

Type of Change	Where Change May Occur	Material Change Example	Not Likely to Be Material Change Example
Definition of Capital	Transactional Documents Bank Statements Gift Documents	After I-526 filing, the petitioner removes his or her funds sourced from income accumulated through tax fraud from the NCE and makes a new investment, the source of which is a gift.	<p>Petitioner establishes that an inconsistent source of funds submitted with his or her petition was due to a clerical error and provides sufficient evidence to overcome the inconsistency.</p> <p>Petitioner initially says his or her source of funds is income from work. Overseas verification shows the employer is engaged in nefarious activities. In response to questions, the petitioner changes his or her story to say that the original source of funds was a gift. This is a credibility issue as opposed to an actual change in facts because the funds are the same.</p>
Escrow Arrangement	Escrow Agreement Offering Documents	<p>After I-526 filing, the petitioner waives his or her right to unilaterally withdraw funds contributed to escrow prior to I-526 adjudication.</p> <p>After I-526 filing, the petitioner amends the escrow agreement, removing a provision allowing the petitioner the unilateral right to withdraw his or her funds from escrow prior to I-526 adjudication.</p>	After I-526 filing, the petitioner submits an amended escrow agreement removing a provision allowing the petitioner the unilateral right to withdraw his or her funds from escrow prior to I-526 adjudication, but the amendment was executed (and the provision was removed) before the date of I-526 filing. Officers should review the credibility of this scenario, but it is not likely a material change because the amended escrow predates the filing date.
Job Creation	Organizational Documents Business Plan	After I-526 filing, the petitioner invests in a different NCE and submits a new business plan and economic analysis relying on the new NCE to try to meet job creation requirements.	Petitioner submits an economic analysis claiming job creation from construction expenditures only. Later, the petitioner amends the economic analysis to also

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	Economic Analysis	Petitioner's I-526 submission identifies a JCE that will operate a Chipotle and includes a business plan to demonstrate that the required jobs will be created through operation of a Chipotle; after filing, the JCE changes its business to a laundromat, which is not supported by the original business plan.	include job creation from post-construction business operations. Both the new and original economic analyses are supported by the original business plan at the time of filing.
Location of EB-5 Financed Activity	Organizational Documents Business Plan Transactional Documents	<p>Petitioner is actively in the process of investing the minimum amount of capital required for a TEA and submits evidence showing the location of the NCE or JCE, as appropriate, has moved from a non-TEA to a TEA after filing.</p> <p>Petitioner's I-526 is associated with a regional center and claims an investment in a TEA. Petitioner's submission states that the JCE is yet to be identified; after I-526 filing, the JCE is identified.</p>	A town decides to change the street name where the business is located, which changes the business address; however, the business remains at the same physical location.
New Commercial Enterprise	Investment Documents Organizational Documents Business Plan Transactional Documents	Petitioner changes his or her investment from the NCE identified in the initial filing to a different NCE.	The NCE changes its name, domicile, or certain other internal characteristics. Changes to the characteristics generally do not change the underlying facts establishing the petitioner's investment into the NCE.
Regional Center		After I-526 filing, the petitioner's associated regional center is terminated before the petitioner obtains CPR status.	After I-526 filing, ownership of the regional center changes and the regional center's application

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			After I-526 filing, the petitioner changes the regional center with which his or her I-526 is associated before obtaining CPR status.	to amend its designation is approved.
Source Funds	of		After I-526 filing, the petitioner removes his or her funds sourced from income accumulated through tax fraud from the NCE and makes a new investment, the source of which is a gift.	Petitioner submits an English translation of a foreign language document showing his or her investment capital came from investment in a particular company. After filing, the petitioner resubmits the foreign language document with a new translation document showing a different company name. Petitioner establishes that the inconsistency with respect to source of funds was due to a clerical error and provides sufficient evidence to overcome the inconsistency

- For additional material change discussion, please see [CHAP](#).

b. Bridge financing

- i. What is allowed, what is not allowed, what is a red flag, and how do we know if it is allowed in the documents provided?
 - As explained in *Matter of Ho*, the business plan should contain explanation of how EB-5 capital will be used including indication if bridge loans will be used. Generally from a job creation perspective, jobs that already existed prior to the petitioner’s investment cannot be considered to satisfy the job creation requirement unless the jobs are in a troubled business, or the petitioner can show that the jobs that were created prior to the petitioner’s investment were created through bridge financing.
 - The [Policy Manual](#) provides:

Bridge Financing

A developer or principal of a new commercial enterprise, either directly or through a separate job-creating entity, may use interim, temporary, or bridge financing, in the form of either debt or equity, prior to receipt of immigrant investor capital. If the project starts based on the interim or bridge financing prior to receiving immigrant investor capital and subsequently replaces that financing with

immigrant investor capital, the new commercial enterprise may still receive credit for the job creation under the regulations.

