BEYOND THE LABOR CERTIFICATION: I-140 AND I-485 PROCESSING OVERVIEW

Employees who are employed pursuant to nonimmigrant work visas such as H1B or L1 are considered "temporary" employees for immigration purposes as nonimmigrant visas have time limitations with regard to the number of years one may remain working in the United States on each any visa (for example H1B visa holders have a six year maximum period they may remain in the United States working). To assure the employer's ability to continue to employ the nonimmigrant employee on a "permanent" basis, employers may begin the employment based permanent residency process (or "green card" process) on behalf of nonimmigrant employees.

The employment based green card process contemplates sponsorship of a prospective employment position that will be offered to the nonimmigrant employee upon approval of the permanent residency process (green card approval). The employment based permanent residency process is typically a three step process for most employees. The first step involves the filing of a labor certification application with the Department of Labor (DOL). The second step involves the filing of an I-140 immigrant visa petition with the United States Citizenship and Immigration Service (USCIS). The third step involves the filing of an I-485 Adjustment of Status to Permanent Resident application with the USCIS. In some circumstances, the second and third step may be filed concurrently.

The discussion below focuses on the second and third steps of the permanent residency process (I-140 and I-485 stages). In some cases, where an employer can bypass the labor certification stage, the process will be a two stage process consisting only of the I-140 petition and I-485 application.

FORM I-140 IMMIGRANT VISA PETITION

The employer's submission of Form I-140 Immigrant Visa Petition to the USCIS on behalf of an employee is the employer's notification to the USCIS that the employer wishes to sponsor an immigrant visa for the employee based upon their formal offer of permanent employment as described in the labor certification. In most cases, the I-140

petition will be based on an approved labor certification certified by the Department of Labor (DOL). However, there are some visa categories (which will be discussed below) that do not require a labor certification filing.

In reviewing the I-140 petition, the USCIS will review the employee's eligibility for the I-140 classification sought as well as review the employer's eligibility to file a Form I-140. The USCIS's approval of Form I-140 establishes the employee's eligibility for the Form I-485 Application to Adjust Status to Permanent Resident.

Selection of Preference Category:

In submitting Form I-140 Immigrant Visa Petition, employers must select the appropriate visa preference category as the basis for I-140 approval. The visa preference category is determined by the employee's basis of eligibility for the immigrant visa. The following are the most common types of employment based preference categories for permanent residency:

- **EB1 (Employment Based First Preference)---**The EB1 category does not require the filing of a labor certification with the Department of Labor (DOL). Instead, employers can directly file Form I-140 Immigrant Visa Petition requesting EB1 classification. This category is designated for:
  - Multinational Managers/Executives who have been employed with a multinational company in a managerial or executive capacity abroad and will continue to do so in the US parent, branch affiliate or subsidiary;
  - Outstanding Researchers/Professors; and
  - Individuals who can demonstrate Extraordinary Ability in the arts, sciences or business.

- **EB2 (Employment Based Second Preference)**---The EB2 category does require that the employer obtain an approved labor certification as the basis for the Form I-140 petition. This category is designated for situations where the **labor certification requires** at least:
  - A Masters degree or higher; or
  - A Bachelors degree plus five (5) years of post-bachelors, progressive experience.

- **EB3 (Employment Based Third Preference)**---The EB3 category does require that the employer obtain an approved labor certification as the basis for the Form I-140 petition. This category is designated for situations where the **labor certification requires** at least at least 2 years of experience up to and including Bachelors degree plus 5 years of experience.

Each fiscal year, the government allocates a certain number of immigrant visa numbers to various visa preference categories. The number of available immigrant visa numbers varies by country based on that country's usage of visas in the prior fiscal year. Within the scope of overall timing due to country of birth, an employee's visa process will further depend on the visa preference category under which the permanent residence process falls.

As such, an employee who was born in a country that has a high usage of immigrant visas (most typically India, China, Mexico, and the Philippines) from a certain preference category may have to wait longer for green card approval compared to nationals from other countries as their country's visa usage may be more backlogged. If a visa preference category is backlogged or does not contain available visa numbers, it means that the Form I-485 cannot be submitted to USCIS or cannot be processed by the USCIS until there are sufficient visa numbers available. These numbers are monitored by the Department of State on a monthly basis as will be discussed in more depth below.

