EB-2 PERM and EB-2 in General - Navigating PERM Immigration Complexities:

An EB-2 petition is an employment-based 2nd preference petition for a foreign professional with an advanced degree or its equivalent (masters degree or higher), or a foreign national who has exceptional ability in the sciences, arts, or business. In some instances, a professional with a Bachelor's degree (or its U.S. equivalent) and five years of progressively responsible experience in the job being offered may be considered to possess the equivalent of a Master's degree in the field.

Very special considerations must be given to the Indian three year Bachelor of Commerce Degree. We continue to encounter issues with processing cases where an EB-2 case uses the Bachelor's of Commerce Degree plus five years of progressive experience in the field to equate to a Master's Degree. It is critical that you consider the use of a qualified legal professional before moving forward with a case of this type.

An EB-3 petition is an employment-based 3rd preference petition for a foreign national employee who has a Bachelor's degree, or, if no degree, then is a skilled worker, meaning the foreign national has at least two years of work experience for the job being offered. Additionally, there is a sub-category for unskilled workers that requires less than two years experience.

It is also important to note that the government may respond to a PERM application with an Audit that may delay the PERM Application process. Oftentimes, if an employer requests a foreign language in the PERM process, the case is likely to come under Audit by the DOL. It is important for the employer and the employee to fully understand the implications of requesting a foreign language requirement in a PERM labor certification application in either an EB-3 or an EB-2 case.

Additionally, once the PERM case is approved (whether it be an EB-3 or an EB-2 case) it is important to know that the employer may encounter an issue in the I-140 part of the case. The I-140 must be filed with the USCIS not later than 180 days after the PERM labor certification is approved by the USDOL. After the I-140 is filed with the USCIS, the USCIS may issue a Request For Evidence (RFE) that addresses (1) the "ability of the employer to pay" the Federally Mandated Prevailing Wage (PW) set forth in the PERM labor certification; and/or (2) the extent to which the PERM has requested "the employer's reasonable job requirements" in the job description of the PERM application. Suffice it to say that preparing the job description for the PERM labor certification is an "art form".

What is the "Priority Date" and how does the client get one?

The priority date is the date that an alien initially expresses his or her intent to immigrate to the United States through an appropriate petition. Namely, for employment-based applicants, this date is the earlier of the date an application for labor certification was received by the DOL or the date that an immigrant preference petition was filed. For certain kinds of employment based petitions, a labor certification is not required, such as for national interest waiver applications and petitions for aliens of extraordinary ability or outstanding researchers/professors. In these kinds of cases, the immigration process starts with the immigrant petition rather than the PERM labor certification application.

If a PERM labor certification application is a prerequisite for an immigrant petition, as it is in most EB-2 and EB-3 categories, the petitioner cannot file the I-140 petition until after the DOL approves the PERM labor certification application. The priority date is thus the filing date of the PERM labor certification application with the Department of Labor. The beneficiary will retain this priority date when filing the I-140 petition once the DOL certifies his or her PERM labor certification application. For family-based applicants, this is the date the USCIS first received the immigrant petition (Form I-130) filed on the alien’s behalf.

"Good Things come to those who wait" - Watching the Immigrant Visa Number Availability - What is your "Priority Date"?

In addition to the apparent difference in the education and experience requirements, another significant difference between EB-2 and EB-3 categories is that visa number availability is different for two categories. Visa number availability means whether there are available immigrant visas that beneficiaries or employment or family based petitions can apply for. This is regulated by the visa number quotas set by the U.S. Congress. Whether there will be an available immigrant visa number thus depends on the quota and how many people are waiting for immigrant visas in the same category.

The Priority Date - Advancement, Retrogression or just plain Patience?

Because certain aliens are subject to restrictions on the annual immigrant visa quota, and sometimes, the quota has been reached in some categories, or there are many people waiting for visa numbers, the State Department publishes a monthly waiting list, called the Visa Bulletin. The Visa Bulletin is based on priority dates, to regulate who is eligible to apply for adjustment of status or complete consular processing. On that list, the State Department provides a date for each family-based or employment-based preference category. That visa availability date is known as the “cut-off date.” Please visit the U.S. Department of State Visa Bulletin page at our site or at the DOS site at travel.state.gov for Visa

Priority Date information.

When is my case "current" - When can I get the work permit? What is the significance of the priority dates and the cut-off dates?

For those aliens who are subject to the annual immigrant visa quotas, the priority date and the cut-off date determine when they can file an application for adjustment of status or complete consular processing in order to become a permanent resident. If their priority dates are earlier than the cut-off dates, they may apply for adjustment of status or start the consular processing. This is referred to as a “current” priority date.

If their priority date is later than the cut-off dates then they must wait until the cut-off dates pass their priority dates. Further, if an application is in process, and the visa numbers retrogress, then an alien will have to wait until his or her priority date becomes current again to continue processing his or her application. Therefore, the earlier the priority date, the sooner the alien will become eligible to apply for permanent resident.