Generally, the replacement of temporary or bridge financing with immigrant investor capital should have been contemplated prior to acquiring the original temporary financing. However, even if the immigrant investor financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing that would be subsequently replaced by more permanent long-term financing, the infusion of immigrant investor financing could still result in the creation of, and credit for, new jobs.

For example, if traditional financing originally contemplated to replace the temporary financing is no longer available to the commercial enterprise, a developer is not precluded from using immigrant investor capital as an alternative source. Immigrant investor capital may replace temporary financing even if this arrangement was not contemplated prior to obtaining the bridge or temporary financing.

The full amount of the immigrant's investment must be made available to the business or businesses most closely responsible for creating the jobs upon which eligibility is based. In the regional center context if the new commercial enterprise is not the job-creating entity, then the full amount of the capital must be invested first in the new commercial enterprise and then made available to the job-creating entity or entities

c. Bonds

i. Are bonds a frequent form of lending between NCE/JCE?

- Most lending arrangements between NCEs and JCE are **unsecured** debt, that is, they are not collateralized by specific assets or portions of assets. These loans are general claims on the JCE that are subordinate to Senior Debt such as a collateralized bank loan and liens on specific property and equipment. These loans are frequently described as "mezzanine finance" because their priority in claims on the JCE lies between that of the senior lenders and the equity investors.
- Bonds are generally a **secured** form of debt and the specific characteristics of a bond define how and over what time-frame the debt is to be repaid; how the proceeds of the bond are to be used; how the bond ranks in relation to other debt; and the legal language known as 'covenants' that requires debt service reserve funds, restrictions on issuing additional debt unless certain conditions are met, etc.

ii. What types of bonds are permissible for loans between NCE/JCE?

- Permissible types of bond investments are those that support a business activity as opposed to a purely financial transaction. Bonds supporting a business activity are termed *project bonds* that generally fund large scale construction projects (schools, roads, public works, etc.) while *refunding bonds* simply refinance existing debt. The key difference is that *project bonds* may support job creation while *refunding bonds* do not.

iii. How do bonds satisfy the requirement that the NCE make capital available to the business most closely associated with job creation?

- NCEs will purchase project bonds issued by the JCE, most likely a State or municipality thereby making investor capital available to the JCE.

iv. Does bond insurance constitute a guaranteed return?

- Many bonds are insured by private insurance companies such as MBIC and AMBAC. Bond insurance, while providing for full repayment of principal and interest, is not a “guaranteed return” of investor capital by the NCE and does not disqualify an otherwise qualifying bond as an EB-5 investment.

d. Path and source of funds

i. Clear definitions of both terms are needed.

- Source is where funds originate (income, employment, house sale, funds to invest in business, etc. and can have multiple layers such as worked for restaurant, used wages to buy house, got loan on house, used loan funds for eb-5 investment). USCIS Policy Manual Volume 6 Part G Chapter 2, A, 4 provides greater detail on this at <https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2> Regulations that can come into play include 8 CFR 204.6(e) and 8 CFR 204.6(j)(3) and 8 CFR 204.6(g).
- Path is how funds moved from source(s) to the NCE. IVT is inherently a broken path that introduces at least one additional source that needs to be shown to derive from lawful means. The immigrant investor is required to invest his or her own capital. The petitioner must document the path of the funds to establish that the investment was made, or is actively in the process of being made, with the immigrant investor’s own funds *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 195 (Assoc. Comm. 1998).
- The source is where the funds are shown to derive from. The path is how the funds move from source(s) to the NCE.
 - a. Examples of source(s): accumulated income, sale of real estate, income used to purchase real estate that is later sold or mortgaged for EB-5 funds, dividend distributions, etc.
 - b. Examples of path(s): funds are moved through twelve friends/family members, funds are given to Exchanger in mainland China and company of Exchanger’s sister in Hong Kong then sends equivalent amount of funds to Petitioner in Hong Kong

ii. Best practice for evaluating documents related to source of funds.

- A best practice is to view the documents individually, against untranslated copy, against open sources (e.g. Google, Panama Papers, BIS, etc.), against government systems (e.g. CCD, LexisNexus, CLEAR,

etc.). Then, view the documents collectively against other evidence in record, against knowledge of that area/industry, against PIERS, etc. Ask yourself regarding each document whether it is (and, if so, to what extent/depth): Credible? Relevant? Probative? We'll discuss this in more depth during the Evaluating the Evidence module.

Burden of proof is on petitioner. In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Mere assertions of counsel without documentary support do not constitute evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

iii. What is sufficient to meet preponderance of the evidence for path and source of funds analysis?

