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Insights, News & Events

IMMIGRATION OFFICIALS FORMALIZE POLICY ON GREEN CARD APPLICATION LANE CHANGES

Insights
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In an announcement sure to be welcome news for employers, federal immigration officials recently released new instructions permitting certain employment-based green card applications to "change lanes" into another category, thereby clearing the path for a more efficient and quicker green card process. The January 21 announcement from the US Citizenship and Immigration Services (USCIS) permits those in the first (EB-1), second (EB-2), and third preference (EB-3) categories to transfer the underlying basis of their pending adjustment of status applications in an effort to clear a path for a more speedy resolution. While requesting such a transfer has always been permissible, there has never been an established procedure – until now. What do employers need to know about this welcome development?

What's The Formal Process?

Starting immediately, applicants with a pending I-485 adjustment of status application can now request to transfer their applications from one employment based preference category to another by submitting a request to the following address by the end of the current federal government fiscal year of September 30, 2022:

Attn: I-485 Supp J
U.S. Department of Homeland Security
USCIS Western Forms Center
10 Application Way
Montclair, CA 91763-1350

Related People

Ralph Hua
Partner - In Memoriam
206.682.2308

Jinyoung Lee
Partner
303.218.3676

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Why Is This Important?

In its announcement, the USCIS acknowledged that there is an "exceptionally high number of employment-based visas available this fiscal year" – especially in the category of the first (EB-1) and second (EB-2) employment based immigrant visa petition. By clearly defining the process allowing applicants to "change lanes," the agency will now allow some cases filed in those categories to reach the finishing line sooner than other categories.

This is a reversal of the trend that existed about two years ago when the third category (EB-3) had a more favorable filing cutoff date. At that time, many applicants took the opportunity to change course and filed their green card applications in the EB-3 category. But now that EB-2 has become the faster lane for a good portion of those applicants, a new wave of changing lane requests has arrived.

When done properly, changing lanes allows many applicants to obtain green cards sooner than they would have in the EB-3 lane. To an employer, the sooner an employee obtains a green card, the sooner its burden and the associated cost on sponsoring a nonimmigrant visa ends. It brings greater stability for both the employee and the employer.

Watch Out for Illegal Lane Change

Embedded in the procedure of transferring the underlying adjudication basis is the principle that the new underlying basis must itself be proper. In the context of employment-based green card application, this translates to an employer's intent to employ the beneficiary in the position described in the immigrant petition upon green card approval, and the employee's intent to take on the said position upon green card approval.

In other words, if an employer would like to help changing an employee's pending EB-3 green card application to EB-2 using this procedure, the question is whether the job described in the EB-2 petition is the job that the employee will hold upon green card approval. This intent for both parties is certified under the penalty of perjury on one of the forms in this process (Form I-485 Supplement J).

Because of the backlog for many applicants born in India and China, many have changed positions or even employers

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over the years as this lane-changing opportunity arrives. It is imperative that both the employer and the employee review the information and the certification language on Form I-485 Supplement J to determine if the intent of placing the employee in the specific position in the underlying immigrant petition upon green card approval still exists.

It only takes one party to lack such a specific intent to render the lane change illegal. While intent is intangible, the Supreme Court has held that "the state of a person's mind is as much a fact as the state of the person's digestion." Falsely attesting to the intent in this setting may carry severe legal consequences.

Conclusion

Fisher Phillips will continue to monitor developments related to this announcement and provide additional guidance as it becomes available. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Immigration Practice Group.

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