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FILING AN EB-1 AS A MULTINATIONAL MANAGER AFTER THE APPROVAL OF AN EB-2 FOR A BACKLOGGED INDIAN BENEFICIARY

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It requires skill and creativity to assist Indians caught in the employment based backlogs to find ways speed up the process or ameliorative solutions. The India employment-based second preference (EB-2) and employment-based third preference (EB-3) dates have barely moved for years, and the prospects for a beneficiary of an I-140 petition born in India for obtaining permanent residence anytime soon are bleak.

One strategy is to file an I-140 petition in the employment-based first preference (EB-1) for an individual who is stuck in the EB-2. Under the State Department November 2919 Visa Bulletin, the Final Action Date for EB-2 India is May 13, 2009. The Final Action Date for EB-1 India is January 1, 2015. Since it is possible to capture the earlier priority date of the EB-2, a successful filing under EB-1 can assist the person to escape the backlog and gain permanent residency more quickly.

Take for instance Sunil Kumar who already has an approved I-140 under EB-2 with a priority date of January 1, 2012. His employer, ACB Corp. sponsored him through the labor certification process as a Systems Analyst. ABC Corp. wishes to promote Sunil to the position of Vice President, Cloud Projects. Under the new position, Sunil will be required to manage all cloud based projects of ABC Corp's Fortune 500 corporate clients. Sunil will oversee subordinate managers and professional employees, mainly software developers and systems analysts, in this new position of Vice President, Cloud Projects.

Before moving ahead, an important caveat: Sunil and his fact pattern is a made up for purposes of illustrating a legal strategy. Any resemblance to actual

persons, entities or actual events is purely coincidental.

Prior to coming to the US, Sunil was employed with ABC Pvt. Ltd. in India, a wholly owned subsidiary of ABC Corp., in the position of Systems Analyst from January 1, 2008 to December 31, 2010. He entered the US in H-1B status on January 1, 2011 to work for ABC Corp as a Systems Analyst.

In order to sponsor an employee under INA 203(b)(1)(C) as a multinational manager or executive for permanent residency (EB-1C), not only must the proposed position in the US be managerial or executive in nature, but the prior employment in the qualifying entity in India should have also been managerial or executive in nature for one year in the past three years, which as will be explained below, can be tolled in certain circumstances. While Sunil was employed as a Systems Analyst at the qualifying entity in India with no obvious managerial duties, towards the end of his employment in India, from October 1, 2009 till December 31, 2010, due to his talent and acumen, Sunil was assigned to manage important migration projects on behalf of ABC Pvt. Ltd. clients in India even though he was not formally employed as a manager. While the title of his position remained Systems Analyst, Sunil managed other professional employees with respect to various complex migration projects that he successfully completed on behalf of his employer.

While Sunil was in H-1B status and performed his duties in an exemplary manner, ABC Corp decided to sponsor Sunil for permanent residency for the position of Systems Analyst. A PERM labor certification was filed on Sunil's behalf on January 1, 2012, and after it got approved, an I-140 petition under EB-2 was also filed and easily got approved. The PERM labor certification that supported the I-140 under EB-2 required a Bachelor of Computer Science degree plus five years of progressively responsible experience as a systems analyst. The five years of experience described in Column K of the PERM labor certification for Sunial included managing technology migration projects for large corporate clients. The 15 months of Sunil's employment at ABC Pvt Ltd. in India from October 1, 2009 to December 31, 2010 could have been viewed as managerial, but an I-140 under EB-1C was not contemplated in 2012 since the position of Systems Analyst in the US was not managerial. Moreover, it was not clear then whether the duties in India during the last fifteen months of his employment would be considered managerial as he was not formally employed as a manager. It was also not conceivable then that the EB-2 would languish in the backlogs until 2019 and beyond. At the present time, however, ABC Corp. is

very keen on promoting Sunil to the position of Vice President, Cloud Projects, which is clearly a managerial position.