The visa preference category becomes important with regard to overall timing of the green card process as the visa numbers available in the higher visa preference categories (ie: EB1) are less used and thus less backlogged than those in lower visa preference categories (ie: EB3). For the EB2 and EB3 categories, these issues are typically contemplated during the preliminary drafting stages of the labor certification.

Priority Date:

An employee's Priority Date is his/her "place in line" with respect to the permanent residency process. The issue of priority date also plays a role with regard to the timing of the permanent residency process. This will further be discussed below.

- For the **EB1 category**, the priority date is established on the date the USCIS receives Form I-140 Immigrant Visa Petition.

- For the **EB2 and EB3 categories**, the employee's Priority Date is established as of the date the labor certification is filed with the DOL.

For all visa categories, Form I-140 Immigrant Visa Petition must be approved in order for the priority date to be officially assigned to the employee.

Using a Priority Date from Another I-140 Petition:

It is possible for an employee to utilize a priority date from a previously approved Form I-140 immigrant visa petition. For example, if a prior employer obtained an I-140 petition approval for an individual and did not withdraw or revoke that approval, it is possible to request that the USCIS utilize the priority date of that prior I-140 approval

notice when the currently employer is submitting its Form I-140 immigrant visa petition. The use of this old priority date can sometimes be instrumental in speeding up the overall permanent residency process for an employee.

FORM I-485 APPLICATION TO ADJUST STATUS TO PERMANENT RESIDENT

For employment based permanent residency processes, the basis of a I-485 filing is the Form I-140 Immigrant Visa Petition. The I-485 "adjusts" or changes one status from that of a nonimmigrant (H1B or L-1) to that of a permanent resident in the United States. Dependent spouses and children under age 21 are included in this stage of the permanent resident process and also must submit I-485 applications with supporting documentation.

Employment-Based I-485 Generally:

In addition to reviewing whether there is a valid I-140 petition to support the I-485 application, USCIS will also review whether there are any issues that would render an applicant inadmissible for adjustment of status purposes and thus determine whether the I-485 should be denied. The Form I-485 includes a list of detailed questions regarding criminal history, past immigration violations, and past memberships and associations, and actions against governments. The application also requires the applicant to detail their full employment and residential history, provide a sealed medical examination from a USCIS approved civil surgeon, as well as other supporting documents.

USCIS typically adjudicates employment based I-485s via mail. However, if USCIS determines that further inquiry is required as to whether an applicant should be allowed to adjust status to permanent resident, USCIS will schedule an in-person interview so that these issues can be reviewed in further detail prior to USCIS adjudication. If the applicant has questions about an incident or circumstance that could render him inadmissible for adjustment purposes, it is critical that the applicant bring this to Younossi Law's attention immediately and most certainly PRIOR to the filing of the I-485. It is key that these issues be assessed for potential impact on the application and possibly briefed for USCIS.

As will be further discussed below, the timing of when to file Form I-485 rests on whether one's priority date is "current." Likewise, whether the USCIS can approve a pending Form I-485 depends on whether the priority date is "current."

How to Determine if a Priority Date is "Current"---Impact of Visa Backlogs and Visa Retrogression:

As referenced above, each fiscal year, the government allocates a certain number of immigrant visa numbers to the various visa preference categories. The number of available immigrant visa numbers varies by country based on that country's usage of visas in the prior fiscal year and the number of available visas is further broken down into various visa preference categories.

Because many countries oversubscribe their allocation of visa numbers (ie: there are more applicants for a visa category than there are visas available per that country's allocation for the fiscal year), the government must determine who is eligible to proceed with filing Form I-485 and whose Form I-485 can be approved by USCIS. The Department of State (DOS) monitors the progression of visa numbers and issues a Visa Bulletin on a monthly basis forecasting the availability of visas and/or backlogs. This bulletin is posted on the DOS website at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. Historically, the visa number usage has been greatest for the countries and categories that include: India, China, Mexico and the Philippines and all applicants in the EB-3 category. In fact, the DOS Visa Bulletin has separate breakout columns for India, China, Mexico and the Philippines due the high visa demand from these countries.

To address the issue of oversubscription and regulate the issuance of visa numbers per the pool of applicants, the DOS imposes "cutoff" dates to allocate the order in which visas are to be issued. The cutoff dates can move forward in time (when the supply of visas for a particular country/category exceeds demand) or these cutoff dates can "retrogress" (when the demand for visas for a particular country/category exceeds the supply). The "cutoff" date is the measure by which to compare whether the priority date is current.

