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DOWNGRADING FROM EB-2 TO EB-3 UNDER THE OCTOBER 2020 VISA BULLETIN

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On September 24, 2020, the Department of State released the October 2020 Visa Bulletin. Importantly, the Filing Date for an EB-3 from India has advanced to January 1, 2015 from February 1, 2010 in the September 2020 Visa Bulletin, while the Filing Date for an EB-1 from India advanced to September 1, 2020 from July 1, 2018. By contrast the Filing Date for EB-2 India advanced to only May 15, 2011 from August 15, 2009.

Significantly, however, the USCIS issued guidance on the same day that the Filing Date, rather than the Final Action Date, applies to employment-based I-485 adjustment of status applications. Historically, USCIS has been very reluctant to allow applicants to use the Filing Date, only doing so in very limited instances. The last time USCIS used the Filing Date for most visa categories was in March 2020. In 2019, USCIS used the Filing Date only four times – in January, October, November, and December. Otherwise, applicants must use the Final Action Date to determine when to submit their I-485. According to earlier guidance from USCIS, applicants may use the Filing Date to determine when to submit an I-485 when the USCIS determines that there are more immigrants visas available for the fiscal year than there are applicants. The Filing Date only allows the filing of an I-485 application when permitted by the USCIS. The Final Action Date determines when lawful permanent residence is issued. USCIS's decision to apply the Filing Date comes as a surprise under the October 2020 Visa Bulletin, albeit a pleasant one, given the agency's previous unwillingness to allow applicants to use the Filing Date.

Since USCIS will accept I-485 filing, a new I-140 will need to be filed for an individual who, for example, wants to downgrade from EB-2 to EB-3. Since the

EB-3 Filing Date has significantly overtaken the EB-2 Filing Date, a beneficiary of an approved EB-2 petition may want to re-file, or downgrade to EB-3. If the beneficiary qualified under EB-2, the beneficiary should be able to qualify for EB-3, and the appropriate "professional", or "skilled worker" will need to be checked on the form. The individual may still rely on an old labor certification when filing the I-140 under EB-3. The I-140 can be filed concurrently with the I-485, so the I-140 need not be approved at the time the I-485 is filed with USCIS.

There is nothing in the law or regulations precluding the existence of two I-140 petitions, one under EB-2, and the other under EB-3. Still, a beneficiary who wishes to downgrade from EB-2 to EB-3 must seek legal advice. Some may be of the view, and they have some support in the Neufeld Memo of June 1, 2007 that the new "downgraded" I-140 under EB-3 should be checked as an amendment rather than as a separate petition. The Neufeld Memo suggests that a new I-140 petition filed after a previously approved I-140 was filed within 180 days of the grant of the labor certification should be filed as an amendment where a new visa classification is being sought. But doing that would nullify the earlier EB-2 petition, and this may not be so desirable in case the EB-2 dates overtake the EB-3 at some point in the future. If that were to happen, then a new amendment of the EB-3 would need to be filed for upgrading to EB-2 On the other hand, 8 CFR 204.5(e)(1), which was last amended in 2017, contemplates the existence of multiple approved petitions on behalf of a single beneficiary even if filed by the same employer, and the beneficiary is entitled to capture the earliest priority date when a subsequently filed petition is approved. This regulation does not preclude the filing of an I-140 petition subsequent to the use of the labor certification through a previously approved labor certification Therefore, the prevalent view is in favor of filing a standalone I-140 to downgrade to EB-3 is preferable to filing it as an amendment. *See Multiple I-140s, Priority Date Retention, and the 2013 China EB-2/EB-3 Anomaly*, AILA Liason (Dec. 16, 2013), available at: https://www.aila.org/infonet/uscis-multiple-i-140s-priority-date-retention. However, this is not to assume that USCIS will not insist that the I-140 should have been checked off as an amendment and may deny the EB-3 petition.

Although an I-485 filed pursuant to a current Filing Date does not confer permanent residence, the I-485 filing confers a number of significant benefits, such as allowing the applicant to "port" to a different job or employer in the

same or similar occupational classification after 180 days pursuant to INA 204(j), obtain an Employment Authorization Document (EAD) that enables them to work in the United States, and request advance parole or travel permission. Note, however, that USCIS' use of the Filing Date will not help those who are waiting for a visa interview abroad, although the National Visa Center (NVC) will initiate the case and obtain documents before the Final Action Date becomes current.

Other complications arise under the Child Status Protection Act (CSPA), which "freezes" the age of applicants under the age 21 who would otherwise age out before being approved for LPR status due to lengthy USCIS backlogs. USCIS has made clear that only Final Action Dates, and not Filing Dates may be used to freeze a child's age. Thus, an applicant who files an I-485 based on a Filing Date should be aware that their child will no longer be protected if the child ages out before the Final Action Date becomes available. The child's I-485 application will be denied, and she can even be put into removal proceedings if she has no nonimmigrant status. We discussed this predicament at greater length, and argued that there is a significant legal basis to use the Filing Date to protect the age of a child under the CSPA in an earlier blog.

Additionally, a small group of EB-2 beneficiaries from India who already have pending I-485 applications (as they filed I-485s in 2012 and then the EB-2 India dates retrogressed) may decide to "downgrade" to an EB-3 from an EB-2, given the more advanced Filing and Final Action Dates for an EB-3. Individuals who find themselves in this situation will need to file a new I-140, which may not protect a child from aging out under the CSPA. CSPA applies only the "applicable" petition, which most likely means the old EB-2 I-140 petition. Individuals who want to downgrade from EB-2 to EB-3 because of the more favorable dates should be aware that their children who were protected under the CSPA under a prior I-140 may not longer receive that protection when a new I-140 is filed if the child is now over 21 years old. Please refer to our earlier blog post for a more in-depth discussion of the CSPA.

EB-1 beneficiaries from India are also in luck, and so long as the EB-1 I-140 was filed on or before September 1, 2020, a concurrent I-485 may be filed. In this case too, legal advice should be taken since the I-485 with all its attendant benefits may not survive if the pending I-140 is denied.

While the movement in the Filing Dates will give relief to many, they are

quixotic and ephemeral. The EB-3 India dates have overtaken the EB-2 dates. At one point, it was always assumed that EB-2 would be ahead of EB-3. But there might be a flipflop as more people are lured into filing under EB-3, and then both EB-2 and EB-3 will be hopelessly backlogged. But those who managed to file I-485 applications will be permitted to apply for employment authorization and can port to new jobs in same or similar occupations. While the green card may still be far away, at least I-485 applicants will be better off than being on a 12th year H-1B extension as they will have more mobility and their spouses and children will also be able to work. Ideally, the immigration system ought to be reformed by eliminating per country limits, and better still, infusing the EB preferences with more visa numbers. For that to happen, Congress has to aligned and in today's polarized environment, this too seems unlikely to happen until at least after the elections.

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