



## NOVEMBER 2021 VISA BULLETIN SEESAW: FREQUENTLY ASKED QUESTIONS

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### **By Cyrus D. Mehta and Kaitlyn Box\***

On Thursday, October 14, 2021, the Department of State released the [November 2021 Visa Bulletin](#), which has brought significant retrogression in employment-based third preference (EB-3) India dates, among other significant changes. The EB-3 India Date for Filing (DFF) retrogressed to January 22, 2012 and the Final Action Date (FAD) almost two years to January 15, 2012. By contrast, the India EB-3 DFF under the October 2021 Visa Bulletin is January 8, 2014 and the EB-3 India FAD is January 1, 2014. On the other hand, the Employment-based Second Preference (EB-2) India DFF has advanced to January 8, 2013 and the FAD to December 1, 2011. As it did in October 2021, USCIS has [elected](#) to use the DFF for employment-based adjustment of status applications. Thousands of applicants who filed concurrent I-140 petitions and I-485 applications when India EB-3 DFF dates rapidly advanced under the October 2020 Visa Bulletin, as well as under the November 2020 and December 2020 Visa Bulletins, are now justifiably disappointed that the USCIS has failed to approve their I-485 applications and will remain stranded in the backlogs if their applications are not approved by October 31. The retrogression of EB-3 India dates, in particular, has thus been the source of much concern and confusion, so we address a few common questions below.

**Q: I have approved I-140s under both India EB-2 and India EB-3 with the same employer. I filed my I-485 adjustment application concurrently with the EB-3 I-140, but it has yet to be approved due to Service Center backlogs and now EB-2 dates are moving ahead. Should I file a second adjustment at a different Service Center based on the EB-2 I-140?**

If the Form I-485 was filed concurrently with the EB-3 I-140, it is generally not advisable to file another I-485 for the EB-2 I-140. There is no guarantee that a separately filed I-485 based on the now current EB-2 I-140 will be processed faster at a different service center than the Texas Service Center, which has been extremely backlogged and processing cases very slowly. USCIS [designates](#) the appropriate filing addresses for applications, and the filing location for adjustment applications based on an approved I-140 depends on the applicant's address. Thus, many adjustment applications will go to the Texas Service Center regardless, and one cannot select an alternative filing location.

The USCIS has a policy of transferring the underlying basis of an I-485 from one I-140 petition to another. The [USCIS Policy Manual](#) contemplates such a transfer of underlying basis from an I-140 filed by one employer to an I-140 filed by another employer, and requires that the applicant write a letter, although USCIS often automatically approves the I-485 based on whichever I-140 is current if both have been filed by the same employer. This used to be USCIS policy some years ago when the China EB-3 overtook the China EB-2.

Although the USCIS Policy Manual explains that portability cannot be exercised under INA § 204(j) until 180 days upon the transfer of underlying basis, this applies when the transfer of underlying basis of the I-485 is with an I-140 filed by one employer to an I-140 filed by another employer, or when the second I-140 petition of the same employer is for a different position, but should not apply when there are two I-140s filed by the same employer for the identical position. Thus, if an employee has two approved I-140s with the same employer and identical position, USCIS should automatically connect the adjustment application to the I-140 that becomes current fastest, without the need for what one may term as interfiling or filing of a second adjustment application. In fact, filing a second I-485 may cause confusion at USCIS and result in further delays.

**Q: My family filed I-485s when my priority date was current under EB-3 India DFF, but they are still pending and my priority date will no longer be current in November 2021. Will my child's age still be protected if he or she turns 21 before our adjustment applications are approved?**

Although we view this policy as erroneous, the [USCIS Policy Manual](#) makes clear that the concurrent filing of an I-485 based on a current DFF does not

protect a child from aging out under the Child Status Protection Act (CSPA). The child's age, according to USCIS, locks in only when the FAD becomes current. (It may be possible for certain people adversely affected by this policy to challenge it in federal court.) There is a likelihood that the India EB-2 FAD will advance ahead of the India EB-3 FAD in the next few months. Thus, an I-485 that was filed concurrently with an EB-3 I-140 ought to lock in the child's age when the EB-2 I-140 becomes current, even if the I-485 was filed concurrently with the EB-3 I-140 as there is a transfer of basis of the I-485 from the EB-3 to the EB-2 I-140. Again, there does not seem any need to file a new I-485 only for the purpose of locking in the child's age and the USCIS has not issued any guidance that one must do so, although it may be prudent to write a letter to the USCIS requesting the transfer of underlying basis. However, because of the lack of guidance from USCIS, those who want to play 100% safe may want to file a new I-485 in lieu of writing a letter to the USCIS requesting the transfer of underlying basis.

The CSPA ought to apply as the underlying basis of the I-485 filed with the EB-3 I-140 transfers to the I-140 filed under EB-2 provided the other conditions to lock in the child's age under the CSPA are met. The I-140 must have been filed before the child's 21<sup>st</sup> birthday, and on the date when the FAD is current on either of the I-140s, the child is under 21. If the child is over 21 at the time the FAD is current, the CSPA allows the child's age to be subtracted by the number of days it took from the filing of the I-140 petition to its approval. If the child's CSPA age falls below 21 after the subtraction, it gets locked in until the I-485 is adjudicated. The child would have also sought permanent residency within one year of visa availability based on the I-485 that was filed with the EB-3 I-140, which has been transferred to the EB-2 I-140. The letter requesting transfer of underlying basis should satisfy the requirement that the child sought permanent residency within one year of the EB-2 I-140 becoming current, although the filing of a second I-485 application under this circumstance is recommended in order to be 100% safe in the absence of USCIS guidance.

Even if there is retrogression of the FAD after the CSPA locks in the child's age, the child's age will continue to be locked in until the FAD becomes current again and the I-485 is adjudicated.

Our [prior blog](#) provides further clarification on CSPA issues.

**Q: I have approved I-140s under both India EB-2 and India EB-3. I was in the processing of filing my I-485 under EB-3 in October 2021. Should I instead file under EB-2?**

Since the USCIS has announced that it will accept I-485 adjustment applications under the DFF for November 2021, applicants in this position should consider filing under the already approved EB-2 I-140 if their priority date is current under the EB-2 Date for Filing, as the EB-2 dates appear to now be moving ahead faster. If the applicant's priority date will not be current under the EB-2 DFF in November 2021, it is prudent to still catch the first bus and file the I-485 under EB-3 before the end of October. If the priority date subsequently becomes current under EB-2, the basis for the I-485 can then be transferred to the EB-2 I-140, as described above.

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

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