



News & Types: Client Advisories

Employment-Based Green Card Priority Date Retrogression

2/17/2023

Practices: Immigration

The U.S. Department of State (“DOS”) may retrogress employment-based immigrant visa categories (a.k.a. “green cards”) when there is a higher number of green card filings than the number of available green cards. Due to retrogression, many individuals will be unable to commence and/or complete the last stage of the green card process (namely the adjustment of status process (“AOS”) if completed in the United States or consular processing if completed overseas) for many years until their priority dates become current.

Every year, the government is allowed to issue approximately 140,000 employment-based green cards plus any unused family-sponsored numbers from the previous fiscal year. Each EB-1, EB-2, and EB-3 immigrant visa category receives 28.6% of the total annual limit, and each EB-4 and EB-5 category receives 7.1% of the total annual limit.

Demand for employment-based green cards from nationals of certain countries (primarily China and India) may also exceed the per-country limits on availability. No country is allowed to receive more than 7% of the overall immigrant visas.

When an employer files a PERM Labor Certification Application with the U.S. Department of Labor (“DOL”), the date on which the Application is received by the DOL is the individual’s priority date. If the individual is exempt from the labor certification process, the date on which the U.S. Citizenship and Immigration Services (“USCIS”) receives the Immigrant Petition for Alien Worker (Form I-140) is the individual’s priority date.

In addition to the priority dates, individuals have to determine their country of chargeability in order to determine which priority date on the DOS’ monthly Visa Bulletin applies to them. For most individuals, country of chargeability is based on the country of birth, not the country of citizenship. For example, a foreign national who is born in India and has subsequently become a citizen of Canada is still chargeable to the priority date for Indian nationals. A limited exception does apply for individuals who are married to a spouse who was born in a country different than the principal’s country of birth.

The DOS has, in many instances, retrogressed the employment-based immigrant visa categories from month to month as quickly as it has advanced the categories. For example, the DOS has retrogressed the EB-3 category in the past. On the other hand, the DOS has rapidly advanced the EB-2 category. Thus, there is very little consistency in the advancement or retrogression of the employment-based categories. Additionally, the DOS consistently cautions that any future priority date movement may be slow or be sporadic until the number of and priority dates of pending older cases can be determined. Unfortunately, it appears that the USCIS is not able to provide complete information to the DOS about its AOS backlog. Therefore, DOS has to estimate the

outstanding cases requiring immigrant visas and their priority dates. This has led to the current unpredictability in the priority date system.

Each month, the DOS updates the available Filing priority dates and the Final Action priority dates at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>. When a individual's Filing priority date becomes available, he/she will be able to file an AOS application with the USCIS if he/she is present in the United States and eligible to file for AOS. If the individual is not residing in the United States or is not eligible to file for AOS, he/she may commence the consular processing procedure through the DOS. The individual will only be able to complete the AOS or consular processing procedure after his/her Final Action priority date becomes available.

An individual who files for AOS is eligible to apply for an Employment Authorization Document (EAD) and/or Advanced Parole (AP) travel document. If the individual's priority date retrogresses while the AOS application is pending, he/she will not be able to complete the AOS process until his/her Final Action priority date becomes available. However, during this time, while he/she is waiting for his/her priority date to become available, he/she will be able to continue to extend his/her EAD and AP documents. Additionally, if his/her AOS application has been pending for more than six months and his/her Form I-140 has been approved, his/her green card process may be portable so that he/she may commence employment in the same or similar occupation as the original offer with a new employer without the abandoning the green card process.

Additional information about priority date movement or retrogression will be contained in the monthly Masuda Funai Business Immigration Updates when it becomes available.