

CONCURRENT I-140 & I-485 PROCESSING – FREQUENTLY ASKED QUESTIONS

1. What is "Concurrent Filing"?

Concurrent filing in this context means the filing of your application for adjustment of status (I-485) either at the same time that your employer (or you, in the case of Extraordinary Ability or National Interest Waiver petitions) file an immigrant visa petition (I-140) or the filing the I-485 while the I-140 is still pending. Concurrent filing became possible as a result of a new interim rule that came into effect on July 31, 2002, and is limited to individuals who fall under the first three employment-based categories: EB1 (Extraordinary Ability Aliens, Outstanding Researchers, Multinational Managers/Executives); EB2 (Advanced Degree professionals and Aliens of Exceptional Ability); and EB3 (Professionals and Skilled Workers). Prior to this new rule, one had to wait until I-140 approval to file the I-485 application. This Rule sets forth two alternative methods for concurrent filing:

- The I-140 and I-485 can be filed together.
- The I-140 can be filed first, followed by an I-485 filing that includes a copy of the I-140 receipt notice.

2. Does this rule apply to Consular Processing?

No. This rule only applies to individuals who will process their Permanent Residency applications through USCIS. It does not apply to individuals who choose to process their applications at a Consulate or to those individuals who are not eligible to apply for adjustment of status. If you choose Consular Processing, you must wait for the I-140 to be approved, after which the National Visa Center will forward a package of documents with a case number necessary for filing the initial forms for Consular Processing.

3. When was this rule enacted?

This interim rule was enacted by USCIS on July 31, 2002, without any advance warnings. The American Immigration Lawyers Association has been requesting this change for a long time. However, it appears that this rule change came about as a result of increased concerns for National Security. By accepting I-485 applications concurrently with I-140 petition processing, USCIS can search their system and obtain finger print checks at an earlier time. They believe that this will help them to apprehend terrorists and other criminals. As mentioned above, this is an interim rule. If/when USCIS issues a final rule, it may be different from the Interim rule. Until a final regulation is issued, the interim rule is in effect.

4. The rule states that the I-140 petition and I-485 application can be filed concurrently only if an immigrant visa is immediately available. What does this mean and how can I determine whether and how it applies to me?

United States immigration laws limit the number of immigrant visas (or Permanent Residence applications) that can be issued/approved each year. A foreign national's place in the "waiting line" is determined by his/her priority date, preference category and country of birth. An immigrant visa is considered available when the applicant has a "priority date" that is earlier than the date listed in the Department of State's Visa Bulletin for the applicant's particular "preference category" and country of birth. One's priority date is based on the date that the labor certification application is filed with the State Employment office or DOL under PERM, or the date that the I-140 immigrant visa petition is filed if a labor certification is not required. Please note that the priority date is not "locked in" until the I-140 immigrant visa petition is actually approved. Preference categories are based on the category of immigrant visa petition that is being filed. An extraordinary ability alien, outstanding researcher and multinational managerial petition are all considered priority workers and fall under the EB1 category. Labor certification based cases are either EB2 or EB3 preference categories determined by the educational and experience requirements of the position as listed on the labor certification. For example, if the labor certification requires an advanced degree, then the eventual preference category will be EB2; however, if the requirement listed on the labor certification is a B.S. and 4 years of experience, the preference category will be an EB3 even if the foreign national him/herself possesses a master's degree.

5. What is the current state of immigrant visa availability for the three employment-based preference categories? Is this expected to change and, if so, when?

Around the 10th of each month, the Department of State issues a visa bulletin for the upcoming month. The visa bulletin can be found through a link on our web site or directly at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

In the past, there was a “shortage” of immigrant visas for particular preference categories for different countries of birth, most notably China, India and the Philippines resulting in the development of waiting lines or quota backlogs. Quota backlogs can be handled either by specific dates or by a notation of “unavailable” meaning that there are no visas available at all for the time being. As stated above, country of birth is used to determine which quota or line applies to an individual. In July 2005, however, the Department of State set the EB3 category as unavailable for world wide immigration—meaning that in addition to persons born in India, China and the Philippines, all countries were impacted. All visa numbers for the EB3 category became unavailable. It is anticipated that the numbers will open up again at the beginning of the government’s new fiscal year (October 1).

