration, criminal, or health-related grounds, would bar adjustment.
- **Eligibility.** Whether each legal requirement for adjustment of status is satisfied.
- **Discretion.** Adjustment of status is a discretionary benefit, and USCIS weighs the positive and negative factors in the record as a whole. The May 2026 memorandum directs officers to apply that review more rigorously, which is the reason a thorough and well-documented application is now of greater importance than previously, and the reason the intent and timeline record is central in a student's case.

When Consular Processing May Be Preferable

For certain students, adjustment of status remains the appropriate route, particularly where there exists a substantial and consistent record of bona fide study and the EB-5 decision plainly arose thereafter. For other students, consular processing abroad may be the preferable course. That may be so where the interval between admission and the EB-5 filings is brief, where questions exist as to the representations made at the time the student visa was issued or at the port of entry, or where status was not properly maintained. Consular processing carries its own disadvantages, including time spent abroad, separate procedural requirements, and the loss of the interim benefits associated with a pending I-485. The appropriate course depends upon the specific facts and should be determined deliberately, in consultation with the firm.

Recommended Steps for Students

The preceding sections set out the applicable law. This section reduces it to specific steps. The applicable group should be read together with the steps that apply in all cases.

The student as investor

The objective is to establish that the applicant was admitted for study and reached the decision to immigrate thereafter. The following steps establish and protect that record.

- Maintain a full course of study and keep F-1 or M-1 status in good standing while any EB-5 step is in progress. A record of maintained status is itself a positive factor.
- Preserve the records that establish when and why the EB-5 decision was made, including dated correspondence with advisors or financial institutions and the financial or family developments that gave rise to it. This evidence supports a genuine change in circumstances.
- Consult the firm before filing Form I-526E rather than afterward. The timing of that filing in relation to admission forms part of the analysis.
- Provide the firm with a complete travel and visa history, including any prior visa refusals and any questions posed at the consulate or the port of entry.
- Treat the Part 6 election on Form I-526E, between consular processing and adjustment of status, as a deliberate decision to be made with the firm rather than a routine entry.
- Do not assume that the passage of a fixed period following admission, such as 90 days, renders a filing safe. It does not.
- Do not engage in unauthorized employment, and do not file Form I-526E or Form I-485 without first having the timeline and intent history reviewed by the firm.

The student as the investor’s child

For a child, intent is of limited significance. Age is the consideration that determines continued eligibility. The following steps address it.

- Request that the firm perform a CSPA age calculation at the earliest opportunity, ideally before Form I-526E is filed, in order to establish whether the child is protected.
- Provide the firm with the child's exact date of birth and current age in months. Small differences may affect the CSPA outcome.
- Maintain the child's F-1 or M-1 status in good standing, with full-time enrollment and a current SEVIS record.
- Account for the one-year window. Upon a visa becoming available, the child must generally act to seek permanent residence within one year. The firm will advise as to what satisfies that requirement.
- Do not assume that the filing of the I-485 fixes the child's age, or that CSPA protection follows automatically from the filing of the parent's petition. Inform the firm if the child may marry or is approaching 21 years of age.

Steps applicable in all cases

Certain points apply irrespective of which family member is the student. Travel is the area in which avoidable difficulties most frequently arise.

- Do not depart the United States while an I-485 is pending without advance parole or another applicable exception. Departure without it may be treated as abandonment of the application.
- Exercise caution before renewing an F-1 or M-1 visa abroad while a green card application is on record. Consult the firm before any international travel.
- Maintain status in good standing throughout. Authorized stay arising from a pending I-485 is not equivalent to lawful F-1 or M-1 status, and a record of maintained status constitutes a positive factor.
- Raise questions with the firm at an early stage, in advance of any filing or difficulty. Whether adjustment of status or consular processing is the appropriate route is an individual determination to be made deliberately.

How the Firm Will Handle the Matter

- **Review of the timeline.** The firm will review admission dates, visa issuance, study history, and the point at which the EB-5 decision was made, so that the question of intent is addressed directly and at the outset.
- **CSPA calculation.** For any child approaching 21, the firm will calculate CSPA age before advising whether to rely upon adjustment of status.
- **Confirmation of visa availability.** The firm will confirm availability for the applicable EB-5 category and priority date, including the governing Visa Bulletin chart, before any filing.

- **Advice as to the route.** The firm will advise whether adjustment of status or consular processing is appropriate, having regard to status, timeline, travel requirements, and family circumstances.
- **Preparation of the discretionary record.** The firm will document, from the outset, bona fide study, maintenance of F-1 or M-1 status, authorized employment, and the change in circumstances underlying the EB-5 decision.
- **Response to USCIS.** The firm will respond to USCIS questions and requests for evidence, including those directed to intent and status history, and will monitor PM-602-0199 as implementing guidance is issued.

Consultation

No two student matters are identical. Whether adjustment of status is appropriate for a given applicant, or for the applicant's child, depends upon the particular facts of the study history, the timeline, and the family circumstances. To discuss a specific matter, please contact the firm, and we will review it with you.

This client advisory is provided for general informational purposes only and is not legal advice. It does not create an attorney-client relationship. Immigration law and USCIS guidance change over time, and the appropriate course of action depends on the specific facts of the matter. Please consult the firm before taking any action based on this advisory.