



IMMIGRATION UPDATE - SEPTEMBER 28, 2020

Posted on September 28, 2020 by Cyrus Mehta

Headlines:

[October Visa Bulletin Shows Major Movement in Employment-Based Cases; USCIS Applies Filing Date Rather Than Final Action Date to Certain Adjustment Applications](#) – USCIS issued guidance the same day stating that the Filing Date, rather than the Final Action Date, applies to employment-based I-485 adjustment of status applications.

[ICE Proposes a Fixed Time Period of Admission and Extension-of-Stay Procedure for Nonimmigrant Students, Exchange Visitors, Foreign Media Representatives](#) – ICE proposes to amend its regulations by changing the admission period of F, J, and I individuals from duration of status to admission for a fixed time period.

[EAD Delays Due to COVID-19: E-Verify/I-9 Guidance](#) – To complete the Form I-9 work authorization verification process, new employees who are waiting for their EADs, and current employees who require reverification, may present certain Forms I-797, Notice of Action, as a List C document that establishes employment eligibility.

[DOL Announces Permanent Adoption of Electronic Issuance of PERM Labor Certifications](#) – The Department of Labor announced that it is permanently adopting the electronic issuance of PERM labor certifications to employers and their authorized attorneys or agents.

[CBP Publishes Notices Extending Travel Restrictions at Land Ports of Entry Between the United States and Canada, Mexico](#) – CBP issued notices extending temporary restrictions on travel of individuals from Canada and Mexico into the United States along land ports of entry at the border. Such travel is limited to "essential travel," as defined in the notice, effective through October 21, 2020.

[USCIS Issues New Guidance on Application of Public Charge Rule](#) – Following litigation, USCIS said it will apply the public charge final rule and related guidance in the USCIS Policy Manual to all applications and petitions postmarked (or submitted electronically) on or after February 24, 2020.

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October Visa Bulletin Shows Major Movement in Employment-Based Cases; USCIS Applies Filing Date Rather Than Final Action Date to Certain Adjustment Applications

On September 24, 2020, the Department of State released the October 2020 Visa Bulletin, which shows major movement in employment-based cases.

Among other things, the Filing Date for an EB-3 from India has advanced nearly five years to January 1, 2015, from February 1, 2010, while the Filing Date for an EB-1 from India advanced to September 1, 2020, from July 1, 2018. By contrast the Filing Date for EB-2 India advanced to only May 15, 2011, from August 15, 2009.

USCIS issued guidance the same day stating that the Filing Date, rather than the Final Action Date, applies to employment-based I-485 adjustment of status (AOS) applications. The Alliance of Business Immigration Lawyers (ABIL) said that in the past, USCIS has been reluctant to allow applicants to use the Filing Date, only doing so in very limited instances. The Filing Date only allows the filing of an I-485 application when permitted by the USCIS. The Final Action Date determines when lawful permanent residence is issued.

As an example, ABIL noted, since USCIS will accept I-485 filing, a new I-140 would need to be filed for an individual who, for example, wants to downgrade from EB-2 to EB-3. Since the EB-3 Filing Date has significantly overtaken the EB-2 Filing Date, a beneficiary of an approved EB-2 petition may want to re-file, or downgrade to EB-3. If the beneficiary qualified under EB-2, the beneficiary should be able to qualify for EB-3, and the appropriate "professional" or "skilled worker" category would need to be checked on the form. The individual may still rely on an old labor certification when filing the I-140 under EB-3. The I-140 can be filed concurrently with the I-485, so the I-140 need not be approved at

the time the I-485 is filed with USCIS.

There is nothing in the law or regulations precluding the existence of two I-140 petitions, one under EB-2 and the other under EB-3. Still, a beneficiary who wishes to downgrade from EB-2 to EB-3 must seek legal advice.

ABIL also recommends that AOS applicants also file applications for an employment authorization document (EAD) and advance parole (AP), to enable work and travel in the event of a disruption in the applicant's current immigration status, ability to obtain a visa, or position.

Contact your ABIL attorney for advice in specific situations.

Details:

- October 2020 Visa Bulletin,
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-october-2020.html>
- "When to File Your Adjustment of Status Application for Family-Sponsored or Employment-Based Preference Visas: October 2020,"
<https://bit.ly/3mU2HCX>
- State Department guidance, updated September 17, 2020,
<https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html>
- "Downgrading from EB-2 to EB-3 Under the October 2020 Visa Bulletin,"
The Insightful Immigration Blog,
<http://blog.cyrusmehta.com/2020/09/downgrading-from-eb-2-to-eb-3-under-the-october-2020-visa-bulletin.html>

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ICE Proposes a Fixed Time Period of Admission and Extension-of-Stay Procedure for Nonimmigrant Students, Exchange Visitors, Foreign Media Representatives

U.S. Immigration and Customs Enforcement (ICE) proposes to amend its regulations by changing the admission period of F, J, and I individuals from duration of status to admission for a fixed time period. ICE said that admitting individuals in those categories for a fixed period will require those who wish to remain in the United States beyond their authorized admission period to apply for an extension of stay with U.S. Citizenship and Immigration Services or to leave the United States and apply for admission with U.S. Customs and Border

Patrol at a port of entry.

If finalized without change, the rule would make the biggest changes to regulation of international students and scholars in 20 years. Written comments on the proposed rule are due by October 26, 2020, via the method identified in the notice.