If the priority date is not current, then the I-485 cannot be submitted; if the I-485 is pending with USCIS when the priority dates retrogress or become unavailable, then the I-485 can remain pending but cannot be adjudicated until the priority date is again current. The Interim Rule regarding concurrent processing does not permit concurrent filing of the I-140 immigrant petition and I-485 if there is a backlog in visa availability. Therefore, if backlogs in visa availability occur prior to the filing of the I-485 application, the I-485 would not be accepted by USCIS until the priority date is again current.

Individuals in the U.S. who are (1) in H-1B status, (2) are beneficiaries of approved I-140 petitions and (3) are otherwise eligible to adjust status (file a Form I-485) but for the lack of visa numbers may be eligible to extend their H-1B status in three year increments under AC21.

6. What about my family members? Can they file “concurrently” too?

Yes. Even though the rule does not explicitly mention family members, derivative beneficiaries can file their I-485 applications at the same time as the principal applicant. Therefore, derivative family members are covered under the “concurrent I-140 & I-485” filing rule. Please remember that derivative family members mean your spouse and unmarried children under the age of 21. There are some exceptions to children who may reach the age of 21 based on another new law called the Child Status Protection Act which was signed into law on August 6, 2002. There are complexities in age-out cases that would need to be addressed on a case-by-case basis.

Please note that the same rules regarding priority dates and preference categories apply to derivative family members who hold the same preference category and priority date as the principal applicant. This means that the priority date must be current both at the time of filing and the time of adjudication of the I-485 for each family member. For example, if a spouse’s I-485 application is not adjudicated at the same time as the employee’s application and there is a roll back in visa numbers so that the priority date is no longer current, USCIS will hold the pending application until the priority date is again current before it can be adjudicated.

7. If I file the I-140 and I-485 concurrently, can I also apply for an Employment Authorization Document (“EAD”) and Advance Parole travel document (“AP”) at the same time?

Yes. An applicant for adjustment of status can submit applications for employment authorization (I-765) and advance parole travel authorization (I-131) as a pending immigrant. This is also true for derivative family members. However, it may be prudent to continue to maintain your underlying nonimmigrant visa classification while the I-485 application is pending (see discussion below).

8. This interim rule applies to all of the first three employment-based categories. But are there any categories where it is not recommended that I file concurrently?

The rule does apply to all three employment-based categories. It is our recommendation that if the I-140 is based on extraordinary ability, outstanding researcher or national interest waiver, that you consider not filing your I-485 concurrently. USCIS has more discretionary authority to approve/deny these types of cases than when the I-140 is supported by an approved labor certification. If there are processing delays because USCIS requests additional evidence on the I-140, this would impact other applications. Furthermore, if USCIS denies the petition, your status in the U.S. may be jeopardized unless you had maintained your nonimmigrant status. Other cases that perhaps should not be done concurrently are those where a new beneficiary is substituted into an employer’s existing labor certification or where there is a successor-in-interest labor certification based on a corporate merger. Again, we believe that cases should be approached on an individual basis to determine what is best in any given situation.

9. Do I have to file my I-485 concurrently with the I-140?

No.

10. My I-140 is pending, but I do not want to file my I-485 right away, because I plan to get married in six months and I want to wait until I am married to file my I-485 so that I can include my spouse. Is this still permissible or do I have to file my I-485 right away?

You do not have to file concurrently. This question highlights one of many reasons why it might NOT be advisable to file concurrently. In order for a spouse to be a derivative beneficiary, the couple must be legally married before the principal applicant's I-485 is approved or before the individual immigrates based on an immigrant visa. If the marriage occurs after the I-485 is approved or the immigrant visa is issued, then the spouse is no longer considered a derivative beneficiary and would need to process his/her case through a family based petition process. Please see other sections of our website for information regarding marriage and immigration. As a practical matter, it is better to file the derivative's application at the same time that the principal's I-485 application is approved.

11. If the I-140 and I-485 petitions are filed concurrently, will the I-140 be adjudicated prior to the I-485 or will they be adjudicated at the same time?

