



REQUESTING PREMIUM PROCESSING ON A DOWNGRADED I-140 PETITION

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In October 2020, USCIS' decision to apply the Filing Dates, rather than the Final Action Dates, to employment-based I-485 adjustment of status applications, together with advancement in the Filing Dates in the State Department Visa Bulletin allowed many noncitizen workers who had been trapped in the green card backlogs for years to file I-485 adjustment of status applications. Since the EB-3 Filing Date for India significantly overtook the EB-2 Filing Date, some beneficiaries approved EB-2 petition opted to "downgrade" by filing a new I-140 under EB-3. Generally, beneficiaries may still rely on the original Labor Certification when filing a downgraded I-140 and retain the priority date of the EB-2 petition, unless the job has drastically [changed](#).

In previous blogs, we have discussed the nuances of [filing a downgrade petition](#), and addressed some [common questions](#) that arise in this situation. One frequent source of questions is whether Premium Processing is available for downgrade petitions given that these I-140 petitions filed since October 2020 are still pending and have yet to be approved. Generally, [USCIS](#) will not accept a case for Premium Processing unless it is filed with an original Labor Certification. Thus, beneficiaries whose Labor Certifications were filed with the original EB-2 petition likely cannot file a downgrade I-140 together with a Premium Processing request. Although USCIS might, in rare instances, accept a Premium Processing request made with an I-140 downgrade petition, it is more likely that the Premium request, or even the entire petition, will be rejected.

A strategy more likely to meet with success is filing the downgrade I-140 via regular processing, waiting USCIS to issue a receipt notice, and then request Premium Processing of the pending I-140. USCIS may still reject the Premium

Processing request if it cannot match the pending I-140 to the previous file or retrieve the original Labor Certification. Even in the case of a rejection, however, the pending I-140 will be safe and subsequent Premium Processing requests can be filed, if desired. There are an increased number of Premium Processing requests from beneficiaries of downgraded I-140 petitions given that the EB-3 India Final Action Date has rapidly advanced. Under the July 2021 State Department Visa Bulletin, the EB-3 India Final Action Date is January 1, 2013. If the I-140 petition is approved when the Final Action Date is current for the I-140 petition, the beneficiary and family members can hope to have their I-485 applications approved although the USCIS has been approving them at a snail's pace and may alarmingly not be able to use up all EB visas for this fiscal year. It should also be noted that the swifter approval of the I-140 petition does not speed up the processing of the applications for employment authorization or advance parole when the I-485 application remains pending.

Recently, however, we have seen some requests to upgrade I-140s to Premium Processing being repeatedly rejected on the ground that an original Labor Certification was no provided, despite other, similar Premium Processing requests being accepted. In an email inquiry placed to the USCIS Premium Processing address in response to one such case, our firm received a helpful response. An Immigration Services Officer advised that Petitioners resubmit rejected Premium Processing requests and indicate on a brightly colored sheet of paper that USCIS has the original labor certification. A more guaranteed method, according to the USCIS response, is to submit a copy of the original Labor Certification. Submissions lacking at least one of these documents are vulnerable to immediate rejection since the reviewing officer will not see a Labor Certification included. Although this was not part of the guidance we received, it would also be advisable to indicate the receipt number of the prior approved EB-2 petition which contains the original Labor Certification, and direct the USCIS to look for it in that petition.

Even if the Premium Processing request is accepted, there is always a risk that the USCIS might issue a Request for Evidence (RFE) even if the prior I-140 under EB-2 was approved. Note, though, that such an RFE could also be issued even if there is no request for Premium Processing, although there might be an incentive to issue the RFE if the officer cannot complete the processing within the mandated 15 days. Although RFEs have been seldom, the most common reason for an RFE is to request submission of evidence that the employer still

has the ability to pay the proffered wage from the establishment of the priority date until the present, and up to the point of time that the beneficiary receives permanent residency. If the employer's current tax returns show losses and the beneficiary is not being paid the proffered wage, Premium Processing should not be considered, and the I-140 can continue to remain pending, until the employer is able to potentially overcome such an RFE. Another reason for an RFE is that the prior SOC code that was designated at the time of the granting of the Labor Certification does not match with the SOC code that was indicated in the downgrade I-140 petition. This is not a valid basis for the USCIS to issue an RFE as the SOC code available for the occupation at that time has become obsolete. For instance, [SOC Code 15-1031](#) for Computer Software Engineers, Applications is no longer in existence. It has now changed to SOC Code 15-1132 for Software Developers, which has again most recently changed to SOC Code 15-1252. This sort of RFE can be more easily overcome.

All of these issues should be carefully considered when requesting Premium Processing of a downgrade I-140 petition. Despite the issues that can arise when making a Premium Processing request of this kind, petitioners can help prevent rejections by following USCIS' guidance and including a highly visible reference to the original Labor Certification, or a copy of the Labor Certification itself with the request. Submitting timely and thorough responses to any RFEs too helps to ensure that the petition will ultimately be successful.

(This blog is for informational purposes and should not be considered as a substitute for legal advice).

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