

## I-140 INTERFILING | FREQUENTLY ASKED QUESTIONS

### INTERFILING BACKGROUND INFORMATION

Certain employment-based I-485 adjustment of status (AOS) applicants waiting for adjudication with pending or approved EB-2 or EB-3 immigrant petitions may consider “interfiling.” This strategy is intended to swap a more favorable employment-based (EB) preference category between two approved immigrant visa petitions, and so enable USCIS to adjudicate a I-485 application more quickly.

USCIS has confirmed:

*An adjustment of status applicant whose application is based on a particular immigrant category occasionally prefers to have the pending application considered under another category... The decision to grant or deny a transfer request is always discretionary...*

*When an applicant requests a transfer of the adjustment application from one basis to another, the priority date must be current for the category the applicant wishes to use. In order to transfer an adjustment application to a new basis involving a preference classification, the applicant must be the beneficiary of a pending or approved visa petition which has a visa available...*

*The adjustment applicant must request in writing that USCIS transfer the applicant's pending adjustment application from one basis to another” <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-8>.*

To interfile, an adjustment applicant must:

- Have continuously maintained adjustment eligibility
- Hold a current, pending I-485 application
- Hold eligibility for the requested category transfer
- Hold a current priority date with the requested category transfer

### FREQUENTLY ASKED QUESTIONS

#### 1. What does the term “interfiling” refer to? Is this the same as “upgrading”, “downgrading”, or “transfer of basis”?

AOS applicants with pending employment-based I-485s, who desire to update the foundational basis for their AOS application (for example, to substitute an EB3 priority date to a more favorable EB2 priority date), may do so with a written request to USCIS. This request may be referred to as “transfer of an underlying basis” or an “interfiling”. Other common terms include “upgrading” or “downgrading”. All of these terms typically refer to the same process.

#### 2. I have a pending employment-based AOS application, my underlying EB-2 or EB-3 I-140 Priority Date is no longer current, but I hold another approved EB2 or EB3 I-140 with a current priority date. What are my options?

After a full consultation and analysis of your specific details, Jackson & Hertogs may recommend several different options, including the following possibilities:

##### Type 1: USCIS Interfile

- A filing with the relevant USCIS office may be recommended for cases where the employee’s employer (that is a current J&H company client) has an eligible I-140 that is current, and the employee wants USCIS to transfer the basis of a pending Adjustment of Status to this I-140.
- **Example:** A Petitioner has an approved EB-2 I-140 for the employee that is current. The Petitioner’s employee’s adjustment of status is pending based on another Petitioner’s EB-3 I-140 that is NOT current. A USCIS Interfile request may be best suited for this employee.
- This filing would include a Form I-485 Supplement J, confirming that the same job with the same employer remains open to the employee.

# I-140 INTERFILING | FREQUENTLY ASKED QUESTIONS

## Type 2: AC21 “employer port” and Interfile at the Same Time

- This procedure is for employees porting to a J&H-represented company on a pending AOS after an I-140 immigrant visa petition was approved with an earlier employer. If this employee has an earlier I-140 immigrant visa petition approval notice based on the same PERM (underlying the I-140 upon which the pending AOS is based) and it is current, we can try to USCIS to consider using that other I-140.
- However, this procedure is not explicitly allowed by USCIS regulation, and J&H is aware of isolated reports of Interfile requests being denied where the newly “ported” employer did not file an I-140 immigrant visa petition on behalf of the employee requesting Interfile. While there is little risk in requesting Interfile under these circumstances, we cannot guarantee approval.
- This process requires Form I-485, Supplement J, with information on both the approved EB-2 and EB-3 I-140 petitions.
- This Form I-485 Supplement J will be sent to the Service Center where the AOS is pending.
- **Example:** Employee has a EB-3 I-140 anchoring a pending AOS application. Employee also has a previously approved EB-2 I-140 based on the same PERM application as the “downgrade” EB-3 I-140 immigrant visa petition. Employee seeks to port from one company to another after the appropriate 180-day waiting period. The interfile request would simultaneously request a change-of-employer “port” while also requesting a change-of-basis for the pending I-485 application, from EB-3 to EB-2.

## Type 3: Letter Requesting Interfile After AC21 Port

- This strategy may be used in the same situation as type 2, BUT for employees who have already filed an I-485 Supplement J form to port their employment from one company to a J&H client company.
- For this type, J&H will only send a letter to USCIS (with supporting docs), requesting an interfile, along with a copy of the previously submitted I-485 Supplement J and a receipt notice (or approval notice if applicable) of that same I-485 Supplement J.
- This filing will be sent to the Service Center where J&H sent the porting Supplement J (where the AOS is pending).
- **Example:** Employee filed a downgrade EB-3 I-140 and AOS. Employee joins a J&H client company more than 180 days after the AOS was filed. Employee also has an EB-2 I-140 based on the same exact PERM as the downgraded EB-3 I-140. J&H has already filed a Form I-485 Supplement J with a porting request. Now this former employer’s EB-2 I-140 priority date is current. J&H will send a letter to the Service Center where the AOS application is pending and ask USCIS to consider using the EB-2 I-140, providing evidence of the previously submitted Form I-485 J supplement.

### 3. Will an interfiling be acknowledged by USCIS?

USCIS should and usually does issue a receipt notice for the I-485 Supplement J form, so an Interfile request including such a form should produce a receipt. Otherwise, however, USCIS will not acknowledge receipt.

### 4. Can I upgrade an I-485 from EB3 to EB2 and subsequently change jobs?

AC21 regulations confirm that employment-based AOS applicants can transfer to a new position in the “same or similar occupational classification” as established in the I-485 application when that filing has been pending for at least 180 days.

In addition, USCIS may consider the 180-day clock to restart upon submitting an interfile request with a Form I-485 Supplement J. Please consult with a J&H attorney regarding the particulars of your situation.

### 5. May I file another I-485 instead of filing an interfile?

USCIS generally recommends submitting an interfile request in lieu of a new I-485 application. Submitting multiple I-485 applications introduces potential delay, as USCIS is likely to request additional information as to which I-485 the applicant desires to pursue. However, there may be times when another I-485 filing is the better option. Please consult with a J&H attorney regarding the particulars of your situation.

### 6. Will an Interfile affect an EAD or AP?

Interfile requests should not affect a pending EAD or AP application.

### 7. If I upgrade from EB3 to EB2, am I allowed to later downgrade back to EB3 if needed?

Historically, with some exceptions, the USCIS has allowed applicants to interfile between categories more than once.

### 8. I filed a EB3 concurrently with an I-485, which is pending still. May I upgrade to an EB2?

Yes.

### 9. Is it permissible to port an I-485 and then upgrade or downgrade it with an approved I-140 from a former employer?

While there is no definitive answer from DOL or USCIS on this matter yet, and there are isolated anecdotes of such Interfile requests being denied, there is no particular harm in trying to request this benefit. Please consult with a J&H attorney regarding the particulars of your situation.

### 10. How long should I wait after Interfile to port to a new company?

You should wait at least 180 days after submitting any Interfile request.

### 11. My priority date is not current on a second I-140. May I still interfile?

No.

### 12. Can an interfile request be made via phone?

***Please note that this FAQ does not provide specific legal advice on any given case. Jackson & Hertogs cautions you to seek individualized advice from qualified legal counsel for your particular set of circumstances.***