- **Priority Date is Current:** When the government deems there are sufficient visa numbers in a particular visa category, the government deems the category "current" and anyone eligible for that visa category may proceed with filing Form I-485 after filing Form I-140, regardless of priority date.

- **Priority Date is Subject to Cutoff Date:** If usage of a particular visa category is oversubscribed (ie: there are more applicants for a visa category than there are visas available), the government will indicate a "cutoff" date. Only those whose **priority date is on or before the cutoff date** can have their application approved or processed by USCIS in that month.

- **Visas are Unavailable:** If the government determines that there are no available visas numbers for a particular visa category for the remainder of the fiscal year, the government will indicate that visa numbers for that category are "unavailable."

One's priority date must be “current” or be on or before the cutoff date listed in the Visa Bulletin for his/her preference category and country at two times during the green card process:

1. when the I-485 Application to Adjust Status to Permanent Residence is *filed*; and,
2. when the I-485 is approved, providing permanent resident or "green card" status.

Interpreting the DOS Visa Bulletin:

To illustrate the reading of the DOS Visa Bulletin to determine if a I-485 can be filed or can be processed below is a minimized version of the November 2009 Visa Bulletin reflecting the EB1, EB2, and EB3 preference categories by country of birth for that month with various permanent residency process scenarios.

	All Other Countries	**China**	**India**	**Mexico**	**Philippines**
EB1	Current	Current	Current	Current	Current
EB2	Current	01APR05	22JAN05	Current	Current
EB3	01JUN01	01JUN01	22APR01	01JUN01	01JUN01

- **Example #1:** Employer files a PERM for an Indian national on January 1, 2008. The PERM requires a Masters degree and 2 years of experience. The PERM was approved and Employer filed Form I-140 based on this approved PERM on August 1, 2008 and requests EB2 classification based on the PERM requirements. Employer’s I-140 is approved March 3, 2009. Can an I-485 be filed for the employee?
  - **Answer:** NO. Per the current visa bulletin, the cutoff date for Indian nationals in the EB2 category is January 22, 2005. As such, the USCIS is only accepting I-485 applications for Indian nationals in the EB2 category with priority dates of January 22, 2005 or earlier. As this employee’s priority date is January 1, 2008, he will likely need to wait about 4 years before an I-485 can be filed for him.

- **Example #2:** Employer files a PERM for a Kenyan national on April 5, 2008. The PERM requires a Masters degree and 0 years of experience. The PERM was approved and Employer filed Form I-140 based on this approved PERM on March 5, 2009 and requests EB2 classification based on the PERM requirements. Employer’s I-140 is approved October 15, 2009. Can an I-485 be filed for the employee?

- **Answer:** YES. Per the current visa bulletin, there is no cutoff date for nationals of "All Other Countries" in the EB2 category. As the priority date of April 5, 2008 is current for this visa category, the I-485 can be filed immediately.

- **Example #3:** Employer files a PERM for a German national on December 10, 2008. The PERM requires a Bachelors degree and 3 years of experience. The PERM was approved and Employer filed Form I-140 based on this approved PERM on August 3, 2009 and requests EB3 classification based on the PERM requirements. Employer's I-140 is approved September 30, 2009. Can an I-485 be filed for the employee?
  - **Answer:** NO. Per the current visa bulletin, the cutoff date for nationals of "All Other Countries" in the EB3 category is June 1, 2001. As such, the USCIS is only accepting I-485 applications for nationals of "All Other Countries" in the EB3 category with priority dates of June 1, 2001 or earlier. As this employee's priority date is December 10, 2008, he will likely need to wait about 7 years before an I-485 can be filed for him.

It is important to note that priority dates do not necessarily progress at the rate of real calendar time. As such, there may be some months where the cutoff dates may not progress at all or progress in minimal amounts (weeks or days). As referenced above, if the DOS determines that the visa demand far outweighs the available visa numbers the dates can retrogress or even become unavailable. Younossi Law monitors the DOS Visa Bulletin on a monthly basis to determine whether certain applications may be filed and/or whether some pending applications may soon be adjudicated by USCIS.

Concurrent Filing of Form I-140 and Form I-485:

While Form I-140 is the basis of eligibility for Form I-485, it is possible to file Form I-485 with USCIS even if USCIS has not approved the Form I-140 petition filing. This is referred to as the "concurrent filing" of Form I-485 with Form I-140. It is possible to concurrently file Form I-485 with either current submission of Form I-140 or with a Form I-140 petition that is pending adjudication with the USCIS.