- 8 CFR § 204.6(g)(1) provides that all capital invested in the NCE (both EB5 and non-EB5 must derive from lawful means.
- 8 CFR § 204.6(j)(3) provides some evidence that is required, as applicable and is pasted below:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

- On a case by case basis, the adjudicator weighs evidence in its totality via a preponderance standard.

(b)(7)(E)

- i. What databases and systems checks are required for adjudicators?
* [redacted], order related A-files, T-files, most receipt files, ECN project folder if relevant, open source, RAILS,
- ii. What databases and systems checks are recommended but not required?
* [redacted] strongly encouraged, panama papers when relevant, more open source when relevant, [redacted] for receipt files,
- iii. What can AOs see with their [redacted] profile?

(b)(7)(E)

- * [redacted] might fall into a don't know what we cannot see situation and answer may be somewhat limited. [redacted] archived, crossings. [redacted] POC.
- iv. What can AOs see with their PCQS profile?
 - This answer might fall into a don't know what we cannot see situation and answer may be somewhat limited. Some [redacted] records, not complete. Some [redacted] info can be seen. CIS info can be seen as well.
- i. Where do the AOs feel they need additional training or clarification from FDNS?
 - i. AOs often ask for updates/reminders as to what NS indicators remain active/sought for EV referrals.
 - ii. Examples of model DS write-ups.
 - iii. Knowledge of all systems that FDNS has access to and what data can be pulled from each of these systems.
- j. Matter of Ho explanation for non-business minded people.
 - * There are at least two Matter of Ho AAO decisions that are relevant to EB-5 adjudications. One is a precedent decision (1998) and the other should speak to the heart of many FDNS fraud findings (1988).
 - * 1998 = This is the precedent decision entitled Matter of Ho. It provides that the business plan must be credible and comprehensive and gives factors that are not all inclusive, but can help in evaluating business plan comprehensiveness and credibility. It reinforces the concept that the NCE must undertake actual meaningful concrete business activity [capitalizing NCE and signing a lease was insufficient]. It reinforces the concept that the capital invested in the NCE must belong to petitioner [someone else cannot be the legal owner of the capital]. It reinforces that to show claimed job creation, Forms I-9 must be accompanied by other evidence to show employees commenced work activities and were hired in permanent full-time positions.
 - * We discuss Matter of Ho 1998 when we go over the precedent decisions.
 - * 1988 = If information in record (provided by petitioner, found by USCIS, or otherwise in record) is inconsistent, then petitioner must overcome inconsistency with independent and objective evidence. [Add examples]. Inconsistencies not overcome with independent and objective evidence not only take away from the evidentiary value of the issue where the inconsistency exists (such as employer/income), but they also detract from the evidentiary value of the remainder of the evidence of record. (one bad apple can spoil the bunch...)
- k. Explain a PPM, Operating Agreement, Subscription Agreement, Escrow Agreement, and other required business contracts to a non-business minded audience.

PPM= is a legal document that can be provided to prospective investors when selling stock or another interest in a business. It is sometimes referred to as an offering memorandum or offering document. It provides prospective investors with details about the interest being sold. In our case, it provides details on the EB-5 investment being offered such as disclosures and information specific to the investment.

OPA= is a legal document that can be provided to structure the rules, responsibilities, regulations, and provisions for how a corporate entity will operate. They often discuss internal management, how money will be distributed, membership roles, member admittance, decision making mechanisms, etc.

SA= is a legal document that can be used to memorialize the sale of ownership interest in a corporate entity and often describes the price, terms, risks, accredited investor status, payment terms, and expectations for seller/buyer.

Escrow Agreement= is a contract that defines an arrangement between parties where one party deposits an asset with a third party. This third party then delivers the asset to the second party when the contract conditions are met. This occurs in EB-5 context when petitioner's funds are held by the third party (often escrow agent) until condition(s) outlined in PPM/subscription agreement are satisfied (such as approval of Form I-526) and then the funds are released to the NCE from the escrow account. It's a means to show that the capital is committed and identified (helps establish required amount of capital, capital at risk, and lawful means requirements).

Please note that none of these exact documents are required. They are often used to meet eligibility requirements such as capital at risk, required amount of capital, etc. It's the legal effect that is required by the regulations, not specifically named documents. The content of a document is what triggers the legal effect – not necessarily the name of the document.

I. Required evidence/documentation for an I-526.

Petitioners from every country in the world are able to file Form I-526. Some of the regulations touch on required evidence such as 204.6(j)(3) that was provided above. Other required evidence includes evidence sufficient to demonstrate that all eligibility requirements were met such as capital at risk, funds deriving from lawful source(s), required amount of capital, and job creation.