Sunil potentially qualifies under EB-1C based on the proposed position of Vice President in the US and his prior managerial experience in India from October 1, 2009 to December 31, 2010. Although the qualifying experience at the foreign entity must be for one year in the past 3 years, the "one of three year" requirement may be met even if the person is in the United States for more than three years if s/he is working for the same employer, affiliate, or subsidiary in the United States and was employed for at least one of the last three by company abroad before entering in valid nonimmigrant status. 8 C.F.R. §204.5(j)(3)(i)(B). Sunil has been in valid H-1B status from January 1, 2011 till today for ABC Corp, which is a wholly owned subsidiary of ABC Pvt. Ltd in India. Although the six year limitation under H-1B has long since gone, he has been able to obtain 3 year extensions pursuant to § 104(c) of the American

Competitiveness in the 21st Century Act by virtue of his approved I-140 under the India EB-2, which has not yet become current. Thus, the experience that Sunil obtained from October 1, 2009 to December 31, 2010 would potentially be qualifying experience for classification as a multinational executive or manager under EB-1C. Although Sunil was admittedly a first level supervisor, INA § 101(a)(44)(A)(iv) states that " managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals." Since Sunil managed professional employees, a case can be made that he was engaged in qualifying managerial role.

Sunil also has a daughter, Sujata, who is going to turn 21 on January 1, 2020. Pursuant to the current I-140 under EB-2, there is no hope that Sunil's daughter will be able to protect her age under the Child Status Protection Act, codified at INA §203(h). If ABC Corp. files a new I-140 under EB-1C, however, even if Suneeta crosses 21 on January 1, 2020, once the EB-1C is approved and captures the EB-2 priority date of January 1, 2012 (and the priority date of January 1, 2012 for EB-1 India continues to remain current), any time between the filing of the I-140 petition and the approval of the I-140 petition can be subtracted from Sujata's age pursuant to INA §203(h)(1)(A)&(B). As long as the

I-140 was filed prior to her 21st birthday, even if it gets approved after her 21st birthday, that time can be subtracted from her age and artificially bring the age

under 21. Sunil may also file an I-485 application for adjustment of status concurrent with the I-140 petition under EB-1C, and corresponding I-485 applications can be filed by his daughter, Sujata, and his spouse, Suneeta. The USCIS allows such an I-485 filing concurrently with an I-140 udder EB-1C if it is clearly explained that the EB-2 priority date will be captured upon the approval of the EB-1C. While Suneeta has work authorization under the H-4 EAD rule, 8 CFR § 214.2(h)(9)(iv), she is nervous that she will not be able to continue to have it as the Trump administration has declared its intention to rescind the rule. Suneeta will be able to obtain an EAD based on her I-485 pursuant to 8 CFR § 274a (12)(c)(9). Unlike the renewal of an H-4 EAD, an EAD obtained based through I-485 gets automatically renewed for 180 days provided the renewal is filed prior to the expiration of the initial EAD.

If the I-140 under EB-1 gets approved, the January 1, 2012 priority date of the EB-2 will transfer to the EB-1, and Sunil, Suneeta and Sujata will get permanent residency once their I-485 applications are approved.

This strategy assumes that like Sunil, a backlogged beneficiary under EB-2, had qualifying managerial experience with a related foreign entity prior to being employed in the US, and the experience indicated in the PERM labor certification is consistent with the qualifying experience that will be indicated in support of the I-140 under EB-1C. The USCIS also strictly scrutinizes the managerial role of the beneficiary at both the qualifying foreign entity and the proposed managerial role in the US. Many similar cases have been arbitrarily denied even where a strong case was made demonstrating the managerial role at both entities. Still, those whose facts are similar to Sunil can try to file a new I-140 under EB-1. Even if the beneficiary does not have prior qualifying managerial experience at the related foreign entity, if he or she has attained recognition in cloud related projects and can qualify as a person of extraordinary ability under INA 203(b)(1)(A) (EB-1A), an I-140 petition can be attempted under EB-1A. An EB-1A I-140 filed as a person of extraordinary ability is also very difficult to obtain, and the USCIS routinely denies such petitions. Yet another more safe approach is to transfer the employee to the foreign related entity in an executive or managerial capacity for one year, and then file an EB-1C after the completion of one year of qualifying employment. However, this strategy will not help if there is a child who is imminently aging out and uprooting a family for one year from the US is less than ideal.

Still, when one's back is against the wall, and there is a child who is aging out, it

is worth trying every legitimate measure permissible under the law. My good colleague Brent Renison has also suggested creative solutions for surviving spouses and children who will age out. If there were no country cap, Indians would not be so badly affected and Sunil with a priority date of January 1, 2012 under EB-2 would have by now had a green card, and also likely become a US citizen, and so would his wife and daughter. Until country caps are eliminated through the passage of S386, or S2603, although S386 has a significantly better chance of passing than S2603, Indians will continue to languish in the EB backlogs. A lucky few may be able to escape the backlogs by filing EB-1 petitions, but not everybody will be eligible to do so.

(*This blog is for informational purposes and is not intended to constitute legal advice*).