AILA Texas Chapter Spring Conference 2017 – South Padre Island

Business Track – EB Preference Categories - Practice Tips

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How is an EB Priority Date established? INA §202(b)(1) & (2)

1. Date the PERM labor certification is filed with DOL, once the I-140 petition is timely filed prior to the expiration date of the PERM (within 180 days) and approved
2. Date the I-140 is filed with USCIS for a PERM exempt category (EB11, EB12, NIW, Schedule A- Exceptional Ability)
3. Date the I-360 is filed for a Religious Worker
4. Date the I-526 is filed for an EB5 Alien Entrepreneur

TIP: For I-140s, I-360s and I-526s, always check the delivery date on the courier/Fed Ex receipt against the USCIS I-797 receipt notice to ensure the priority date is correct. For PERM based I-140s, check the priority date listed on the I-797 receipt notice for the I-140 against the PERM filing date. Mistakes happen and every day counts.

Chargeability 9 FAM 503.2 - Is the Country of Birth always used to determine chargeability?

Country of Birth is generally used rather than Country of Citizenship, with these exceptions:

1. Cross Chargeability – The country of birth of either spouse (principal or dependent) can be used for the other spouse, as well as dependent children to utilize a more favorable, earlier priority date. However, the country of birth of the dependent child may not be used for the parent(s). INA 202(b)(1) and (2). Cross chargeability is used to preserve family unity. TIP: Use a bright colored sheet of paper as a cover sheet requesting cross chargeability in big, bold font. List the name, relationship and COB of the person with the better priority date, as well as the same information for the other family members that will utilize the earlier priority date based on cross chargeability.

2. Child born while "passing through" a country – if born in a foreign state in which neither parent was born or had residence at the time of birth, the birth country does not have to be used

3. Country of birth at the time of birth has now undergone changes in political jurisdiction – must use the foreign state that has jurisdiction at the time of the visa application (eg. India/Pakistan partition)

4. Hong Kong is the equivalent of a "foreign state" by Public Law 101-649 in FY 1991.

5. Born in the U.S. but not a USC due to parents being diplomats in the U.S. at time of birth – use country of citizenship or country of last residence if not a citizen of any country

6. Former USC who has lost U.S. citizenship through expatriation - use country of citizenship or country of last residence if not a citizen of any country

Final Action Dates vs Dates for Filing on the Visa Bulletin

As of the October 2015 Visa Bulletin, there are now two separate charts of priority dates to use to determine when an employment based adjustment of status can be filed. It was announced in September 2015 that USCIS and DOS made revisions to procedures to more accurately predict overall immigrant visa demand accounting for both I-485 filings and immigrant visa consular processing. The goal was to determine cut off dates that would allow the maximum number of immigrant visas issued annually to be used and also to minimize the month-to-month fluctuations of priority dates.

Which chart must I use to determine whether an Adjustment of Status I-485 application can be filed?

https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates:

> "The monthly DOS Visa Bulletin summarizes the availability of immigrant visas according to:

1. The "Application Final Action Dates" chart
2. The "Dates for Filing Applications" chart

When USCIS determines there are more immigrant visas available for the fiscal year than there are known applicants, you may use the Dates for Filing Applications chart to determine when to file an adjustment of status application with USCIS. Otherwise, you must use the Application Final Action Dates chart to determine when to file an adjustment of status application with USCIS.

Unless otherwise indicated on www.uscis.gov/visabulletininfo, you must use the "Application Final Action Dates" for determining when you can file a Form I-485 with USCIS."

The Visa Bulletin is usually released by DOS a couple of weeks before the first of the month. However, USCIS reviews and publishes instructions for which chart to use a few days to a week later. It is important to wait for USCIS instruction in order to use the correct chart. Below is the USCIS message for the April 2017 Visa Bulletin.

"For Family-Sponsored Filings:
You must use the Dates for Filing Family-Sponsored Visa Applications chart in the Department of State Visa Bulletin for April 2017.

For Employment-Based Preference Filings:
You must use the Final Action Dates chart in the Department of State Visa Bulletin for April 2017."

Practical tips:

The applicant's priority date must be earlier than the priority date listed on the chart. For example: the applicant's priority date for EB3 COB Mexico is 15 Feb 2017 and the Final Action Date for EB3 Mexico is 15 Feb 2017. His I-485 cannot be filed in April because his PD is not earlier than the listed date.

Carefully monitor the Visa Bulletin as soon as released by DOS and USCIS instructs as to which chart must be used. Communicate with clients proactively to prepare them to file early in the month that their priority date becomes current. It may take time to obtain the medical exam and vaccinations. Because PDs can retrogress or become unavailable month to month, you do not want to risk losing the window of opportunity to file the I-485s

Run reports each month on priority dates to identify those that are a couple of months away from becoming current so you can review the file and proactively reach out to the client. Plan early to avoid mistakes of filing in haste.