Details:

- ICE notice of proposed rulemaking, 85 Fed. Reg. 60526 (Sept. 25, 2020), <https://www.justice.gov/eoir/page/file/1319896/download>
- "Fact Sheet: Proposed Regulation on the Change of Admission Period of F, J, and I Nonimmigrants from Duration of Status," Presidents' Alliance on Higher Education and Immigration, <https://www.presidentsalliance.org/fact-sheet-proposed-regulation-on-the-change-of-admission-period-of-f-j-and-i-nonimmigrants-from-duration-of-status/>

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EAD Delays Due to COVID-19: E-Verify/I-9 Guidance

U.S. Citizenship and Immigration Services (USCIS) issued a notice on September 23, 2020, stating that issuance of certain employment authorization documents (EADs) may be delayed due to the COVID-19 pandemic.

To complete the Form I-9 work authorization verification process, new employees who are waiting for their EADs, and current employees who require reverification, may present certain Forms I-797, Notice of Action, as a List C #7 document issued by the Department of Homeland Security that establishes employment eligibility, even though the notice states it is not evidence of employment authorization, USCIS said. For the notice to be acceptable, it must include a Notice Date issued between December 1, 2019, and August 20, 2020, and indicate that USCIS has approved the employee's Form I-765, Application for Employment Authorization. Both new and current employees may present this notice to complete the I-9 until December 1, 2020. New employees must also present an acceptable List B identity document.

USCIS said that by December 1, 2020, employers must reverify employees who presented the notice as a List C document. Those employees must present new evidence of employment authorization—either their new EADs or any other

acceptable documentation they choose—from either List A or List C.

Details:

- USCIS notice, <https://www.uscis.gov/i-9-central/form-i-9-related-news/employment-auth-ization-document-ead-delays-due-to-covid-19>

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DOL Announces Permanent Adoption of Electronic Issuance of PERM Labor Certifications

The Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) announced on September 25, 2020, that it is permanently adopting the electronic issuance of PERM labor certifications to employers and their authorized attorneys or agents.

On March 24, 2020, OFLC announced that due to the impact of the COVID-19 pandemic, it would electronically issue PERM labor certifications to employers and their authorized attorneys or agents through June 30, 2020. On June 16, 2020, OFLC announced that it was extending that period through September 30, 2020. On July 30, 2020, DOL signed a memorandum of agreement (MOA) providing access to the Department of Homeland Security (DHS) to all applications for permanent labor certification submitted to OFLC through the PERM online system, including the ability to verify that a PERM application has been certified. OFLC said the MOA "eliminates the need for duplicate certification requests and increases the integrity of the PERM program by supporting efforts to combat instances of fraud and abuse in connection with labor certification and employment-based immigrant and nonimmigrant programs."

Details:

- OFLC announcement, Sept. 25, 2020, <https://www.dol.gov/agencies/eta/foreign-labor/>

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CBP Publishes Notices Extending Travel Restrictions at Land Ports of Entry

Between the United States and Canada, Mexico

U.S. Customs and Border Protection (CBP) issued notices extending temporary restrictions on travel of individuals from Canada and Mexico into the United States along land ports of entry at the border. Such travel is limited to "essential travel," as defined in the notice, effective through October 21, 2020.

CBP said the restrictions were necessary to lower the risk of transmission and spread of the virus associated with COVID-19.

Details:

- CBP notice (Canada), 85 Fed. Reg. 59670 (Sept. 23, 2020), <https://bit.ly/3cG7tiH>
- CBP notice (Mexico), 85 Fed. Reg. 59669 (Sept. 23, 2020), <https://bit.ly/2S43cfE>
- Department of Homeland Security fact sheet, updated September 18, 2020, <https://www.dhs.gov/news/2020/09/18/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>

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USCIS Issues New Guidance on Application of Public Charge Rule

U.S. Citizenship and Immigration Services (USCIS) said it will apply the public charge final rule and related guidance in the USCIS Policy Manual to all applications and petitions postmarked (or submitted electronically) on or after February 24, 2020. For those who sent their applications or petitions by commercial courier (for example, UPS, FedEx, or DHL), USCIS will use the date on the courier receipt as the postmark date.

USCIS released the guidance on September 22, 2020, on its application of the public charge final rule and related guidance to applications and petitions in light of a September 11, 2020, decision by the U.S. Court of Appeals for the Second Circuit (*State of New York, et al. v. DHS, et al.* and *Make the Road NY et al. v. Cuccinelli*) that allows the Department of Homeland Security (DHS) to resume implementing the rule nationwide, including in New York, Connecticut, and Vermont. The decision stays a July 29, 2020, injunction issued during the COVID-19 pandemic that prevented DHS from enforcing the public charge final rule during the national health emergency.

Details:

- USCIS notice,
<https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule>
- Final Rules on Public Charge Determinations, NAFSA,
<https://www.nafsa.org/regulatory-information/final-rules-public-charge-determinations>

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Firm in the News

Cyrus Mehta has authored a FAQ on ethics during the COVID-19 pandemic, as part of an ongoing project. New FAQs will be added as new issues arise.

<https://www.aila.org/practice/ethics/ethics-resources/2016-2019/faqs-ethics-pandemic> (available to AILA members) **Mr. Mehta** was an invited speaker on hot topics in ethics at the AILA Indiana Chapter monthly meeting on September 24, 2020 via Zoom Video.

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