USCIS has not been consistent in how they process concurrently filed petitions and applications. Since the implementation of concurrent processing, we have seen cases where both the I-140 and the I-485 have been adjudicated at the same time and separately. Please note that there is a possible impact on the portability provisions of AC21 in those cases where porting from one position to another occurs while the I-140 is still pending even if the I-485 has been pending for more than 6 months. Pursuant to the American Competitiveness in the 21st Century Act (AC21) which became law on October 17, 2000, if 180 days have passed since you filed an Adjustment of Status application, you may switch employers (or jobs) as long as you remain in the same or similar occupation. Please check our website for more information about AC21. Please note, however, that although the law is in effect, USCIS has not yet issued regulations and we are relying on a USCIS memorandum detailing how it will handle these situations. Please note that you must have work authorization to join the new employer. This means that you either must have an EAD or a new H-1B visa petition approved on your behalf, depending upon your situation.

It is possible that if you change jobs and your I-485 is pending for more than 180 days and then USCIS denies the I-140 that your I-485 application would also be denied since there would be no job to "port" to a new employer. USCIS has issued various memorandum regarding this issue. If you are considering porting either while the I-140 is pending or after it is approved, we recommend that you seek counsel from an immigration attorney.

12. Will concurrent processing speed up the I-485 process?

The processing times for each service center can be found through a link in our web site. USCIS has not been consistent in how it processes concurrently filed cases. Some I-485 cases appear to be adjudicated when the I-140 is adjudicated and others are not. We believe that ultimately, the sooner you file the I-485, the sooner USCIS will process the case barring delays based on security checks and priority date retrogressions.

13. I am currently on an H-1B visa, which expires in five months. If I file the I-140 and I-485 petitions concurrently and obtain an EAD, do I need an H-1B visa extension?

Once an application for adjustment of status is pending, one's status in the U.S. is that of a pending adjustment applicant. Further, it is not necessary to maintain an underlying nonimmigrant status because an adjustment applicant could obtain an EAD and an AP to work and travel. In July 1999, USCIS issued a rule that allowed for individuals to maintain H or L classification in the U.S. while they had applications for adjustment of status pending. Therefore, adjustment applicants who held H or L status could choose to maintain their nonimmigrant status (e.g. by working only for the petitioning employer), and use the H-1B or L-1 visas for travel and employment authorization, with similar rules for their derivative family members (e.g. H-4 not working, H-4 or L-2 not using AP). However, if the I-485 application is denied and the individual did NOT maintain the underlying nonimmigrant classification, then they would go out of status in the U.S. Although employment-based I-485 applications are usually approved, it is advisable to be aware of the risk.

In conclusion, it may be important to maintain one's nonimmigrant status throughout the time that the I-140/I-485 petitions are pending in the event that the I-140 is denied, since the I-485 cannot stand without the underlying approved I-140 petition.

14. Despite all of the uncertainties about the Interim Rule regarding concurrent filing, isn't it still a good idea, because the sooner I file my I-485 the sooner the "clock will start ticking" under the law which allows me to change jobs once my I-485 has been pending for 180 days?

Not necessarily. As mentioned above, pursuant to AC21, the law now provides that an adjustment application that has been pending for 180 days or more remains valid even if the applicant changes jobs or employers, **provided that the new job is in "the same or a similar occupational classification"** as the job for which the I-140 was filed. USCIS has still not issued any regulations regarding AC21's implementation, so we do not know with certainty how strictly USCIS will interpret the "same or similar" provision; nor do we know the impact of a job/employer change which occurs prior to the 180th day when the adjustment application remains pending after the 180th day.

It is even less certain how USCIS will interpret the interplay between the 180-day law and the concurrent filing rule. The 180-day law was passed to address specific concerns Congress had about USCIS processing delays. In fact, the title of this section of AC21 is "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence". USCIS may well argue that since the concurrent filing rule is intended to eliminate delay, the 180-day law does not apply at all, or at least does not apply until the I-140 is approved.

Even if USCIS finds that the 180-day law applies, the timing of any job/employer change could be problematic. If you change jobs/employers after the adjustment has been pending for 180 days, but before USCIS adjudicates the I-140, USCIS could deny the I-140 if it is determined that it was not approvable at the time of filing, resulting in a denial of the I-485. Without clarification from USCIS, we do not recommend that you take advantage of the portability provisions under concurrent filing unless the I-140 has been approved AND the I-485 has been pending for at least 180 days. Please consult an immigration attorney before you port employment so that you understand the potential impacts.