

Downgrading an I-140 from EB-2 to EB-3

As all EB-2 and EB-3 I-140 beneficiaries are aware, there has been a HUGE jump in the Chart B Visa Bulletin for October 2020, particularly in the EB-3 category (January 1, 2015). With the EB-3 priority date jumping ahead of the EB-2 priority date, many I-140 beneficiaries have elected to “downgrade” their EB-2 I-140s to an EB-3, to take advantage of the availability of concurrent filing for adjustment of status.

Our office has received many requests to confirm that the downgraded I-140 will be filed as a “new” I-140, so that the EB-2 I-140 will still be available if EB-3 dates retrogress and EB-2 dates jump ahead. This was the plan until we heard some news from the American Immigration Lawyers Association.

It appears there is now a bit of controversy among AILA, attorneys, and USCIS adjudicators on how to properly file these – as a new petition or as an amendment. AILA has been telling attorneys to file these as “new” petitions for years, so that the underlying EB-2 petition also remains valid. Then if EB-2 dates jump back ahead, the beneficiary could use the EB-2 petition priority date to adjust status. This has been done for years, and there is justification in the regulations to do it this way.

However, there is a USCIS Memo from 2007, which was added to the Adjudicators Field Manual, that states Officers can only accept an I-140 filing that relies on a previously used PERM if the new petition “amends” the old I-140 petition. It appears USCIS is now taking this position, after years of taking the “new” petition position. AILA has reported several denials of downgraded I-140s because they were filed as “new” rather than “amended.”

Because the Adjustments are being filed together with these downgrades, and most likely we will only be allowed this in October 2020, we do not want to run the risk of having the I-140 downgrade denied because USCIS is playing games, and then the adjustment also gets denied. Therefore, our office has decided to add a blurb in the letter of support that this new I-140 petition is really being filed as a new petition, but the “amended” box is also being checked, just in case.

The downside of this approach is that if USCIS only accepts the new I-140 as an amendment, the underlying I-140 in the EB-2 category will have to be refiled and amended again to convert



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back to EB-2, which results in more attorney fees and USCIS filing fees. However, this is the safest way to go this October. With filing concurrent adjustments that will only be allowed to be filed in October, the stakes are too high this month to risk a USCIS denial on a downgraded "new" I-140. We are hedging our approach this month to prevent the I-485 from being denied.

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