

Update: I-140 Premium Processing and 2-Year EAD

During the summer of 2006, U.S. Citizenship and Immigration Services (“USCIS”) initially permitted the filing of Form I-907 Request for Premium Processing Service for many types of pending Form I-140 Immigrant Petition for Alien Worker cases. However, by the fall of 2007, USCIS reconsidered this policy, and suspended the filing of such I-907 premium processing requests for certain I-140 petitions.

That suspension remains today. Indeed, petitioners or beneficiaries of only certain pending I-140 petitions may file an I-907 request to expedite the processing of such I-140 petitions – where the beneficiary’s “H-1B” non-immigrant visa classification eligibility is due to expire. Unfortunately, many still improperly file such I-907 premium processing requests.

Specifically, one is eligible to file such an I-907 request only if the beneficiary is in the U.S. in H-1B visa status. (Those beneficiaries who have already run out of H-1B visa eligibility time, and who changed status or left the U.S., are not able to benefit at this time.) Also, the beneficiary must be within sixty days of the end of the 6th year of H-1B visa eligibility time. The purpose of this premium processing option is to benefit those individuals who could not qualify for a one-year extension of H-1B visa eligibility beyond the 6th year (based upon other U.S. government regulations), and who needed an approved I-140 petition to remain in the US.

It was originally assumed that the term “6th year” could be read to mean “last year” in H-1B visa eligibility time. However, USCIS maintains that it will continue to define the term “6th year” literally. Therefore, if the beneficiary is in the 7th year (or greater) of H-1B visa eligibility time, a premium processing request may not be accepted.

Recently, USCIS announced it will begin issuing two-year Employment Authorization Documents (“EAD”) in certain cases. But USCIS has narrowly defined which types of cases will be eligible for such two-year EAD.

USCIS will review the issue of visa retrogression – simply stated, the availability of certain visas – at the time the Form I-765 Application for Employment Authorization is filed. If the visa category priority date is “current” as of the date of I-765 application filing, but later retrogresses – simply stated, is delayed or made unavailable – while the I-765 application is pending, USCIS has the discretion to review the case again and issue the two-year EAD. But, if the priority date is backlogged or unavailable as of the date of I-765 application filing, but later becomes “current” while the I-765 is pending, USCIS also has the discretion to review the case again and issue a one-year EAD.

Importantly, in order to be eligible for a two-year EAD card on a concurrently-filed I-485 Application to Adjust Status, the I-140 petition must be approved. If the I-140 is still pending, USCIS will only issue a one-year EAD card.

[Portions of this article are excerpted from official American Immigration Lawyers Association memoranda.]

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