Can a Priority Date be retained?

8 CFR §204.5(e): Retention of Priority Date INA §203(b)(1), (2), or (3) –the oldest valid Priority Date can be retained.

When is the Priority Date no longer valid?

According to the final AC21 rule, effective January 17, 2017, an approved I-140 cannot be revoked from 180 days after the approval, even if the Employer withdraws or goes out of business.

However, it can be revoked by: (1) fraud or a willful misrepresentation of a material fact; (2) a determination that the petition was approved based on a material error; or (3) revocation or invalidation of the labor certification associated with the petition.

Why Upgrade or Downgrade?

To reduce visa wait times, specifically for India/China nationals. The April 2017 Visa Bulletin Final Action dates for India EB-2 is June 22, 2008 and EB-3 is March 24, 2005. China's Final Action date for EB-3 is Aug 15, 2014 and EB-2 is Jan 15, 2013. China is now in a period where the EB-3 date more current than EB-2. With the amount of people who already upgraded to EB-2 from India, they might soon be in the same predicament as China, in which case the whole upgrade/downgrade thing might actually become moot. Also bear in mind that the pendulum can swing either way, making either of the two slower or faster after achieving the upgrade or downgrade.

Bear in mind this is not a game, especially for upgrading. The minimum requirements for the job has to be EB-2 to upgrade your petition.

Upgrading to EB-2

Upgrading to a new job from EB-3 to EB-2 requires a new PERM-Labor Certification and a new I-140. I usually put the older Priority Date for the I-140, Page 4, Part 5 Number 2H on the Labor Certification filing date; include the porting date in the petition letter and also attach the old I-140 approval notice with the date highlighted.

Questions to consider:

1. What does the position require?
2. Does the Beneficiary have the adequate education/experience
3. Does the Employer have the ability to pay

EB-2 requires at least Bachelor's degree + 5 years experience or a Master's Degree. Note that the Bachelor's Degree needs to be a 4 year degree, under the PERM regulations, it is not allowed to count 3 years of experience as equal to one year of education as under the H-1B regulations.

Upgrading with Different Employer:

This is the easiest option. One can use the experience gained from the previous employer for a new position with a new employer. Also note, experience gained with the same employer in a foreign branch, or another branch of the Company, having a different Federal Employer Identification Number, can be used. USCIS still defines a Company by its Federal Employer Identification Number.

Upgrading with the same employer with additional Experience:

USCIS recognizes that positions change over time. A software developer can become an IT Manager/Project lead/Senior Software engineer. The new position must be at least 50% different from the old one.

USCIS might issue a Request for Evidence saying that the two jobs are same. I try to avoid words used in the previous job description.

Upgrading with the Same Employer by education:

This can be done too, if the job is a new one. Especially helpful for 3 year Bachelor's degree holders from India. Note that the Employer cannot pay for that education.

Downgrading to EB-3—The China problem

Downgrading from EB-2 to EB-3 can be done by just filing new I-140. The rationale is that employees and employers meeting the threshold for EB-2, will automatically meet the threshold for EB-3.

Downgrading to EB-3 needs an Amended I-140, with a copy of the old approved PERM-Labor Certification, and an explanation in the petition letter. On I-140 Part 4, Page 3, Number 7 and 8, explain that you are not filing with original labor certification, and ask Citizenship and Immigration Service to request Department of Labor for a duplicate

Other strategies to move up the preference chart

Applicants are not prohibited from having more than one immigrant petition pending at one time. (If one is approved, you may have to contact USCIS to get them to consolidate all of the files in order to adjudicate the case.)

<u>More than one Immigrant Petition</u>

Why or how could a person have more than one petition?

- Leave employer before they adjust status but after I-140 has been approved
- Subject to visa bulletin backlog (Chinese or Indian nationals) and decide to do something with less wait time/backlog (e.g. EB-5, EB-11 self-petition, EB-3 India files EB-2 NIW etc)
- Individual waiting on I-140 approval wants freedom to work with any employer, files self-petition (EB-2 NIW or EB-11)

Recapturing a Priority Date

In the EB context, a Priority Date can be recaptured and assigned to a subsequent EB petition, so filing another petition in a category where PD is current - or will be sooner - makes sense, especially for nationals of China or India.

- In your cover letter, note in bold font that you are requesting to recapture an old priority date and assign it to the petition you're filing. Include copy of the prior I-140 approval notice.
- NOTE: PRIORITY DATE CAN BE RECAPTURED ONLY IF A PETITION IS APPROVED. Can't recapture date of filing of Labor Cert where no I-140 was filed (or where Labor Cert I-140 was denied)

Other possibilities

EB13 – International Manager or Executive Transferee

EB-2 or EB-3 PERM Beneficiary transfers abroad for one year to qualify for EB-13 Exec/ Manager

EB-13 requirements include 1 year overseas at a company affiliate, parent or subsidiary in a managerial or executive role and offer to come to US company (affiliate, subsidiary or parent) to take a managerial/executive role.