PERM Regulations Impact EB-2 versus EB-3 decision.

The PERM regulations provide that if a position requires qualifications

that are greater than those defined in the OES Job Zones level and SVP (Specific Vocational Preparation) level, the employer may be required to provide a business necessity justification.

The OES Job Zones has five levels, among which Job Zones level 4 and Job Zones level 5 are most relevant to the PERM applications. Every occupation or a similar occupation to it is classified under the various levels.
These are not very flexible standards. In order to determine what level job is being offered, you match the job duties to the same or similar occupation in the OES database. Then you see what Job Zones level it has been classified under. For example, a computer programmer has been classified under Job Zones level 4.

According to the DOL, a position that has been classified under Job Zones level 4 usually requires a Bachelor's degree. A position that has been classified under Job Zones level 5 usually requires a minimum of Bachelor's degree and may also require an advanced degree. The Job Zones classification is related to the the Standard Vocational Preparation level accorded to each position.

What the DOL is doing is saying is that occupations in Job Zones level 1 are the kinds that normally require the least amount of skill, training and education. Occupations in Job Zones level 5 are the kinds that

normally require the most amount of skill, training and education. The Job Zones and SVP scales are objective criteria the DOL uses to help distinguish between low skill and high skill jobs.

For example, a Job Zones level 4 position has an SVP of 7, while a Job Zones level 5 position has an SVP of 8. According to the DOL, an SVP of 7 is defined as a position that requires from at least two years to at most four years of experience, education, and training combined. An SVP of 8 is defined as a position that requires from at least four years to at most ten years of experience, education and training combined. This is how the DOL differentiates between the various Job Zones levels. A job offer, in order to be "normal," must conform to both the Job Zones level requirements and the SVP requirements.

For a position that is classified under Job Zones level 4, if the employer requires a Bachelor's degree and 3 years of experience, the employer will be exceeding the requirements. According to the DOL, a Bachelor's degree is the same as 2 years of experience, education or training. Thus, in our example, the employer is requiring experience, education and training that totals 5 years of experience, when a Job Zones level 4 position is only allowed to require up to a maximum of 4 years of experience. In this case, the DOL may consider the requirement to be unduly restrictive and request

that the employer provide a business necessity justification.

The Job Zones level directly affects one’s choice with regard to selecting an EB-2 and EB-3 position. For example, the positions of computer programmer and computer software engineer are both Job Zones level 4 positions. If an employer intends to require a master’s degree for the position of computer programmer in order to file an EB-2 petition, the DOL may challenge that the employer’s requirements as being unduly restrictive because it exceeds the level 4 requirements. The DOL may require the employer to provide documentation and evidence to justify the business necessity for the higher education requirements.

What is the significance of Choosing between an EB-2 and EB-3 position?

The immigrant visa numbers for the EB-3 category frequently retrogress or otherwise become unavailable for those born in China, India, Mexico and the Philippines. Each country has an annual quota of assigned immigrant visa numbers for each employment-based category. If the visa number for one country is oversubscribed in one category, those visa numbers will retrogress or become unavailable to beneficiaries born in those countries. In other words, even if the PERM application and immigrant petition (Form I-140) are approved, but the visa number is not available to the alien beneficiary, the alien will NOT be eligible to file for adjustment of

status or consular processing to obtain lawful permanent residence.

Sometimes, the EB-2 visa numbers retrogress as well. During some periods of the year, the immigrant visa numbers may become totally unavailable due to over subscription. For immigrant visa number availability, please check the Visa Bulletins posted on Department of State's website.

Generally, if there is any backlog, the EB-2 category usually has a shorter waiting period than the EB-3 category. If the visa numbers are not current for the category according to the alien's priority date, the alien has to wait until it becomes current before being eligible to file an application for adjustment of status (Form I-485) or complete consular processing in order to become a lawful permanent resident. Therefore, it is of major concern whether an alien should file under the EB-2 or EB-3 category since such a decision will determine whether visa numbers are current.

The ultimate decision is yours but . . . what to do?

If an employer has real business needs justifying the requirement of education and experience qualifications that exceed the SVP, the employer may still go ahead and file an EB-2 PERM application. The employer should be prepared to provide business necessity documents and/or evidence to

justify its need once the DOL makes a request for such documentation. If the DOL requests documentation and/or evidence to support the business necessity, the PERM application may be delayed. However, so long as there is a real business need for the higher requirements, the application may still be approved.

Consider also that if you have already filed an EB-3 case that there is oftentimes not a problem if you also do an EB-2 case (if the employer can do one for you). This may advance your priority date. In other cases it may not pay to do the EB-2. It is critical to speak to a qualified legal representative about the advantages of doing the EB-2 case (if you have and EB-3 case pending) and for you to consider the advantages of doing a case for a PERM labor certification with an employer that you are not presently working for.

For more information about the PERM labor certification, the PERM audit process, the ability to pay issue or other issues related to the PERM labor certification process, please contact us at info@visaserve.com.