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HUH? WHY SHOULD REQUESTING A TRANSFER OF UNDERLYING BASIS WITH AN I-485 SUPPLEMENT J RESTART THE 180-DAY PORTABILITY CLOCK?

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We follow up on our blog series on requesting a transfer of underlying basis. Previous blogs on this topic can be found here and here. Due to the exceptionally high number of EB-1 and EB-2 visas available this fiscal year, USCIS is urging applicants to consider switching to these preference categories, which will no doubt encourage more applicants to file a transfer of underlying basis request. As a background, many India born beneficiaries are the subject of two I-140 petitions in both the EB-2 and EB-2 preferences. These beneficiaries had employers file I-140s under EB-3 along with concurrent I-485 applications when the Dates for Filing in the October 2020 Bulletin advanced further than the EB-2 to January 1, 2015, and this trend continued under the November 2020 and December 2020 Visa Bulletins. There has been a switcheroo since then, and sadly many who could have gotten their green cards when the EB-3 Final Action Date was January 1, 2014 lost out when USCIS could not adjust these applicants by September 30, 2021. The India EB-2 has advanced much further than the India EB-3, which is why many wish to request that the I-485 application filed with the EB-3 I-140 in October 2020 be transferred to the previously approved I-140 under EB-2. Under the State Department March 2022 Visa Bulletin, the India EB-2 Final Action Date is May 1, 2013 while the India EB-3 Final Action Date has retrogressed to January 15, 2012. The EB-3 Dates for Filing has retrogressed to January 22, 2012.

AILA's Case Assistance Committee recently posted a practice pointer on February 9, 2022, which we further analyze for the benefit of our readers. *See AILA Doc. No. 22012600*. The practice pointer discusses USCIS' guidance on

requesting a transfer of underlying basis, which requires a written request along with an I-485 Supplement J to the following address:

> *Attn: I-485 Supp J*
> *U. S. Department of Homeland Security*
> *USCIS Western Forms Center*
> *10 Application Way*
> *Montclair, CA 91763-1350*

The USCIS guidance further states that "if a request to transfer the underlying basis has previously been submitted to a USCIS office prior to the issuance of this new guidance, USCIS indicates on its website that a new request should not be submitted again to the above address". However, anecdotal evidence indicates that many are resubmitting their request for a transfer of underlying basis following this new procedure, even though they may have previously sent a letter previously requesting a transfer of underlying basis. The submission of an I-485J at least results in the generation of a receipt and an approval. This evidence may allow the applicant to further follow up on the request to transfer underlying basis.

Most significantly, AILA's practice pointer also states that USCIS has indicated that filing a transfer of underlying basis request with an I-485, Supplement J restarts the 180-day clock for adjustment applicants who wish to port to new employment. USCIS states that "for purposes of portability, you would restart the portability clock on the day we receive the transfer request". We are perplexed by USCIS' response, and analyze it further herein.

INA § 204(j) states that "for an individual whose application for adjustment of status…has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed". Thus, if an applicant's I-485 has been pending for more than 180 days, it makes little sense that the portability clock should restart upon submission of an I-485J when the applicant is also requesting a transfer of underlying basis from EB-3 to EB-2. It should also be noted that many applicants are filing an I-485J for the first time when requesting a transfer of basis as the I-485J was not required at the time the I-140 under EB-3 was filed concurrently with the I-485 under the October 2020,

November 2020 and December 2020 Bulletins.

The purpose of the I-485J is two- fold: Part 1.a. requires the applicant to confirm that the employer is offering a bona fide job that the noncitizen intends to accept upon receiving permanent residence, while part 1.b. can instead be checked to indicate that the noncitizen is porting to a new position that they intend to accept when the I-485 is approved. Hence, I-485J is required to confirm the existence of the job offer that is the subject of the labor certification and the I-140, or, alternatively, it is required to request portability under INA § 204(j). If the applicant checks the first box, confirming the validity of the existing I-140 job offer, the 180 -day portability clock should not start.

Many adjustment applicants may find that their job duties have changed slightly since their I-140s were filed, such that they now involve, for example, the use of updated technologies. One can take the position that the job remains the same and the applicant is not porting, so the 180-day clock should not restart if Part 1.a. in the I-485J is checked. What happens, though, if an applicant checks Part 1.b. when the job duties have changed slightly, even though the essence of the job remains similar and s/he is with the same employer. It makes little sense for the portability clock to restart in this situation. Surely USCIS would not expect an applicant to go back to the old job with the current employer if it were to approve the I-485 application in less than 180 days from the time thee request to transfer the underlying basis was made.

Other applicants who are requesting a transfer of underlying basis may want to move to a new job at an entirely different employer. When one is changing jobs and files the I-485J, and the underlying basis is not being changed, there should not be an issue. The portability clock should not start again. The I-485 has been pending for 180 days already and INA § 204(j) should trigger.

The situation becomes somewhat more nuanced, however, when the applicant also wants to port to a new job and transfer the underlying basis from EB-3 to EB-2. USCIS seems to suggest that the portability clock would restart in this situation, but the results would be perverse. Imagine the absurd scenario where USCIS approves the I-485 within 180 days, and an applicant would have to go back to the old job as the 180-day clock did not complete when requesting the transfer of underlying basis. The safest course of action for applicants in this scenario is to refrain from requesting a transfer of underlying

basis. Thus, if the I-485 is associated with the EB-3 I-140, then it is best to port and stay in EB-3 rather than requesting a transfer of underlying basis to be on the safe side.

Relevant case law also illustrates the absurdity of USCIS' position. In *Matter of VSG*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), the AAO recognized that a beneficiary who has ported under INA §204(j) is an affected party for purposes of revocation of an I-140 petition, and such a beneficiary must be afforded an opportunity to participate in such revocation proceeding. If the 180 day porting clock were to start again upon an interfiling request, that could de-recognize the ability of a beneficiary to participate in revocation proceedings in contradiction of a growing number of court decisions, see e.g. Khedkar v USCIS, Mantena v. Johnson and Kurupati v USCIS, that have recognized that the beneficiary of the I-140 petition is within the zone of interests that the statute or regulation seeks to protect. Such a result would be nonsensical.

All of these scenarios make little sense. There should be no restarting of the 180-day portability clock, as INA § 204(j) requires only that the I-485 be pending for 180 days. Even if requesting a transfer of underlying basis latches the I-485 to the EB-2 I-140, that should not restart the portability clock. The transfer of basis should not be intertwined with I-485 portability.

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

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