

When is a Waiver of Immunity Required of an EB-5 Applicant?

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Applicants to the EB-5 Immigrant Investor program come from all walks of life, ranging from entrepreneurs to surgeons and diplomats. After successfully completing the initial source of funds phase of the EB-5 process and armed with an I-526 Petition approval notice in hand, the next step for any approved EB-5 investor is to process their immigrant visas. Persons outside of the United States will typically process at the U.S. embassy or consulate in their country of residence; those individuals currently present in the U.S. pursuant to a valid nonimmigrant status will typically elect to adjust status to that of a conditional permanent resident from within the United States. This blog post will focus on the requirement to waive certain rights, privileges, exemptions and immunities for those persons adjusting from A, G, or E nonimmigrant status to that of a conditional permanent resident.

The [A visa](#) category is generally reserved for foreign officials and employees of embassies or consulates, along with their immediate family members, who are in the U.S. for official business; whereas the [G visa](#) category is generally reserved for representatives to international organizations—such as the United Nations—and their employees and immediate family members. Because the recognition and control of these individuals concerns international relations, the U.S. Department of State (DOS) is the primary agency charged with oversight and administration. Pursuant to Article 31 of the [Vienna Convention on Diplomatic Relations](#), current diplomatic agents enjoy near-absolute immunity from U.S. civil jurisdiction, meaning that they cannot be sued in their individual capacity unless the subject matter falls within a narrow set of exceptions. The bigger implication of this international accord is that this class of nonimmigrants is not fully subject to the laws of the United States.

The flip side of this immunity coin presents itself when the A or G visa holder decides that they wish to become a lawful permanent resident, given that the latter concept is wholly inconsistent with the doctrine of diplomatic immunity: if you want to permanently live in the U.S. and enjoy the rights and protections conferred by U.S. law, then you must also be subject to its obligations and judicial power. Indeed, USCIS instructs in its *Adjudicator's Field Manual* that “an alien cannot hold both lawful permanent resident status and diplomatic immunity.”^[1]

In a similar vein, individuals in the United States as a treaty trader (E-1) or investor (E-2) also have additional considerations in adjusting to lawful permanent residence. The E visa category is comprised of treaty traders or investors entitled to be in the country under a bilateral treaty of

commerce and navigation between the U.S. and the individual's home country. As a result, the E visa category confers certain legal rights that flow from the underlying treaty. As discussed above, these legal carve outs can result in an E visa holder not being fully subject to the laws of the United States, which is inconsistent with the concept of lawful permanent residency.

So what is the A, G, or E visa holder to do when it comes time to get their green card?

In addition to the ordinary adjustment of status procedures using Form I-485, A, G, and E nonimmigrants—as well as “those who have an occupation that would allow the applicant to have [such] status”—must file a [Form I-508, Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities](#). The purpose of this form is in its descriptive title: it is used to waive certain rights, privileges, exemptions, and immunities associated with the applicant's occupational status so that they may acquire or retain lawful permanent resident status in the United States. There is no additional filing fee in connection with this form. Following the standard fields aimed at collecting important qualifying biographic and employment information, the applicant must attest to and sign a waiver statement, in which they renounce any special protections they previously enjoyed pursuant to their A, G, or E status. This form must accompany the individual's application to adjust status (note that A and G visa holders must also submit [Form I-566](#)).

While it may appear to be just one more form amongst many, waiving one's rights under these circumstances is more than a mere formality. Such a waiver can touch on many aspects of life, including tax liability and benefits under the particular trade agreement between the applicant's home country and the U.S. And unfortunately, if you subsequently change your mind, it will involve more than just another form waiving the waiver.

[1] Adjudicator's Field Manual (AFM) §23.2(k).

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