



Member Perspective

EB-5 versus EB-2/3: My Priority Date Under EB-2/3 Is Current, Should I Continue My EB-5 Petition?

By [Rebecca S. Singh, Esq.](#), Partner and Senior Attorney, Mona Shah & Associates Global

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For the past two years, EB-5 developers found themselves a niche domestic market—the H1-B candidate. Visa retrogression for countries like India drove many to seek out EB-5 investments as a faster way of attaining permanent resident status.¹ However, since the release of the October 2020 Visa Bulletin by the Department of State (DOS) on September 24, 2020, investors from this niche market have begun to look at EB-5 a little hesitantly. The reason for this is that the dates for the employment-based categories, EB-2 and EB-3, have jumped significantly, perhaps giving the impression that the long visa wait time may be coming to an end. However, the dates have vaulted under Chart B, *Dates for Filing*. Under the EB-3 category, the date advanced from February 1, 2010 to January 1, 2015, and from August 15, 2009 to May 15, 2011 under the EB-2 category.² In contrast, the dates under the *Final Action Dates* (Chart A) only advanced by a few months. Although welcoming news for India-born applicants, there is much yet to consider.



THE SIGNIFICANCE OF THE ADVANCEMENT

Since October 2015, DOS has referred to two cut-off dates for immigrant visa processing: (1) *Final Action Dates*, known as Chart A, and (2) *Dates for Filing*, referred to as Chart B.³ If an applicant's priority date (PD) is current under Chart B, the applicant and his or her family can apply for adjustment of status. Once the I-485 adjustment of status application is filed, concurrently with an I-765 and I-131 applications, the applicants can obtain unrestricted employment authorization ("EAD") and advance parole ("AP") for travel within 90 days. Currently, USCIS issues a combined authorization card, which includes both of these employment and travel benefits.

¹ The United States is the second-most common destination for Indian migrants, representing approximately two million of the total 14 million Indian migrants worldwide. See also: <https://mshahlaw.com/demand-us-eb-5-visa-continues-rise-india-distinctions-made-china/>

² <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-october-2020.html>

³ To understand the difference of Chart A and Chart B, please see our article *Help Is On The Way For Mainland China EB-5 Investors Stuck In Immigrant Visa Backlogs!* at <https://mshahlaw.com/help-is-on-the-way-for-mainland-china-eb-5-investors-stuck-in-immigrant-visa-backlogs/>

What is significant about the October 2020 Visa Bulletin is not just the movement of the dates, but that USCIS is actually *accepting* filings of I-485 adjustment of status applications. This is one of the few and rare occasions that USCIS has used Chart B in the past five years. This will allow EB-2 and EB-3 applicants to port to new employment in similar occupations after 180 days, gaining more flexibility for the applicant and his or her family, rather than extending the H1-B for yet another year.

WHAT TO CONSIDER?

Although USCIS has taken strides to help those stranded in the EB-2 and EB-3 categories for years, there are several issues one should keep in mind.

Chart B is NOT the Green Card

Although Chart B under the October 2020 Visa Bulletin allows for applicants to file the I-485 adjustment of status application, and to obtain the EAD and the AP, the I-485 application will be *set aside in a queue* until the applicant's PD is current under Chart A, the *Final Action Date*. Once current under Chart A, then USCIS will adjudicate the I-485 applications to determine eligibility for permanent residence (the green card). For many applicants, the dates in Chart A are many years away.

As we have seen significant advancement in Chart B under EB-2 and EB-3, we only saw slight movement under these categories for Chart A. According to USCIS guidelines, Chart B becomes available to applicants within the U.S. filing for adjustment of status when there are more immigrant visas available than there are applicants in the fiscal year.⁴ This has been an unprecedented year with the global pandemic, which has caused delays with USCIS and U.S. consulate closures globally. For all we know, the numbers may very well be skewed, and we may see the same dates moving forward or even retrogressing for the next few years as the world gets back to a new normalcy. It is also important to note that October 1st is the beginning of the new fiscal year when another set of visas become available. It may be the skeptical to note that although we may see movement now, we may *not* see any further movement in the Visa Bulletin in the coming months.

Age Out of Children

Chart B does not help age out children. The Child Status Protection Act (CSPA) allows for a child's age to freeze under the age of 21 once an individual has filed the I-140 petition. However, once the I-140 petition is approved, the child's age begins to run again. Without complicating matters under the CSPA, as there is a significant backlog under the EB-2 and EB-3 categories, the child has a potential of aging out and will not receive the green card under the parent's petition. USCIS has made it clear that Chart A determines the date for calculating a child's age, so the child must wait for the parent's PD to become current under Chart A to determine the child's eligibility for the green card.

⁴ <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates>

Downgrading from an EB-2 to an EB-3

EB-2 applicants may want to think twice before downgrading to an EB-3. Although currently the date in Chart B under EB-3 has advanced 5 years (whereas it jumped less than 2 years under EB-2), we may actually see further backlog in the EB-3 category under Chart A as many will file to downgrade.

It is also wise for the EB-2 applicant to seek advice from counsel as downgrading categories can hurt potential age-out children. The applicant may also lose out on the EB-2 category if it advances ahead of the EB-3 category.

Increase of Filing Fees

As of October 2, 2020, USCIS will be implementing a fee increase on certain applications and petitions. An additional fee must be included to file Forms I-765 and I-131 (EAD & AP) with the I-485 application, \$490 and \$585 respectively. Since USCIS will accept the I-485 applications as of October 1, the immigration community will see added disorder within the Service as thousands of applications will be filed to beat the fee increase. I would not be surprised if applications are lost or returned back to the sender. Either way, USCIS will sure make a pretty penny! As was recently disclosed, USCIS collected more than \$1.8 billion in EB-5 filing fees during Q1 and Q2 FY2020, a growth of approximately \$158 million (or 9%) year-over-year.⁵ Let's hope we see some action in the adjudication of these applications.

WHY CONTINUE THE EB-5 PROCESS?

If your PD is not anywhere near 2009 or 2010, EB-5 is still the faster option for Indian-born individuals seeking permanent residency in the U.S. Many EB-5 investors are contemplating withdrawal from the EB-5 program, but it would be advisable not to do so (other than the difficulties of withdrawal from an “at risk” program) as Chart A under the EB-2 and EB-3 categories only advanced a few months. It may be years yet until an EB-2 or EB-3 applicant receives the green card. Be aware of what options you may have—it is always better to have a backup option than having no option at all.

⁵ <https://mshahlaw.com/iiusa-submits-report-for-the-record-for-house-judiciary-committee-hearing-on-uscis-oversight/>