

Update on Employment-Based Immigrant Visa Retrogression  
October 31, 2005

The Immigration & Nationality Act sets a limit on the number of green card applications (or immigrant visas) that can be processed in a given fiscal year. No more than 140,000 people may become green card holders each year based on an offer of employment in the United States. In addition, immigrant visa issuance to nationals of any particular country may not exceed 7% of the total annual cap of 140,000.

The Department of State (DOS) divides the annual total figure of 140,000 immigrant visa numbers into twelve monthly allotments, broken down according to several employment-based "preference categories" and specific nationalities. Each month, DOS publishes a Visa Bulletin (accessible at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)) that shows immigrant visa availability in each employment-based (and family-based) preference category, according to country of nationality. If there are sufficient numbers in a given category to meet demand for that month, then the category is reported as "current." However, when there are categories in which demand exceeds supply in a particular month, the category is "oversubscribed" and a cut-off date is established. Any visa applicant whose Application for Labor Certification was filed on or before the cut-off date (or, in cases where no Labor Certification was required, whose I-140 Immigrant Petition was filed on or before the cut-off date) is eligible to apply for Adjustment of Status (or an immigrant visa through a consulate) during that month. All others must wait until the following month and check the Visa Bulletin again.

Until very recently, there have been sufficient numbers available to meet demand in almost all employment-based preference categories. However, decreased processing times for Labor Certification Applications and Immigrant Petitions have resulted in more demand for immigrant visa numbers. Demand is currently outstripping supply in several employment-based preference categories, causing those categories to "retrogress" in availability. DOS estimates that retrogression in additional preference categories will occur in the coming months.

Congressional legislation has been introduced to address the problem of immigrant visa retrogression. If enacted into law, the legislation would "recapture" 90,000 employment-based immigrant visa numbers unused in prior years. In addition, the bill would permit applicants to file Adjustment of Status ("green card") applications even though an immigrant visa number is not currently available. Although such applications could not be approved until the applicant's preference category became "current," permitting applicants to file would give them an authorized period of stay during which they could wait in the United States for their applications to be eligible for approval. During the waiting period, they would be entitled to work authorization and travel permission on the basis of their pending applications.

At this time, it is unclear whether the legislation will pass both houses of Congress and be enacted into law, or whether any legislation that does pass will contain the same provisions as the current bill. McCandlish Holton will continue to track the legislation and post updates as indicated.

For your reference, we have attached a set of frequently asked questions about this topic that were prepared by the American Immigration Lawyer's Association. If you have further questions about immigrant visa retrogression, please contact your McCandlish Holton immigration attorney.

## 1. WHAT IS THE "QUOTA BACKLOG"?

The Immigration and Nationality Act sets limits on how many green card visas may be issued each Fiscal Year (October 1 through September 30) in all visa categories. In addition, in the employment-based area where immigration is based on employment and not family relationships or investment, nationals of each country may obtain immigrant visas (i.e., a green card), in different preference categories (i.e., EB-1, EB-2, EB-3). The law further provides that no one country may have more than a specific percentage of the total number of visas available annually. If these limits are exceeded in a particular category, for a particular nationality, a waiting list is created and applicants are placed on the list according to the date of their case filing. This date is called a "Priority Date." The priority date is the single, most important, factor in any immigration case.

## 2. WHAT ARE THE DIFFERENT EMPLOYMENT-BASED PREFERENCE CATEGORIES?

Employment-Based First Preference (EB-1)  
Employment-Based Second Preference (EB-2)  
Employment-Based Third Preference (EB-3)  
Other Workers

## 3. WHAT DOES EB-1 MEAN?

*Employment-Based First Preference (EB-1)* includes: (1) Persons with extraordinary ability in the sciences, arts, education, business and athletics (persons who have risen to the top of their profession); (2) Outstanding professors and researchers; and (3) Multi-national executives and managers.

## 4. WHAT DOES EB-2 MEAN?

*Employment-Based Second Preference (EB-2)* includes: (1) Members of professions holding advanced degrees (Master's or Ph.D.) (The *position* must be one that requires a Master's or Ph.D. to perform the duties – the degree held by the individual does not determine whether or not it is an EB-2, rather it is the company's job requirements. Additionally, the immigration regulations provide that a job which requires a minimum of a Bachelor's degree PLUS a five years of progressively responsible experience will be considered equivalent to a Master's level position and will qualify for EB-2.); and (2) Persons of exceptional ability in the sciences, art or business. Persons of exceptional ability are those who have a degree of expertise above that which is ordinarily expected.