Turn EB-3 into EB-2

1. **By proving "exceptional ability"**

I-140 must be filed within 180 days of PERM Labor Cert approval or PERM expires per DOL regulations:

20 CFR 656.30(b): Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

- **656.30(b)(1)** An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland

Security within 180 calendar days of the date the Department of Labor granted the certification.

- **656.30(b)(2)** An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

This means that if an I-140 was filed within 180 days of a PERM being certified, another can be filed later. So if the I-140 is denied, you can re-file with proof that an I-140 was originally filed within 180 days of PERM certification.

And if a PERM was filed an I-140 was filed in EB-3 category but exceptional ability was required in the PERM, you can file another I-140 in the EB-2 exceptional ability category.

Why would you do both? Why not just file EB-2 I-140?
Because the EB-2 may be a harder argument. If your Beneficiary needs AC-21 H-1B extensions, you might want to try for the EB-3 because it's a sure thing, and then file EB-2 Exceptional Ability petition and recapture the Priority Date of the prior petition anyway.

2. **Approved EB3 based on PERM followed by EB-2 NIW**

In December 2016, the AAO introduced a new standard for adjudicating NIW cases – Matter of Dhanasar. USCIS officers are being trained on this new guidance, but many are cautiously optimistic that this new standard gives more room for us to argue for NIWs based on prospective future benefit to the US vs. past achievements as was the case in NYSDOT. Dhanasar also includes a balancing test of whether the U.S. is better off with this person versus a labor cert yielding a U.S. worker.

<u>Strategies for Aging out EB dependent children</u>

Always ask your EB clients if they have any children at all and their ages. Even if the children aren't living with them, aren't of their current marriage, or don't have plans to move to the US right now. It's a lot easier to include a child as a dependent than to try to immigrate through F-2B, F-1 or F-3 immigrant visa category.

Get to know CSPA: INA sect 203(h). Note: it protects children from USCIS processing delays but not visa number backlogs. It may be worthwhile to try an EB-2 NIW or EB-11 self-petition (and possibly concurrently file I-485) if it is worth it to your client to try to have their kids immigrate with them rather than wait for another option.

If beneficiary's children will age out, they need to be ready to change status or depart (if attending school, change to F-1). Some children of employment-based adjustment applicants

may change to F-1, then try for an H-1B, and eventually try for EB-3 or EB-2 I-140. Depending on visa bulletin backlogs and country of birth, their own EB process may be faster than waiting on F-2B, F-1 or F-3 priority date. However, you may want to advise parent to still file I-130 as soon as they can because if the EB case doesn't work out, the son/daughter has a backup plan.

Be sure your client and his children understand that once a person marries, they're no longer a "child" and they're no longer an "unmarried son or daughter" for F-2B purposes. If your client becomes an LPR and will petition for aged-out son/daughter as F-2B, the backlog is around 8 years. A marriage cancels the petition unless the petition has first naturalized. So Petitioner and Beneficiary in the I-130 process need to understand that and your best practice is to put that in writing to them both.

However, if your client's son or daughter does want to marry and prospective spouse is USC or LPR, this is faster than waiting on the parent's I-130 priority date. Remember that spouses of LPRs – like adult sons and daughters in F-2B, F-1 and F-3 categories - are subject to INA §245(c):

c) Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to

(1) an alien crewman;

(2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H) , (I) , (J) , or (K)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States;

(3) any alien admitted in transit without visa under section 212(d)(4)(C) ;

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217 ;

(5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S) ;

(6) an alien who is deportable under section 237(a)(4)(B) ;

(7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or

(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3) , or who has otherwise violated the terms of a nonimmigrant visa.

Generally speaking, preference category petition beneficiaries must maintain status and be in lawful status when they file for Adjustment of Status and must not have worked without

authorization. (There is an exception in 245k for some NIV holders.) This is important because someone who has overstayed will not be eligible for AOS. However, their LPR or USC parent could be a qualifying relative for an unlawful presence waiver during the consular process.

Don't forget to check for other possibilities:

- Has anyone in the family been the victim of a crime? If so, is there a U visa possibility?
- Is the family afraid to have the son or daughter return home? If so, is there an asylum claim?
- If the son/daughter graduates from college/university and can't get H-1B, can he/she work outside the U.S. for at least 1 year in a managerial/executive or specialized knowledge capacity and return as an L-1? This would give the person 5-7 years in the U.S. in lawful status.
- Mexican or Canadian nationals – TN
- Singaporean/Chilean nationals – H1B1
- Australian nationals – E-3