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FREQUENTLY ASKED QUESTIONS ON FILING A "DOWNGRADE" EB-3 PETITION UNDER THE OCTOBER 2020 VISA BULLETIN

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The October 2020 Visa Bulletin significantly advanced the Filing Date of the employment-based third preference (EB-3) for India to January 1, 2015. This would make many beneficiaries with approved I-140 petitions caught in the EB-3 backlog eligible to file I-485 adjustment of status applications. Even those with approved I-140 petitions under the employment-based second preference (EB-2) could potentially file a downgrade I-140 petition under EB-3 and concurrently file I-485 applications. Following the posting of our blog last week, Downgrading from EB-2 to EB-3 Under the October 2020 Visa Bulletin, we have received many questions, which I address below:

1. I have an approved I-140 petition under EB-2 with a priority date of May 15, 2013. Am I able to file a downgrade I-140 under EB-3 along with a concurrent I-485 application for myself, spouse and minor child?

Since the Filing Date for EB-2 India is May 15, 2011 in the October 2020 Visa Bulletin, and the priority date on your I-140 petition is May 15, 2013, you cannot file an I-485 with your I-140 petition under EB-2. However, your employ will be able to file a new downgrade I-140 petition under EB-3 (as a petition approved under EB-2 should meet the lower threshold requirement of EB-3 and the EB-3 date is January 1, 2015), based upon which you will be able to file a concurrent I-485, and your spouse and child will also be able to file I-485 applications as derivatives with your I-485 application.

2. How will filing an I-485 application benefit me?

Filing an I-485 application under a Filing Date will not result in permanent residency or the green card. The Final Action Date in the Visa Bulletin needs to become current for you to be eligible to receive the green card. The Filing Date is a prediction of where the Final Action Date will be at the end of the fiscal year. As this is just an estimate, there is a possibility that if the advance in dates results in many I-485 filings, the Filing Date can also retrogress rather than move forward. While your I-485 is pending, you and your derivative family members will be eligible to apply for an employment authorization document and advance parole or travel permission. If the I-485 application is pending for 180 days, you will also be able to exercise job portability under INA 204(j) in a same or similar occupation either with the same or another employer.

3. Must I be in a nonimmigrant status in order to be eligible to file the I-485? What if I am in violation of my H-1B status since my last entry because my employer terminated me during the Covid-19 economic downturn 120 days ago, but now wishes to hire me back?

Yes. You need to be in a lawful nonimmigrant status as a condition to filing an I-485 application, but with an exception. If your employer terminated you 120 days back, you have been out of status for 60 days (as you were entitled to a 60 day grace period upon termination). Fortunately, under INA 245(k), you may still be eligible to file an I-485 as 245(k) renders one ineligible to apply for adjustment of status who has failed to maintain status for more than 180 days from your last admission. Since you failed to maintain status for 60 days from your last admission, you will still be able to file an I-485 application if your employer files the downgrade I-140. 245(k) will also apply to your spouse and child if they too fell out of status for less than 180 days.

Upon filing the I-485, you can also apply for an Employment Authorization Document. Upon receiving the EAD, your employer will be able to employ you.

4. Assuming that I was in H-1B status at the time of filing the I-485 application, do I still need to remain in H-1B status after I file the I-485 application?

While it is always prudent to remain in H-1B status (as one who is maintaining status cannot be placed in removal proceedings), it is not required as being an I-485 applicant authorizes you to remain in the US. However, an I-485 applicant without the underlying H-1B status can theoretically be placed in removal proceedings, although as a practical matter this rarely happens. For instance, if you wish to port to a new employer, and the new employer is not willing to file an H-1B extension, you can rely on the employment authorization document that was issued to you as a pending I-485 applicant. Likewise, you may also rely on the advance parole for purposes of travel, and this would even obviate the need for you to seek a new H-1B visa from the US Consulate during the Covid-19 period, which may only issue emergency visa appointments.

5. What if the Final Action Date on my prior EB-2 I-140 becomes current before the Final Action Date on my EB-3 becomes current?

The USCIS does have the ability to use the most appropriate I-140 - whether under EB-2 or EB-3 - when the visa becomes available for the appropriate preference category. If the USCIS does not do this on its own volition, you can write to the USCIS to request that the I-485 application be transferred from one basis to another, see https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-8 . Alternatively, you can also try calling the USCIS Contact Center at i-800-375-5283 and request a transfer of the I-485 from one basis to another. There is no need to file a new I-485 based on the EB-2 I-140 if the EB-2 Final Action Date becomes current.

6. My son is 18, will his age be protected under the Child Status Protection Act if he turns 21 and our I-485 applications are still pending?

Under current USCIS policy, the Filing Date does not freeze the age of the child based on the Filing Date (see Recipe for Confusion: USCIS Says Only the Final Action Date in the Visa Bulletin Protects a Child's Age under the Child Status Protection Act). So, if the Final Action Date does not become current before your child turns 21, your child will not be able to adjust to permanent residence with you. Note, however, that under the CSPA, you can subtract the number of days the I-140 petition remained pending from the age of your child if he is over 21 at the time the Final Action Date becomes current.

The lack of CSPA protection based on a Filing Date is erroneous policy. My colleague Brent Renison has filed a lawsuit to force USCIS to accept the Filing Date for CSPA protection, and you can visit his website, http://www.entrylaw.com/backlogcspalawsuit, to join the lawsuit in case your child will be impacted by this policy.

7. Should I request premium processing on the downgrade I-140 petition?

The USCIS has specifically indicated that premium processing for an I-140 will be precluded if the original labor certification was filed with the previous I-140 under EB-2, although some have requested premium and USCIS accepted request. If a child is involved who may need CSPA protection, then requesting premium on the I-140 is not advisable as you will be able to subtract more time (as the I-140 petition will take longer to get approved) from the child's age in case the child turns 21.

8. I have an approved EB-3 I-140 filed by a prior employer with a priority date of January 1, 2014. My new employer has just filed my labor certification and is hoping to capture the priority date of the prior I-140 after the labor certification gets approved. Can I use the prior I-140 to file an I-485 application?

The prior employer would have to offer the job to you on an I-485 Supplement J. It has to be a bona fide offer of employment based on the terms of the underlying labor certification of that I-140. If is not a bona fide offer of employment, it would certainly not be advisable to go ahead and file the I-485 application based on the previously approved I-140. Rather, it would be prudent to wait for the labor certification to get approved and recapture the old priority date when the current employer is able to file the I-140 petition. However, there is no way of knowing whether the Filing Date will continue to be current by the time the new labor certification is approved. Still, this would be the only approach if the prior employer's offer of employment is not bonafide.

9. Can the EB-3 I-140 downgrade be denied?

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. 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. However, one cannot foreclose the possibility of a USCIS examiner inventing erroneous reasons to deny an EB-3 I-140 based on the same labor certification that supported an I-140 under EB-2.

Still, an I-140 downgrade can be denied on legitimate legal grounds such as if the employer cannot demonstrate ability to pay the proffered wage to the beneficiary if the tax returns show losses, or if the USCIS revisits an issue that it did not pay attention to while adjudicating the prior I-140 petition such as whether the foreign degree was a single source degree.

10. If the EB-3 I-140 gets denied, will my previously I-140 EB-2 be safe?

If the grounds for denying the EB-3 were based on issues that were relevant to the approval of the EB-2, such as whether the beneficiary possesses a single source degree or whether the employer had the ability to pay the proffered wage at the time the labor certification was filed, then there is a risk that the I-140 under EB-2 can also get revoked.