In order for concurrent filing to be possible, the priority date for the particular visa category must be current.

Taking Advantage of Cross-Chargeability:

Determining what country an individual falls under with respect to visa category is based on one's country of birth, not country of citizenship. That is, if someone pursuing permanent residency was born in India but later became a citizen of Canada, his visa number would be "charged" against India's visa allocation for that particular visa category based on his country of birth.

Cross-chargeability is an option when someone's visa number can be charged against a different country than country of birth. There are two instances when this is possible:

- An individual's visa number can be charged against their spouse's country of birth if their spouse is also an applicant on the permanent residency application.
- An individual's visa number can be charged against their parents' country of birth if the parents were only temporarily residing in the country of birth at the time of the applicant's birth.

The ability to use cross-chargeability can be instrumental in speeding up a permanent residency process. For example, an Indian national's EB2 visa process will likely be backlogged which could prevent him from filing I-485 for quite a few years. However, if that Indian national was married to a spouse born in the Germany who will be a dependent applicant on the I-485, the I-485 application could be immediately filed requesting cross-chargeability based the spouse's birth in Germany.

American Competitiveness in the Twenty-First Century Act (AC21):

On October 17, 2000, former President Clinton signed into law the American Competitiveness in the Twenty-First Century Act (AC21). It is important to keep in mind that the USCIS has not issued final regulations pertaining to AC21. USCIS has only provided guidance with respect to AC21 issues via inter-agency and field memorandums.

Prior to AC21, beneficiary employees were required to remain employed with the petitioner employer that filed the I-140 petition on their behalf until the approval of the permanent residency and for a reasonable time thereafter. If the beneficiary employee changed positions while the permanent residency process was pending, the new employer would have to begin an entirely new permanent residency process for the beneficiary employer.

AC21's portability provisions allow an employee beneficiary to move to a new employer and keep intact the permanent residency process begun by their prior petitioner employer without the new employer having to file a new labor certification or I-140 on their behalf. The underlying permanent residency process may remain intact upon the employer change only if:

- Form I-485 has been filed with USCIS and remains pending (ie: has not been adjudicated) for at least 180 days

AND

- The new employment position is in a same/similar occupation as the employment position listed in the underlying Form I-140 or labor certification filed by the prior petitioner employer.

USCIS will take into account several factors to determine whether the new employment position is in a same/similar occupation as employment position listed in the underlying Form I-140 or labor certification filed by the prior petitioner employer including: comparison of the job duties, comparison of occupational codes, and comparison of offered salaries for significant discrepancies.

USCIS has issued guidance indicating that the move to a new employer before the 180 days should not necessarily render a beneficiary employee ineligible to port his/her permanent residency process. However, it is important to note that changing employers at this juncture could ultimately jeopardize the permanent residency process. The USCIS has indicated that an I-140 is no longer valid for porting purposes when:

- The I-140 is withdrawn before the I-485 has been pending for at least 180 days.
- The I-140 is denied or revoked at any time.

Beneficiary employees who change employers prior to the 180 days of the I-485 filing therefore risk the approvability of the permanent residence process in the event that: the prior employer withdraws the I-140 Petition; the USCIS denies the I-140 Petition on its merits; and/or issues a Request for Evidence on the I-140 Petition filing and the prior employer opts not to respond or does not respond in a manner that sufficiently addresses the USCIS inquiry. Failure to respond or incomplete responses to USCIS inquiries could lead to a denial of the I-140 petition which in turn leads to the USCIS denying the I-485 application.

USCIS has issued guidance indicating that while the I-140 Petition does not have to be approved when a portability request is made to the USCIS, the petition does have to be approved in order for USCIS to grant the portability request. An un-adjudicated Form I-140 Petition is not made "valid" merely through the act of filing the petition with the USCIS or via the passage of 180 days. A denied Form I-140 petition is also not considered valid regardless of when it was denied and regardless of whether a portability request was made to the USCIS. For this reason, it may be advisable to port employment only if the I-140 is approved, the I-485 has been pending for 180 days AND the new position is same/similar to the position in the underlying application.

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Younossi Law looks forward to working with you on the permanent residency process. Should you have any questions regarding the process, please contact the immigration professional with whom you usually work at Younossi Law.