## 5. WHAT DOES EB-3 MEAN?

*Employment-Based Third Preference (EB-3)* includes: (1) Professionals and skilled workers (bachelor's degree or two years of training). The *position* must require a minimum of a bachelor degree or two years of training.

## 6. WHAT DOES "OTHER WORKERS" MEAN?

Other Workers includes positions that require less than two years of experience.

## 7. WHAT IS THE "PRIORITY DATE"?

If your category is employment-based and requires a labor certification, the priority date is established on the date a labor certification is filed with the State Workforce Agency. If your category is employment-based but does not require a labor certification, then the priority date is established on the date the CIS receives the I-140 Immigrant Visa Petition. However, the priority date does not attach to your case until the I-140 has been approved.

#### **8. WHY IS THE PRIORITY DATE IMPORTANT?**

In order for an individual to obtain an immigrant visa, a visa number must be available to you. This is referred to as the priority date being "current." The priority date is current if there is no backlog in the category, or if the priority date is on or before the date listed as current in the State Department's monthly Visa Bulletin. This Bulletin is accessible at [www.travel.state.gov](http://www.travel.state.gov). You may sign up online to have the Visa Bulletin automatically e-mailed to you by the State Department each month.

#### **9. CAN I GET AHEAD ON THE QUOTA BACKLOG LIST?**

There is no way to get ahead on the list, other than filing an Immigrant Visa Petition in a higher preference category, provided that the individual and/or their position meet the criteria to do so. Otherwise, the individual must wait until eligible to apply along with others on the list before proceeding with filing the last step in the green card process. The last step is accomplished by filing an application to adjust status to that of a lawful permanent resident in the U.S., or by obtaining an immigrant visa at a U.S. Consulate abroad.

#### **10. THE I-140 FILED ON MY BEHALF WAS BASED ON A LABOR CERT SUBSTITUTION. WHAT IS MY PRIORITY DATE?**

The Priority Date is determined by the CIS. We will know the Priority Date upon issuance of an I-140 Petition Approval Notice.

#### **11. WHAT IS THE DIFFERENCE BETWEEN THE VISA CATEGORY BEING "U" (UNAVAILABLE) AND "MM/DD/YY" (QUOTA BACKLOG)?**

Unavailable means that there are no more visas available at all for the month. If there is a date noted (i.e. 07-01-02), it is considered to be the cut-off date, and that means that there is a "quota backlog". Only individuals who have a priority date earlier than the cut-off date may move forward with the permanent resident process.

#### **12. WHAT DOES "C" MEAN?**

"Current" – this means that there is no quota backlog in this category.

#### **13. WHAT DOES IT MEAN TO BE "CURRENT"?**

If there is a "C" in your employment-based category on the Visa Bulletin, then there is no quota backlog and you may proceed with your I-485 adjustment application or immigrant visa application.

#### **14. IF THE VISA BULLETIN SHOWS A DATE OF 6-1-02 AND MY PRIORITY DATE IS 6-1-02, IS MY PRIORITY DATE CURRENT?**

No. In order for the priority date to be current, it must be a date prior to the date published in the visa bulletin.

**15. HOW OFTEN DO THE BACKLOGS CHANGE AND WILL THEY IMPROVE?**

Each month, the State Department issues the visa bulletin, usually in the middle of the month. When the bulletin is issued, it will provide information that will take effect on the first day of the following month. (i.e., on 9-12-05, the DOS released the dates effective as of 10-1-05). Depending on the availability of immigrant visas, the priority dates in each category and for each country can change each month. However, please note that the priority dates can also stay the same. They can move very slowly or progress by several months or years. They can move forward or backward. Therefore, there is no way to anticipate what the priority date will be in a future month or when a category will become current.

**16. THE CUT-OFF DATE IS JANUARY 1, 2000. DOES THIS MEAN THAT IT WILL TAKE 5 YEARS BEFORE THE PRIORITY DATE WILL BECOME CURRENT?**

No. It all depends on how many visas are used. Please see the answer to the above question.

**17. I HAVE AN APPROVED I-140 PETITION WITH MY PREVIOUS EMPLOYER AND MY CURRENT EMPLOYER IS SPONSORING ME NOW FOR A GREEN CARD. WHAT IS MY PRIORITY DATE?**

You may use the Priority Date attached to the approved I-140 Petition. The Priority Date will be printed in the top portion of the Form I-797 Approval Notice. You may use this priority date when you are eligible to file your adjustment or immigrant visa application based on your current employer's green card process.

