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EB3 to EB2 conversion

Submitted by Rajiv S. Khanna on Sep 6th 2012

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EB3 to EB2 conversion

EB3 to EB2 porting

EB3 to EB2

Good afternoon, everyone. This is US Immigration Attorney, Rajiv S. Khanna for immigration.com, the Law Offices of Rajiv S. Khanna, P.C.

This is a community information call. It is not intended to create an attorney/client relationship. Whatever we say here remains merely an informational conversation.

This is a follow-up to the August 30 Community Conference Call.

We are talking about issues related to converting from EB3 to EB2.

What is this idea of EB-3 to EB-2 conversion?

Most of you know that EB-3 for countries like India and China are very backed up and EB-2's are better. Actually, for the rest of the world also, EB-2 is much better. So sometimes even though you have obtained a Labor Certification (PERM certification) and then you obtained an I-140 approval or you are on the path to that, you feel, "Oh, maybe I should have filed an EB-2, or maybe circumstances have changed and now I can file under EB-2." So, in those cases, when we get the priority date from an EB-3 case and put it on top of an EB-2 case, thereby essentially converting an EB-3 case to an EB-2 case, we refer to that loosely as a conversion. Really, it is not a conversion. It is a new case filed under EB-2, and essentially the priority date is being transferred.

One relevant question here. Can priority dates be transferred if an employer revokes my old I-140?

The answer is "Yes." USCIS has said that they will allow transfers (carryovers) of priority dates even if the old I-140 is revoked, as long as the revocation is not for fraud.

So, when you do this analysis of EB-3 to EB-2 conversion, the first question you want to ask yourself is ?Am I currently qualified for EB-2??

Why is this question important? Remember a Green Card is for a job in the future, which means today I am working as a programmer; tomorrow's job could be a project manager, and even though I continue to work as a programmer for the next three years or until I get my Green Card, it is not a problem. The future job of project manager can be given to me once the Green Card is approved. Or before. That is up to the employer, but it is not required. So the idea is a Green Card is for a future job. However, you must be qualified for it on the date you filed the PERM application.

So let's say you have three years of experience after Bachelor's Degree, and you know that the Green Card will take three or four more years, can you file under EB-2 today?

No, because you are not qualified. You may be qualified in two years or three years, but that does not mean you can file an EB-2 right now.

So are you currently qualified for EB-2?

One of the recommendations I have is for people who are not qualified and don't have the five-year experience or have a three-year Bachelor's Degree, you may consider doing a Master's Degree online. I have a video on this. It's on my blog. It tells you how to choose an appropriate on-line Master's Degree program that is accredited and that will help you get into EB-2.

Here is a link to the video and a transcript:

Accreditation of distance education for EB-2

The next question you want to ask yourself is Do I want to process my EB-2 case with the same employer who petitioned the EB-3 or some other employer?

It is a little bit easier to do it with another employer, but given the choice between going with a totally new employer and going with an employer who is totally, solidly behind me, who is going to pay the attorney's fees. This is a considerable expense. If they're on my side and they want to cooperate fully with the law, then of course I would stay with the same employer.

The next question you have to ask yourself is Do you need a promotion--present or future?

What does that mean? What if you have three years of experience before you joined this employer, you want to process your Green Card through this employer, and you've got two years with this employer now? Now you've got five years but two years are with the same

employer through whom you are going to file your EB-2 who also did your EB-3 earlier. In order to use that experience, you must be offered a job which is more than fifty percent different than what you were doing before. Let's say the old job was all coding and the new job is mostly providing project management, so that's a promotion and then the experience that you have gained with this employer can be applied towards your EB-2.

I hope I'm making myself clear. Most of you already know the concepts, but still I want to put it out there so that you are sensitized to the issues. You can ask your lawyers the right kind of questions and make sure your case is being properly approached. These concepts are difficult. They can be complicated. Even we can make mistakes. Lawyers are not perfect, as all of you know. Be educated and take your lawyers' help in making these decisions.

It is very important to have a bona fide job.

What does that mean? If you have a three-employee company and the employer says, "I will you a promotion." That's a little difficult to establish and believe. It can be true but, if you are a 300-employee company or a 3,000-employee company, probably a better case for a promotion, but of course it all depends upon the facts of the case. I'm just giving you an example. This does not mean smaller companies cannot process promotion cases.

How do I eliminate the risk of problems of EB-3?

What does that mean? I already have my EB-3 approval. I don't want to do anything that's going to mess that up.

What you can do is, you can make sure, taking the example of the programmer under EB-3 who wants to go for project manager under EB-2. If your EB-3 was for a programmer, make sure you continue working as a programmer until the I-140 for the new case is approved. So don't change jobs, because, if you take a promotion to project manager, then the Government could question, "This guy has already taken a promotion, then why would he come back to the lower job which is the Green Card job?" Do not take a promotion until the I-140 for the new case is approved. That would be important.

What if I used AC-21?

This is a very tricky situation. You are one of the lucky ones who's got your I-485 pending and I-140 is approved under EB-3. You changed from IBM to Sun Microsystems. You changed employers. Your job was programmer. Now, for AC-21, the job that Sun gives you has to be the same or similar to the job IBM gave you. So it's got to be a programmer or thereabouts. Now the problem here is this. In order for Sun Microsystems to process your case under EB-2, they have to assess whether they have to promote you so that an EB-2-level job can be given to you or can they use the same job. This can be tricky.

So for AC-21, the key question is can the same job which was the subject of AC-21 be used to file an EB-2 case?

Tricky question. Depends upon the facts of the case.

Now, to the posted set of Questions from the Community Conference call of August 30th.

First Set of Questions

Question: I have an I-485 pending on EB-3. I have been with my company for 12 years. They are planning to apply for EB-2. Same company. I have a Bachelor's four-year engineering degree from India. Can I qualify for EB-2?

Answer: Yes if the job that is being offered to you is sufficiently dissimilar from the EB-3 job.

Question: Is there any audit risk?

Answer: No. Filing for a conversion (again, I am using the term "conversion" loosely) does not create any additional audit risks.

Question: If we apply in EB-2, will my EB-3 application processing stop?

Answer: No, it does not stop.

Question: What happens to the EB-3?

Answer: It goes on. Don't take up a promotion. I just mentioned that.

Question: My wife is working on EAD. Will her EAD be affected?

Answer: No, not at all. No problem at all.

Question: If I get EB-2 I-140 approved, can I use EB-3 priority date?

Answer: Yes.

Question: At that time, will I get another EAD from EB-2 processing?

Answer: No. What you do is, you take the EB-2 I-140 approval and put it on top of the existing I-485. So your old I-140 gets knocked out and the new one now sits on top of your I-485. So I-485 does not need to be re-filed.

Second set of questions

Question: He is preparing for his I-140 for EB-2. Can this be done premium processing?

Answer: Sure.

Question: Do we have to specify the pending EB-3 case information?

Answer: You will have to, because if there is an I-140 approved or pending under the old case, you have to mention that. There is a question I think on the form.

Question: Should we do it during the I-140 filing?

Answer: Yes. On the form itself, there is a question. If there is only a Labor Certification pending, there is nothing to say. If the I-140 is either pending or approved from the old case, you have to say it in the new I-140.

Question: When I started filing for my EB-2 case, my attorney mentioned not to file AC-21.

Answer: I think that's a personal choice. I like to file AC-21's and then I like to assess whether I would need a promotion case or I can go ahead with the same AC-21 job for EB-2. I would like your lawyer to decide that as I do not know the case.

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