**18. VISA AVAILABILITY IS BASED ON COUNTRY. IS THAT COUNTRY OF CITIZENSHIP OR COUNTRY OF BIRTH?**

Your country of *birth* is what determines your country of chargeability.

**19. MY SPOUSE WAS BORN IN A DIFFERENT COUNTRY THAN I WAS. SINCE THE I-485 IS BASED ON MY EMPLOYMENT, DOES MY SPOUSE'S COUNTRY OF BIRTH HELP ME?**

Your spouse's country of birth may also be used to determine chargeability. For instance, if you were born in India, but your spouse was born in France and there is a quota backlog for India, but no quota backlog for France in your preference category, you and your spouse may proceed with your immigrant process based on your spouse's country of birth.

**20. BOTH MY WIFE AND I WERE BORN IN INDIA AND MY PRIORITY DATE IS NOT CURRENT. OUR CHILD WAS BORN IN THE UNITED KINGDOM AND THE PRIORITY DATE FOR THAT COUNTRY IS CURRENT? CAN WE USE OUR CHILD'S COUNTRY OF BIRTH FOR ELIGIBILITY?**

No. You can use your spouse's country of birth for eligibility. However, your child's country of birth cannot be used.

**21. I HAVE HEARD THAT ONLY THOSE INDIVIDUALS FROM INDIA AND CHINA ARE SUBJECT TO QUOTA BACKLOGS. I WAS NOT BORN IN ONE OF THOSE COUNTRIES. DO QUOTA BACKLOGS APPLY TO ME?**

Yes. Quota backlogs can apply to everyone, regardless of where they are from. While the backlogs have typically affected some countries more than others, note that on the October Visa Bulletin, the backlogs apply to all countries for the EB-3 preference category.

**22. MY EMPLOYER HAS A LABOR CERTIFICATION PENDING ON MY BEHALF. DO QUOTA BACKLOGS AFFECT THE PROCESSING OF THE APPLICATION?**

No. The labor certification process is not affected by quota backlogs.

**23. CAN I CHANGE THE VISA CATEGORY AND/OR REFILE THE LABOR CERTIFICATION TO GET AROUND THE QUOTA BACKLOGS?**

No. The visa category cannot be changed once the labor certification (or I-140 if there is no labor certification) has been filed. Also, since quota backlogs are based on the filing date, it is not in your interest to refile a case now and obtain a 2005 or later priority date.

**24. THE LABOR CERTIFICATION FILED ON MY BEHALF WAS APPROVED. CAN THE COMPANY STILL FILE THE I-140 PETITION IF THE PRIORITY DATE IS NOT CURRENT?**

Yes. The filing and adjudication of an I-140 is not affected by the quota backlogs.

**25. MY I-485 WAS ALREADY APPROVED. HOWEVER, MY DEPENDENT'S APPLICATION IS STILL PENDING AND MY PRIORITY DATE IS NO LONGER CURRENT. IS MY DEPENDENT'S APPLICATION AFFECTED BY THE QUOTA BACKLOG SINCE MY APPLICATION IS APPROVED?**

Yes. Even through your case was approved, your dependent's application is still based on your priority date. The CIS cannot approve the dependent's application until the priority date is current.

**26. THE QUOTA BACKLOGS WERE NOT IN AFFECT WHEN I FILED MY I-485 APPLICATION. DOES THIS OCTOBER QUOTA BACKLOG AFFECT ME?**

Yes. The CIS can work on the pending application. However, they cannot approve the application unless the priority date is current.

**27. THE I-140 AND I-485 WERE CONCURRENTLY FILED AND BOTH ARE PENDING AT CIS. WILL THE I-140 BE PROCESSED IF THE PRIORITY DATE IS NO LONGER CURRENT AND THE I-485 CANNOT BE APPROVED?**

Yes. The CIS will continue to process the I-140 and it can be approved, regardless of the quota backlog.

**28. CAN I INQUIRE REGARDING THE STATUS OF AN I-485 CURRENTLY PENDING AT CIS IF I AM SUBJECT TO A QUOTA BACKLOG?**

No. Under CIS guidelines, inquiries may not be made on a case unless the priority date is current.

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**29. IF MY I-485 APPLICATION IS STILL PENDING, AND MY PRIORITY DATE IS NO LONGER CURRENT, WILL CIS STILL ISSUE A FINGERPRINT NOTICE AND/OR RFE?**

They may. CIS can still process the case but cannot approve it until the priority date is current. Therefore, you may receive requests for evidence or fingerprint appointments. It is important to comply with these requests. Even though the case cannot be approved, it can be denied for failure to provide information or show up for fingerprinting.

**30. MY I-485 HAS BEEN PENDING A LONG TIME DUE TO SECURITY AND BACKGROUND CHECKS. ONCE THEY CLEAR, CAN MY CASE BE APPROVED IF MY PRIORITY DATE IS NO LONGER CURRENT?**

No. Even though the only issue may have been the security and background checks, the CIS cannot approve the case until the priority date is current.

**31. DOESN'T CIS ASSIGN ME A VISA NUMBER WHEN THE CASE IS FILED?**

No. Immigrant visa numbers are not assigned to a case until right before approval.

**32. CAN I STILL OBTAIN EAD CARDS AND AP DOCUMENTS IF MY I-485 IS PENDING AND I AM NOW SUBJECT TO A QUOTA BACKLOG?**

Yes. As long as you have a pending I-485 application at CIS, you are eligible to apply for and receive EAD and AP documents.

**33. MY ADJUSTMENT APPLICATION IS PENDING AND I RECENTLY MARRIED. CAN I ADD MY SPOUSE TO THE APPLICATION (I.E. CAN MY SPOUSE FILE THEIR I-485) IF MY PRIORITY DATE IS NOT CURRENT?**

No. In order to add a dependent to the pending application, the priority date must be current.

**34. MY FINGERPRINTS HAVE ALREADY BEEN TAKEN. HOWEVER, DUE TO THE QUOTA BACKLOG, THEY MAY EXPIRE. WILL CIS REQUIRE ME TO REDO MY FINGERPRINTS ?**

Yes. Fingerprint results expire after 15 months. CIS will review the fingerprints at the time that they are ready to complete the adjudication of the I-485. If the results have expired, they will send out a new fingerprint appointment notice.

**35. IF THE CASE IS PENDING AT CIS AND CANNOT BE APPROVED DUE TO QUOTA BACKLOGS, WILL I BE REQUIRED TO PROVIDE ANY UPDATED INFORMATION OR DOCUMENTS?**

The CIS may ask for updated employment information. However, new photos and medical exams should not be required.

**36. IF I AM NOT ABLE TO FILE THE I-485 DUE TO QUOTA BACKLOGS, IS THERE ANOTHER WAY FOR MY H-4 SPOUSE TO OBTAIN WORK AUTHORIZATION?**

An I-765 (EAD) application cannot be filed unless an I-485 is pending. Therefore, your spouse will not be eligible for an EAD card and will need to seek employment sponsorship for work authorization.

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**37. IF I-140 PETITION FILED ON MY BEHALF IS STILL PENDING AND MY PRIORITY DATE BECOMES CURRENT, MAY I FILE MY ADJUSTMENT APPLICATION?**

Yes, if you have an I-140 Petition pending and your Priority Date becomes current, you and your dependents may file your adjustment applications as long as the Priority Dates remains current.

**38. I AM RUNNING OUT OF H-1B TIME. WHAT WILL HAPPEN TO MY H-1B STATUS IF THE QUOTA BACKLOG HOLDS UP MY GREEN CARD APPLICATION?**

The AC21 legislation provided some relief in this area. If you have an approved I-140 and you are unable to proceed with the I-485 due to quota backlogs, the company is eligible to apply for extension of H-1B time, in increments of three years, on your behalf. Your dependent's H-4 status may also be extended.

If you are not the beneficiary of an approved I-140 petition, you may still be able to obtain extensions, in one year increments, as long as the labor certification or I-140 petition have been pending more than 365 days.

**39. IF I AM NOT ABLE TO FILE THE I-485 AND THEN I LOSE MY JOB OR CHANGE JOBS, DOES AC21 PORTABILITY PROTECT ME?**

No. In order to take advantage of AC21 portability, the I-140 Petition must be approved and the I-485 must be filed and pending over 180 days.

**40. DUE TO THE QUOTA BACKLOGS, I WANT TO REVIEW MY OPTIONS FOR IMMIGRATING THROUGH A US CITIZEN. I HAVE MINOR US CITIZEN CHILDREN. I HAVE A US CITIZEN SPOUSE. CAN THEY SPONSOR ME FOR PERMANENT RESIDENCY?**

Unfortunately, a child cannot sponsor you for permanent residency until they are at least 21 years old. However, if you have a US citizen child who is over 21 or a US citizen spouse, please contact us to discuss your options.